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EPA

CASE DIGEST:
• Clean Water Act

A Supplement to **LITIGATING CIVIL PENALTIES**

This Digest grew out of a simple list of cases on the Clean Water Act that I started years ago. Whenever I researched a subject or ran across a new case, I saved it in my "CWA Case List." Over the years the list grew large, but was never truly comprehensive. Consequently, this Digest does not attempt to present all the cases and other authorities for each subject. In some instances, such as the groundwater section, the universe of case law is well represented. In other subjects, such as citizen suits, I have included only a portion of that large body of case law.

I have not read every case cited in this Digest. Many of the parenthetical case summaries come from court decisions, law review articles and briefs, or were provided to me by other EPA lawyers. I've checked many, but not all, for accuracy. Like all research aides, the Digest should not be treated as gospel, and all citations should be checked before relying on them.

Mark Ryan
October 8, 1999
Boise, Idaho

My very first enforcement assignment when I joined the EPA was a $1,200 Clean Water case involving the Spill Prevention Control and Countermeasure regulations; requirements designed to keep oil and hazardous substances from reaching navigable waters in the event of a spill or accident. Since that time in 1978, I have handled or supervised hundreds of actions under all media. The Clean Water Act, one of our foundation statutes at EPA has seen decades of enforcement litigation, raising issues that have broad precedential application across all of our enforcement programs. **Mark Ryan** has done an enviable and tireless job of compiling, indexing and summarizing cases, issues and concepts involving the Clean Water Act into a user-friendly, plain language desk reference. This compilation is an outstanding companion to our earlier desk reference LITIGATING CIVIL PENALTIES. We are grateful to him for his commitment, dedication and substantial contribution to the practice of federal civil penalty litigation.

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ANTI-BACKSLIDING

33 U.S.C. § 1342(o) (note definition of "effluent limitation" in § 502(11); note also exceptions under subpart (2))

33 U.S.C. § 1313(d)(4)(B) (Standard Attained) (allows for backsliding "where the quality of the waters equals or exceeds levels necessary to protect the designated use for such waters" only if consistent with antidegradation)

40 C.F.R. § 122.44(l) (anti-backsliding regulations for BPJ permits)

Natural Resources Defense Council, Inc. v. EPA, 863 F.2d 1420, 1427, 28 ERC 1609 (9th Cir. 1988) (antibacksliding amendment to the CWA is designed to prevent "backsliding" from limitations in BPJ permits to less stringent limitations which may be established under the forthcoming national effluent limitation guidelines. It prohibits a permit containing effluent limitations issued under a BPJ determination from being "renewed, reissued, or modified on the basis of effluent guidelines promulgated under [the national rulemaking] . . . subsequent to the original issuance of such permit.")

Citizens for a Better Environment v. Union Oil, 861 F. Supp. 889, 900, 39 ERC 1393, 1400 (N.D. Cal. 1994) (cease and desist order issued to Unocal did not modify Unocal's permit because, inter alia, modification would have violated anti-backsliding provisions of the CWA)

Public Interest Research Group of N.J. v. N.J. Expressway Auth., 822 F. Supp. 174, 185, 37 ERC 1423, 1432 (D. N.J. 1992) (an MOU that provided for less stringent effluent limitations than in NPDES permit could not constitute a modification of the permit because that would violate anti-backsliding provisions)

In re City of Hollywood, Fla., 5 E.A.D. 157, 167 n.13 (EAB 1994) (state must act on mixing zone request prior to Region's decision on remand in order to avoid anti-backsliding concerns)

In re City of Tulsa, OK, 3 E.A.D. 505, 507 (CJO 1991) (Region did not wrongfully rely upon anti-backsliding exception provided in § 303(d)(4(A)(i) when issuing the renewed permit because waste load allocation that formed the basis for the effluent limitation in the renewed permit was revised ans was in effect prior to the issuance of the renewed permit)

In re City and County of San Francisco, 4 E.A.D. 559 (EAB 1993) (no anti-backsliding where subject permit was held not be a "renewed, reissued, or modified" version of a "previous permit." There was no "previous permit" because the first permit issued was challenged and never became final before the subsequent (and less stringent) permit became effective)

In re Star-Kist Caribe, Inc., 2 E.A.D. 758 (CJO 1989) (anti-backsliding regulation does apply to permit limits based on BPJ)

H.R. Conf. Rep. No. 1004, 99th Cong. 2d Sess. 1986, at 155 (Congress intended "to preserve pollution control levels achieved by dischargers by prohibiting the adoption of less stringent treatment or control limitations, standards, or conditions than those already contained in a

permit.")

EPA, "Interim Guidance on Implementation of Section 402(o) Anti-backsliding Rules for Water Quality-Based Permits"

ANTIDEGRADATION

See WATER QUALITY STANDARDS

BEST MANAGEMENT PRACTICES

33 U.S.C. § 1314(e) (Best Management Practices for Industry)

33 U.S.C. § 1342(a)(2) ("The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.")

40 C.F.R. § 122.44(k)(2), (3) (BMPs are to be used "to control or abate the discharge of pollutants when . . . (n)umeric effluent limitations are infeasible . . . or . . .(t)he practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the [CWA].")

40 C.F.R. § 125.100 et seq. (Subpart K - Criteria and Standards for Best Management Practices Authorized under Section 304(e) of the Act)

40 C.F.R. § 130.2(m) ("Methods, measures or practices selected by an agency to meet its nonpoint source control needs. BMPs include but are not limited to structural and nonstructural controls and operation and maintenance procedures. BMPs can be applied before, during and after pollution-producing activities to reduce or eliminate the introduction of pollutants into receiving waters.")

Rybachek v. EPA, 904 F.2d 1276, 1283, 1287 , 31 ERC 1585 (9th Cir. 1990) ("EPA is authorized to establish best management practices ("BMPs") 'to control plant site runoff, spillage or leaks, sludge or waste disposal, and drainage from raw material storage' in order to diminish the amount of toxic pollutants flowing into receiving waters.")

In re Arizona Municipal Storm Water NPDES Permits, 7 E.A.D. 646 (EAB 1998) (petition for evidentiary hearing rejected on multiple grounds; held that no numeric effluent limits needed to meet state water quality standards where effective BMPs are employed)

EPA GCO 72 (October 20, 1978) ("EPA has authority under 402(a) of the CWA and under Natural Resources Defense League v. Costle, 568 F.2d 1369 (D.C. Cir. 1977) to include BMP requirements in permits when suitable numeric effluent limitations based on the application of the BMP control technology currently available cannot be set.")

BEST PROFESSIONAL JUDGMENT (BPJ)

33 U.S.C. § 1342(a)(1)(B)

40 C.F.R. § 125.3(a)(2)(i)(B) ("For effluent limitations established on a case-by-case basis based on Best Professional Judgment (BPJ) under section 402(a)(1)(B) of the Act in a permit issued after February 4, 1987, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established and in no case later than March 31, 1989.")

40 C.F.R. § 125.3(c)(2) ("Technology-based treatment requirements may be imposed through one of the following three methods: . . . (2) On a case-by-case basis under section 402(a)(1) of the Act, to the extent that EPA-promulgated effluent limitations are inapplicable. The permit writer shall consider . . .")

Texas Oil & Gas Assoc. v. EPA, 161 F.3d 923 (5th Cir. 1998) ("In situations where EPA has not yet promulgated any [effluent guidelines] for the point source category or subcategory, NPDES permits must incorporate 'such conditions as the Administrator determines are necessary to carry out the provisions of the Act.' . . . In practice, this means that the EPA must determine on a case-by-case basis what effluent limitations represent the BAT level, using its "best professional judgment." 40 C.F.R. § 125.3(c)-(d). Individual judgments thus take the place of uniform national guidelines, but the technology-based standard remains the same.")

Sierra Club v. Cedar Point Oil Co., 73 F.3d 546, 41 ERC 1897 (5th Cir. 1996), cert. denied, 519 U.S. 811 (1996) ("We see nothing impermissible with allowing the Government to enforce the Act by invoking § 1311(a), even if no effluent limitations have been promulgated for the particular business charged with polluting.")

In re City of Port St. Joe and Florida Coast Paper Co., 7 E.A.D. 275, 291 n.24 (EAB 1997) ("The authority to exercise BPJ in prescribing permit conditions is found inferentially in Section 402(a)(1) of the Clean Water Act, which authorizes the Administrator to issue a permit containing 'such conditions as the Administrator determines are necessary to carry out the provisions of this Act . . .' BPJ is specifically referred to in the NPDES implementing regulations. *See, e.g.*, 40 CFR 125.3.")

BYPASS

40C.F.R. § 122.41(m)(1)(i) ("Bypass means the intentional diversion of waste streams from any portion of a treatment facility.")

40 C.F.R. § 122.41(m)(2) ("Bypass not exceeding limitations. The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of paragraphs (m)(3) and (m)(4) of this section.")

40 C.F.R. § 403.17(a)(1) ("Bypass means the intentional diversion of waste streams from any portion of an Industrial User's treatment facility.")

Southern Ohio Coal Co. v. Interior Dept., 20 F.3d 1418, 38 ERC 1393, 1401 (6th Cir. 1994) ("Because a state may adopt permit conditions more stringent than federally required, 33 U.S.C. § 1370(1), it may choose to not include a bypass provision in a permit. Where it does include a bypass provision, such provision must meet the standards set forth in 40 C.F.R. § 122.41(m).")

United States v. Weitzenhoff, 1 F.3d 1523, 1532, 38 ERC 1365 (9th Cir. 1993) ("In establishing the guideline prohibiting bypass except where necessary for essential maintenance . . . the EPA explained that '[g]enerally, maintenance is that which is necessary to maintain the performance, removal efficiency and effluent quality of the pollution control equipment. However, for the purposes of this section, it is necessary to distinguish between maintenance that is 'essential' and that which is routine.' 49 Fed. Reg. 38,037 (1984). . . . [I]f it is possible to perform the maintenance 'with no loss in treatment plant performance,' the maintenance is not considered 'essential' for purposes of the bypass exception.")

Natural Resources Defense Council, Inc. v. EPA, 822 F.2d 104, 122-123, 26 ERC 1153 (D.C. Cir. 1987) (Permit condition prohibiting bypass falls within broad statutory authority of EPA; countering industries' argument that they should be allowed to bypass unneeded equipment, the court wrote: "In the context of a statute which seeks the elimination of pollution, it is difficult to believe that Congress intended that dischargers be entitled to shut off their treatment facilities and 'coast' simply because they were momentarily not in danger of violating effluent limitations." (emphasis in original)).

United States v. City of Toledo, Ohio, Docket No. 3:91CV7646 (N.D. OH Aug. 8, 1999) (held that bypass due to inadequate capacity in the POTW is unauthorized to the extent there were feasible alternative, including placement or construction of additional treatment units or storage equipment)

United States v. Penn Hills, 6 F. Supp. 2d 432, 46 ERC 1279 (W.D. Pa. 1998) (municipality held liable on summary judgment for discharges of raw sewage; bypass defense rejected on grounds that defendant had viable, albeit expensive, options to bypassing its treatment equipment during high flows)

United States v. City of Toledo, 867 F. Supp. 603, 608, 38 ERC 1964 (W.D. Ohio 1994) (city held liable for discharges were notice given to EPA of "unintentional bypass" in NPDES permit application was not specific or timely)

Save our Bays & Beaches v. City & Cnty of Honolulu, 904 F. Supp. 1098, 1134, 26 ELR 20595 (D. Hawaii 1994) (defendant held liable for large number of unpermitted bypass events)

Hawaii's Thousand Friends v. Honolulu, 821 F. Supp. 1368, 1378, 37 ERC 1398 (D. Hawaii 1993) (municipality found liable for unlawful bypasses of POTW)

Public Interest Research Group v. U.S. Metals Ref., 681 F. Supp. 237, 26 ERC 2004 (D.N.J. 1987) (bypass defense defeated on summary judgment motion on grounds that defendant did not meet bypass requirements of permit)

Chesapeake Bay Foundation v. Bethlehem Steel Corp., 652 F. Supp. 620, 631, 25 ERC (BNA)

1684 (D. Md. 1987) (reliance on 40 C.F.R. § 122.41(m) misplaced where state-issued permit contained stricter bypass provision)

Student Public Interest Research Group of N.J. v. Hercules, Inc., 1986 LEXIS 28723, 23 ERC 2081 (D.N.J. 1986) (bypass defense held not to apply)

In re Ketchikan Pulp Co., Docket No. CWA-1089-12-22-309(g) (ALJ Head Nov. 22, 1995), aff'd, 7 E.A.D. ___ (EAB 1998) (discharge of sludge from aeration basin held to be illegal bypass because the maintenance that led to the bypass was routine and not essential and because reasonable alternatives to bypass existed other than dumping contents of basin into receiving water)

45 Fed. Reg. 33290, 3339 (1980) ("In general, bypass will not be excused except in extreme situations, and the lack of adequate backup equipment for downtime periods will not be a defense unless the permittee could not have anticipated the need for such equipment at the time the facility was constructed.")

44 Fed. Reg. 32854 (1979) ("The bypass provision is intended to provide relief from permit limitations during unusual circumstances; it is not intended to allow limitations to be routinely exceeded.")

See also UPSET DEFENSE

CHEMICAL WARFARE AGENTS (§ 301(f))

33 U.S.C. § 1311(f) ("Notwithstanding any other provisions of this chapter it shall be unlawful to discharge any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste, into the navigable waters.")

Chemical Weapons Working Group, Inc. v. Army, 111 F.3d 1485, 44 ERC 1683, 1686-87 (10th Cir. 1997) (311(f) does not apply to stack emissions from chemical weapons destruction facility; "Plaintiffs' broad construction of the phrase 'discharge . . . into the navigable waters' under § 311(f) would necessarily result in regulation under § 301(a) of any air emission that might possibly result in atmospheric deposition into navigable waters. . . [C]ommon sense dictates that Tooele's stack emissions constitute discharges into the air - not water- and are therefore beyond the reach of § 301(f)'s reach.")

CITIZENS' SUITS (§ 505)

A. Generally

33 U.S.C. § 1365 (citizen suit provisions)

33 U.S.C. § 1365(g) ("For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.")

United States Department of Energy v. Ohio, 112 S. Ct. 1627, 118 L. Ed. 2d 255, 34 ERC 1489 (1992) (a state is a citizen for the purposes of § 505 of the CWA)

Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 108 S. Ct. 376, 384, 98 L. Ed. 2d 306, 26 ERC 1857 (1987) (The CAA and CWA citizens' suits provisions "share the common central purpose of permitting citizens to abate pollution when the government cannot or will not command compliance.")

Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517, 27 ERC 1001, 1007 (9th Cir. 1987) ("Our own review of the legislative history indicates only that citizen suits should be handled liberally, because they perform an important public function: 'It is the Committee's intent that enforcement of these control provisions be immediate, that citizens should be unconstrained to bring these actions, and that the courts should not hesitate to consider them." S. Rep. No. 414, 92nd Cong. 2d Sess. *reprinted in* 1972 U.S. Code Cong. & Admin. News 3746.")

Friends of the Earth v. Carey, 535 F.2d 165, 172, 8 ERC 1933 (2d Cir. 1976) ("Congress [has] made clear that citizen groups are not to be treated as nuisances or troublemakers, but rather as welcomed participants in the vindication of environmental interests." (CAA))

Friends of the Earth, Inc. v. Chevron Chemical Co., No. 1:94CV434 (E.D. Tex. May 12, 1995) (offer of judgment by defendant under local rule held inconsistent with citizen suit provisions of CWA on grounds that it would have a "chilling effect" on citizen's bringing enforcement actions)

Coastal Fishermen's Ass'n v. N.Y. City Dept. of Sanitation, 772 F. Supp. 162, 33 ERC 1932 (S.D.N.Y. 1991) (citizen suits can proceed where federal and state entities are not fulfilling their enforcement duties)

Student Public Interest Research Group v. Georgia-Pacific Corp., 615 F. Supp. 1419, 23 ERC 1338 (D.N.J. 1985) (citizen suits are required most where an agency encourages a polluter to believe its unlawful behavior will go unpunished)

S. Rep. 414, 2nd Cong., 1st Sess. 80, Legis. History, p. 1498 ("If the court viewed the agency action as inadequate, it would have jurisdiction to consider the citizen action notwithstanding a pending agency action.")

Statement of Sen. Bayh on the Conference Report on S. 2770, Legis. History, p. 217 ("[C]itizen suits can be a very important a tool for keeping industry and Government alike from letting standards and enforcement slip.")

S. Rep. No. 28 (1985) ("Citizen suits . . . operate as Congress intended -- to both spur and supplement government enforcement actions.")

Comment, *Slowing the Net Loss of Wetlands: Citizen Suit Enforcement of Clean Water Act 404 Permit Violations*, 27 Envtl. L. 245 (1997)

David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd when Enforcement Authority Is Shared by the United States, the States and Their Citizens?*, 54 Md. L. Rev. 1552, 1577 (1995)

B. 60-Day Notice Requirement

33 U.S.C. § 1365(b) ("No 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, . . .")

40 C.F.R. Part 135 (Prior Notice of Citizen Suits)

Hallstrom v. Tillamook County, 493 U.S. 20, 107 L. Ed. 2d 237, 110 S. Ct. 304 (1989) (60-day notice is mandatory precondition for a citizen suit; "[D]ecisions will further congressional purpose of giving agencies and alleged violators a 60-day non-adversarial period to achieve compliance with RCRA regulations." 493 U.S. at 32)

Atlantic States Legal Found. v. Stroh Die Casting, 116 F.3d 814, 44 ERC 1897 (7th Cir. 1997), cert. denied, 118 S. Ct. 442 (1997) ("[T]he key to notice is to give the accused company the opportunity to correct the problem," and that based upon the factual record, which included Stroh securing a permit, building a wastewater treatment system, redirecting the wastewater to a new outfall, and its admission of May 29, 1990 that it was not in compliance, there was sufficient evidence that Stroh was on notice; held that the April 1989 notice satisfied the jurisdictional requirements of the statute)

New Mexico Citizens for Clean Air and Water v. Espanola Mercantile Co., Inc., 72 F.3d 830, 833 (10th Cir. 1996) (the purpose of the pre-suit notice is to "allow parties time to 'resolve their conflicts in a non-adversarial time period.'")

Public Interest Research Group of N.J. v. Hercules, Inc., 50 F.3d 1239 , 40 ERC 1385 (3d Cir. 1995) (notice not required for violations of same parameter from same outfall identified in earlier notice when discovered after filing of original notice; "In deciding whether to initiate an enforcement action, the EPA and the state must be provided with enough information to enable them intelligently to decide whether to do so. At the same time, the alleged violator must be provided with enough information to be able to bring itself into compliance. We will judge the sufficiency of the plaintiffs' 60-day notice letter in terms of whether it accomplishes these purposes." 50 F.3d at 1249)

Washington Trout v. McCain Foods, Inc., 45 F.3d 1351, 40 ERC 1123 (9th Cir. 1995) (held that 60-day notice letter did not comply with § 505 and 40 C.F.R. § 135.3(a) because it failed to identify those who would become plaintiffs)

Greene v. Reilly, 956 F.2d 593 (6th Cir. 1992) (60-day required in order to bring citizens' suit under CWA; lack thereof grounds for dismissal)

Community Assoc. for Restoration of the Environment v. Bosma Dairy, No. CY-98-

3011-EFS (E.D. Wash. May 21, 1999) (held that notice letter sufficiently apprized defendant of location and nature of violations)

Hayes v. Browner, No. 97-CV-1090-BU (N.D. Okla. Oct. 28, 1998) (case dismissed for failure to abide by 60-day non-adversarial notice requirement)

Cedar Point Oil Co. v. EPA, Civ. No. 3:93-cv-58WS (S.D. Miss. Sept. 30, 1996) (suit by permit applicant for mandamus ordering EPA to issue him a permit while a citizen suit for unpermitted discharge is pending against him rejected for lack of jurisdiction; held that no private right of action exists under the CWA and plaintiff failed to allege cause of action under 505(a)(2) and failed to provide requisite 60-day notice; also held that CWA does not impose any duty on EPA to act on a pending NPDES application within any prescribed time period)

Sierra Club v. Raytheon Co., 22 ERC 1050 (D. Mass. 1984) (notice held sufficient where sent to president of company and plant manager, but not to registered agent)

S. Rep. No. 92-414 at 80 (1971), 92nd Cong. 1st Sess., reprinted in 2 *Legislative History of the Water Pollution Control Act Amendments of 1972* at 1498 (1973), U.S. Code & Admin. News 1972, pp. 3668, 3745 ("[S]uch regulations should reflect simplicity, clarity, and standardized form. The regulations should not require notice that places impossible or unnecessary burdens on citizens but rather should be confined to requiring information necessary to give a clear indication of the citizens' intent. These regulations might require information regarding the identity and location of the alleged polluter, a brief description of the activity alleged to be in violation, and the provision of law alleged to be violated.")

C. Administrative and Judicial Bars to Citizens' Suits

33 U.S.C. § 1365(b)(1)(B) ("No action may be commenced . . . if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a state to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.")

33 U.S.C. § 1319(g)(6)(B) ("Applicability of limitation with respect to citizen suits")

Jones v. City of Lakeland, 175 F.3d 410, 48 ERC 1353 (6th Cir. 1999) (district court lacks subject matter jurisdiction over an FWPCA citizen suit against a city for discharging pollutants in violation of its NPDES permit when the state environmental agency is diligently prosecuting the city under State law)

Knee Deep Cattle Co. v. Bindana Investment Co., 94 F.3d 514, 43 ERC 1161 (9th Cir. 1996) (property owner's CWA citizen suit against owner of neighboring sewage treatment plant for violations of plant's discharge limit held not barred by consent order plant owner entered into with state authorities setting interim effluent limits and calling for plant upgrade; CWA bars citizen suits only where state is diligently prosecuting action against violator under law comparable to CWA administrative penalty provision;

here, order was finalized before suit was filed, and state law was not comparable)

Citizens for a Better Environment v. UNOCAL, 83 F.3d 1111, 42 ERC 1737 (9th Cir. 1996) ("because UNOCAL has not paid a 'penalty,' the § 309(g)(6)(A(iii) bar to citizen suits does not apply.")

Arkansas Wildlife Federation v. ICI Americas, Inc., 29 F.3d 376, 382 (8th Cir. 1994) (injunctive relief as well as civil penalties foreclosed by comparable state action; administrative action filed before 60-day notice preempts citizens suit even if amended after notice was filed; first and amended order considered to be parts of the same action which commenced before the filing of the 60-day notice)

Washington Public Interest Research Group v. Pendleton Woolen Mills, Inc., 11 F.3d 883, 37 ERC 1806, 1808 (9th Cir. 1993) ("Our conclusion that WashPublic Interest Research Group's citizen suit is not barred is compelled by the language of the state which unambiguously bars suits only when the EPA has instituted an administrative penalty action.")

Student Public Interest Research Group, Inc. v. Fritzsche, Dodge & Olcott, Inc., 759 F.2d 1131 (3d Cir. 1985) (citizens free to bring suit because previous EPA administrative enforcement action was not a "court" proceeding under § 505(b)(1)(B))

The Old Timer, Inc. v. Blackhawk-Central City Sanitation Dist., 51 F. Supp.2d 1109 (D. Colo. 1999) ("Viewing the CWA enforcement scheme as a whole, and considering certain statements made during § 1319(g)'s enactment, I conclude Congress intended to preclude citizen suits only when the EPA or the state has already commenced an 'administrative penalty action' against a polluter.")

Long Island Soundkeeper Fund, Inc. v. New York City Dep't of Envtl. Protection, 27 F. Supp. 2d 380, 383-84 (E.D.N.Y. 1998) (holding language of CWA made it clear that "state prosecution of the same claims, no matter how diligent, will not preclude a properly filed private action, or require its dismissal.")

Sierra Club v. Hyundai American Inc., 46 ERC 1582 (D. Or. 1997), adopted, motion denied, 23 F. Supp. 2d 1177, 46 ERC 1585 (D. Or. 1997) (motion to dismiss denied; no preemption of citizens complaint for injunctive relief (no penalty) where 60-day notice was filed after state issued notice of violation, but before state assessed penalty)

California Sportfishing Protection Alliance v. City of West Sacramento, 905 F. Supp. 792, 801-802, 42 ERC 1131 (E.D. Cal. 1995) (held that 309(g)(6)(B) "has no application to state enforcement actions.")

Knee Deep Cattle Co. v. Bindana Investment Co., 41 ERC 1117 (D. Or. 1995), rev'd, 94 F.3d 514, 43 ERC 1161 (9th Cir. 1996) (operator of cattle feeding and breeding business may not pursue CWA citizen suit against owner of private sewage treatment facility that serves neighboring trailer park, because citizen suits under Act are barred if state is diligently prosecuting action against alleged violator under comparable state law)

Sierra Club v. Colorado Refining Co., 852 F. Supp. 1476, 1484 n.11, 38 ERC 1700 (D. Co. 1994) (administrative action filed after 60-day notice does not preempt citizen suit as long as citizens complaint filed within 120 days)

Washington Public Interest Research Group v. Pendleton Woolen Mills, Inc., No. C91-5143T(Z) (W.D. Wash. Dec. 12, 1991), rev'd, 11 F.3d 883, 37 ERC 1806 (9th Cir. 1993) (EPA diligent prosecution of an administrative enforcement action against Pendleton Woolen Mills sufficed to bar a citizen suit under CWA, even though no penalties were involved)

North and South Rivers Watershed Association v. Town of Scituate, 755 F. Supp. 484, 32 ERC 1954 (D.Mass. 1991), aff'd, 949 F.2d 552, 34 ERC 1006 (1st Cir. 1991) (discussion of 309(g)(6) bar and "comparable state law" and "diligent prosecution")

Mass. Public Int. Research v. ICI Americas Inc., 777 F. Supp. 1032, 1036 (D. Mass. 1991) (citizens group is not barred if it files its 60-day notice prior to EPA bringing an administrative action)

Atlantic States Legal Foundation, Inc. v. Universal Tool & Stamping Co., 735 F. Supp. 1404 (N.D. Ind. 1990) (state administrative proceeding not a bar to citizens' suit because not a "court" action)

Wiconisco Creek Watershed v. Kocher Coal Co., 641 F. Supp. 712 (M.D. Pa. 1986) (state administrative proceeding not a bar to citizens' suit because not a "court" action)

See also PENALTIES: Preemption

D. Administrative Procedure Act

Oregon Natural Resources Council v. United States Forest Service, 834 F.2d 842, 851 (9th cir. 1987) ("Where the plaintiffs may otherwise proceed under the citizen suit provision, they should not be allowed to bypass the explicit requirements of the [CWA] established by Congress through resort to . . . the APA.")

Allegheny County Sanitary Auth. v. EPA, 732 F.2d 1167, 1177 (3d Cir. 1984) ("The Water Pollution Control Act provides an adequate remedy for plaintiff in the circumstances here . . . [Thus,] preclusion of the APA remedy is proper.")

American Canoe Assoc., Inc. v. EPA, 30 F. Supp. 2d 908, 915, 47 ERC 2100 (E.D. Va. 1998) ("[D]uplicative causes of action cannot lie under both the Clean Water Act and the Administrative Procedure Act.")

Environmental Defense Fund v. Tidwell, 837 F. Supp. 1344, 1356 (E.D.N.C. 1992) ("If a plaintiff can bring suit against the responsible federal agencies under the CWA, this action precludes an additional suit under the APA.")

E. Attorney's Fees

33 U.S.C. § 1365(d) (Litigation costs)

Armstrong v. Asarco Inc., 138 F.3d 382, 46 ERC 1471 (8th Cir. 1998) (after the 60-day period lapsed, citizens filed in federal court two weeks before EPA did for the same violations; EPA settled with Asarco and a consent decree was entered; citizen plaintiff held to be prevailing party even though it was not a party to the consent decree, and was awarded attorney fees in case involving unpermitted lead discharges; "In a nutshell, the magistrate judge concluded that plaintiffs are prevailing parties in this litigation as a whole because of their impact as a catalyst and their success in achieving essentially what they had sought to accomplish.")

Comfort Lake Assoc. Inc. v. Dresel Contracting Inc., 138 F.3d 351, 46 ERC 1289 (8th Cir. 1998) (attorney's fees denied where case was dismissed as moot; held that citizen suit did not act as "catalyst" to get state to act)

Public Interest Research Group of New Jersey v. Air Force Department, 51 F.3d 1179, 40 ERC 1577 (3d Cir. 1995) (trial court erred when it reduced plaintiff's att. fee award by 50% because it had prevailed on only 50% of the issues; rather, it should have calculated lodestar figure and then adjust amount of that figure to reflect degree of success obtained by plaintiff)

Atlantic States Legal Found., Inc. v. Eastman Kodak Co., 933 F.2d 124, 127-28 (2d Cir. 1991) ("We believe that when the polluter's settlement with state authorities follows the proper commencement of a citizen suit, one can, absent contrary evidence, infer that the existence of the citizen suit was a motive for the polluter's settlement and that the citizen suit plaintiff is therefore a prevailing party.")

Idaho Conservation League, Inc. v. Russell, 946 F.2d 717, 33 ERC 2076 (9th Cir. 1991) (environmental group not entitled to attorneys fees from EPA when it settled with defendant and EPA was not a party to the settlement even though EPA was a defendant in the lawsuit)

Environmental Defense Fund v. Hankinson, No. 5:91-CV-467-F2 (E.D. N.C. Feb. 24, 1997) ($337,162.73 in attorneys fees award to plaintiffs in challenge to EPA determination that Weyerhauser silviculture facility did not need 404 permit)

Colorado Environmental Coalition v. Romer, 796 F. Supp. 457 (D. Colo. 1992) (plaintiff entitled to attorneys' fees for negotiating settlement of citizen suit even when complaint was not filed until time of filing of consent decree)

F. Continuing Violations (*Gwaltney* Test)

Gwaltney v. Chesapeake Bay Foundation, 484 U.S. 49, 98 L. Ed. 2d 306, 108 S. Ct. 376 (1987) (CWA does not permit citizen suits for wholly past violations, and for the plaintiffs to have standing, they must have shown the existence of ongoing violations or the reasonable likelihood of continuing future violations)

Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc., 149 F.3d 303, 46 ERC 2025 (4th Cir. 1998) (held that defendant who came into compliance with CWA *after* plaintiffs filed their citizen suit was not liable for penalties and dismissed the case; court reasoned that since plaintiff was in compliance, there was no possible injunctive relief, and since all penalties get paid to the Treasury, plaintiff could seek no relief)

Connecticut Coastal Fishermen's Ass'n v. Remington Arms, 989 F.2d 1305, 1313, 36 ERC 1251 (2nd Cir. 1993) ("The present violation requirement of the [CWA] would be completely undermined if a violation included the mere decomposition of pollutants.")

Sierra Club v. Union Oil Co., 853 F.2d 667, 671, 28 ERC 1333 (9th Cir. 1988) (intermittent violations "do not cease to be ongoing until the date when there is no real likelihood of repetition.")

Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp., 807 F.2d 1089, 1094, 25 ERC 1425 (1st Cir. 1986) (there was no reasonable likelihood of recurring violation where the facility has shut down)

Hamker v. Diamond Shamrock Chemical Co., 756 F.2d 392, 397, 22 ERC 1826 (5th Cir. 1985) ("[C]ontinuing residual effects resulting from a discharge are not equivalent to a continuing discharge.")

Informed Citizens United, Inc. v. USX Corp., 1999 U.S. Dist. LEXIS 1600 (S.D. Tex. 1999) (past fill of wetlands held to be continuing violation of CWA on grounds that fill had not yet been removed; case dismissed on other grounds (defendant held a valid COE permit for the fill))

Wilson v. AMOCO Corp., 46 ERC 1998, 2001 (D. Wy. 1998) (dismissing the case, held that "migration of residual contamination from previous releases does not constitute an ongoing discharge."; "Although *Gwaltney* settled that 'wholly past' violations are not cognizable under the CWA's citizen suit provision, it offered little explanation as to when a violation ceases to be ongoing and becomes 'wholly past.'")

San Francisco Baykeeper v. Tidewater Sand & Gravel Co., 46 ERC 1780, 1786 (N.D. Ca. 1997) (possibility of continuing violations found where sand & gravel operator had installed storm water control devices, but had "not demonstrated that there is no real likelihood that its past noncompliance will recur.")

Russian River Watershed Protection Comm. v. City of Santa Rosa, 1997 U.S. Dist. LEXIS 145 (N.D. Cal. 1997), aff'd, 142 F.3d 1136, 46 ERC 1498 (9th Cir. 1998) (held that the plaintiffs had not established intermittent or continuing violations of the NPDES permit that would give the plaintiffs standing to bring a CWA citizen suit against the City; court stated that the plaintiffs had shown no violations that had continued on or after the complaint in the case was filed, had shown no pattern of violations in the past, and had not proven the continuing likelihood of a reoccurrence in intermittent or sporadic violations)

Prisco v. New York, 902 F. Supp. 374, 26 ELR 20415 (S.D.N.Y. 1995) (no continuing

violation found where defendant discharged to wetland in distant past, but had not continued to do so for years)

Friends of Sante Fe Co. V. LAC Minerals, 892 F. Supp. 1333, 1354 (D.N.M. 1995) ("migration of residual contamination resulting from previous releases is not an ongoing discharge within the meaning of the [CWA].")

Sierra Club v. Colorado Refining Co., 838 F. Supp. 1428, 1434, 38 ERC 1171 (D. Colo. 1993) (CWA violation occurs if a refinery continues to discharge pollutants into soils and tributary groundwater which then makes its way into water body)

Bettis v. Town of Ontario, 800 F. Supp. 1113 (W.D.N.Y. 1992) (no continuing violation found where defendant had filled wetland in past, but had ceased fill activities, but had not removed material)

North Carolina Wildlife Federation v. Woodbury, 29 ERC 1941 (E.D.N.C. 1989) (because defendants had failed to remove illegal fill from wetlands, they could not argue that the violations were "wholly past" and thereby avoid a citizen's suit; "if citizens suits were barred merely because any illegal ditching and drainage of a wetland tract was completed before it might reasonably be discovered, violators would have a powerful incentive to conceal their activities from public and private scrutiny - which would lead to serious problems in public and private enforcement of the Clean Water Act.")

Sierra Club v. Raytheon Co., 22 ERC 1050 (D. Mass. 1984) (plaintiff may seek civil penalties for past violations of the Act)

G. "Effluent Standard or Limitation"

Oregon Natural Resources Council v. U.S. Forest Service, 834 F.2d 842, 850 (9th Cir. 1987) (citizens may file suit to enforce permit limitations derived from water quality standards, but not water quality standards themselves "[E]ffluent limitations may be derived from state water quality standards and may be enforced when included in a discharger's permit. We agree with defendants that it is not the water quality standards themselves that are enforceable. . .")

Northwest Environmental Advocates v. Portland, 56 F.3d 979 (9th Cir. 1995), cert. denied, 116 S. Ct. 2550, 135 L. Ed 2d 1069 (1996) (citizen suits may enforce state-established standards)

Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 12 F.3d 353 (2d Cir. 1993), cert. denied, 513 U.S. 811, 130 L. Ed 2d 19, 115 S. Ct. 62 (1994) (private citizens have no standing to enforce broader state regulations contained in NPDES permits)

Upper Chattahoochee Riverkeeper Fund, Inc. v. City of Atlanta, 953 F. Supp. 1541, 44 ERC 1251, 27 ELR 20830 (N.D. Ga. 1996) (conditions imposed pursuant to state law into NPDES permit are enforceable by citizen suits)

H. Federal Facilities

See FEDERAL FACILITIES (§ 313)

I. Intervention

Sierra Club v. EPA, 995 F.2d 1478, 36 ERC 2092 (9th Cir. 1993) (City of Phoenix has right to intervene in lawsuit against EPA by S.C. brought to require EPA to change the permits issued to the city for two of its POTWs)

J. Mootness

Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 66, 108 S. Ct. 376, 98 L. Ed. 2d 306 (1987) ("In seeking to have a case dismissed as moot, . . . the defendant's burden 'is a heavy one.' The defendant must demonstrate that it is '*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.' Mootness doctrine thus protects defendants from maintenance of suit under the Clean Air Act based solely on violations wholly unconnected to any present or future wrongdoing, while it also protects plaintiffs from defendants who seek to evade sanction by predictable 'protestations of repentance and reform.'")

Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc., 149 F.3d 303, 46 ERC 2025 (4th Cir. 1998) ("Applying the reasoning of [Steel Co. v. Citizens for a Better Environment, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)], we conclude that this action is moot because the only remedy available to Plaintiffs - - civil penalties payable to the government - - would not redress any injury Plaintiffs have suffered.")

Comfort Lake Assoc. Inc. v. Dresel Contracting Inc., 138 F.3d 351, 46 ERC 1289 (8th Cir. 1998) (citizen group may not pursue injunctive relief claim in citizen suit brought against real estate developers under CWA for alleged violations of discharge permit issued for construction of retail store because alleged violation ceased during suit; claim is moot as long as there is no reasonable expectation that wrong will be repeated; also, plaintiffs' claim became moot when state environmental agency terminated developer's discharge permit and approved stipulation agreement assessing penalties for permit violations)

Atlantic States Legal Foundation, Inc. v. Stroh Die Casting Co., 116 F.3d 814, 820, 44 ERC 1897 (7th Cir. 1997), cert. denied, 118 S. Ct. 442 (1997) ("If the violation [of the CWA] is cured at some point while the suit is pending . . . the case nevertheless does not become moot.")

Natural Resources Defense Council, Inc. v. Texaco Ref. & Mktg. Inc., 2 F.3d 493, 503 (3d Cir. 1993) (holding "once a citizen plaintiff establishes an ongoing violation of a parameter at the time the complaint is filed, the court is obliged to assess penalties for all proven violations of that parameter")

Atlantic States Legal Found., Inc. v. Pan Am. Tanning Corp., 993 F.2d 1017, 1021 (2d Cir. 1993) ("We hold . . . that a defendant's ability to show, after suit is filed but before

judgment is entered, that it has come into compliance with limits on the discharge of pollutants will not render a citizen suit for civil penalties moot")

Carr v. Alta Verde Indus. Inc., 931 F.2d 1055, 1065 n.9 (5th Cir. 1991) ("Even had [defendant's post-complaint] improvements mooted the plaintiffs' action for injunctive relief, it would not necessarily have mooted the plaintiffs' action for civil penalties")

Atlantic States Legal Found., Inc. v. Tyson Foods Inc., 897 F.2d 1128, 1135 (11th Cir. 1990) (holding "the mooting of injunctive relief will not moot the request for civil penalties as long as such penalties were rightfully sought at the time the suit was filed")

Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp., 807 F.2d 1089, 1094 (1st Cir. 1986) ("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.")

The Old Timer, Inc. v. Blackhawk-Central City Sanitation Dist., 51 F. Supp.2d 1109 (D. Colo. 1999) (distinguishing Laidlaw, held that plaintiff's case was not moot despite defendant's upgrades to treatment system that brought it into compliance with permit because ongoing violations caused direct injuries to its business and property)

Stone v. Naperville Park Dist., 38 F. Supp.2d 651, 49 ERC 1019 (N.D. Ill. 1999) (operation of a trap-shooting facility where lead shot and clay targets are discharged into water without an NPDES permit violates CWA; held that plaintiffs claim for penalties not moot ever though defendant stop trap shooting and applied for permit)

Natural Resources Defense Council v. Southwest Marine Inc., Civ. No. 96 CV 1492-B (AJB) (S.D. Cal. 1999) (reaffirming prior decision that citizens have standing to seek civil penalties)

Natural Resources Defense Council v. Southwest Marine Inc., 1998 U.S. Dist. LEXIS 18703 (S.D. Cal. 1998) (distinguishing Laidlaw, held that plaintiffs claim for penalties not moot where assessment of penalty might have effect of halting future violations; plain language of Article III gives courts jurisdiction over "cases or controversies"- - it does not require individualized, microscopic analysis of what remedies, such as civil penalties, citizen suits plaintiffs are seeking)

Public Interest Research Group of New Jersey, Inc. v. Elf Atochem N. America, Inc., 817 F. Supp. 1164, 1181, 36 ERC 1855 (D. N.J. 1993) (motion to dismiss on mootness grounds denied because although penalty had already been paid to state, additional penalties were available to citizens plaintiffs, creating a sufficient case or controversy)

K. Nondiscretionary Duties

33 U.S.C. § 1365(a)(2) ("[A]ny citizen may commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.")

Sierra Club v. Train, 557 F.2d 485, 488, 10 ERC 1433 (5th Cir. 1977) (suit against EPA for failure to enforce under § 309 dismissed because enforcement is a discretionary duty)

Natural Resources Defense Council v. Train, 510 F.2d 692, 700, 7 ERC 1209 (D.C. Cir. 1975) (in authorizing citizen suits under § 505, "Congress did not fling the courts' door wide open," but rather confined such suits to "clear-cut" failures to perform mandatory duties)

Cedar Point Oil Co. v. EPA, Civ. No. 3:93-cv-58WS (S.D. Miss. Sept. 30, 1996) (suit by discharger against EPA for failure issue it an NPDES permit dismissed on grounds that CWA does not impose any duty on EPA to act on a pending NPDES application within any prescribed time period)

J.E. Brenneman Co. v. Schramm, 473 F. Supp. 1316, 1318, 14 ERC 1173 (E.D. Pa. 1979) (suit by contractor against EPA for failure to exercise a nondiscretionary duty to withhold funds for a wastewater treatment plant dismissed for lack of standing)

Oljato Chapter of Navajo Tribe v. Train, 515 F.2d 654, 663, 7 ERC 2190 (D.C. Cir. 1975) (CAA case; Congress intentionally drafted citizens' suit provision so as "to limit suits against the Administrator to a chosen few" to enforce a specific duty clearly mandated by statute)

Annotation, *Citizen's action against Administrator of Environmental Protection Agency to compel performance of nondiscretionary duty under § 505(a)(2) of Federal Water Pollution Control Act Amendments of 1972 (33 USCS § 1365(a)(2))*, 57 A.L.R. Fed. 851, secs. 2, 7

L. Penalty Must Be Paid to Treasury

Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 53, 108 S. Ct. 376, 379, 98 L. Ed. 2d 306 (1987) (civil penalties imposed by a court under the CWA must be made payable to the U.S. Treasury)

Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1, 14 n. 25, 101 S. Ct. 2615, 2623 n. 25, 69 L. Ed. 2d 435 (1981) ("Under the [CWA], civil penalties, payable to the Government, also may be ordered by the court.")

Sierra Club v. Electronic Control Design, 909 F.2d 1350, 1355 (9th Cir. 1990) ("While it is clear that a court cannot order a defendant in a citizens' suit to make payments to an organization other than the U.S. treasury [sic], this prohibition does not extend to a settlement agreement whereby the defendant does not admit liability and the court is not rendering non-consensual monetary relief.")

Sierra Club v. Chevron, USA, Inc., 834 F.2d 1417, 1522 (9th Cir. 1987) ("[A]ny penalties recovered from [a citizens' suit] are paid into the Untied States Treasury")

Atlantic States Legal Foundation, Inc. v. Universal Tool & Stamping Co., Inc., 786 F. Supp. 743 (N.D. Ind. 1992) (despite requests of both plaintiff and defendant that penalty

be paid to an environmental group, court held that it must be paid to treasury, relying on Tyson Foods, Gwaltney, and Roll Coater)

Chesapeake Bay Foundation v. Bethlehem Steel Corp., 608 F. Supp. 440, 449 (D. Md. 1985) ("any penalties recovered from [a citizens' suit] are paid into the Untied States Treasury")

S. Rep. No. 92-414, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 3668, 3745 ("One modification would allow the Court to impose civil penalties provided as a result of actions brought by citizens. It should be noted that any penalties imposed would be deposited as miscellaneous receipts [in the Treasure] and not be recovered by the complainant.")

H. Rep. No. 92-911, *A Legislative History of the Water Pollution Control Act Amendments of 1972* at 820 ("[T]he courts are authorized to apply appropriate civil penalties . . . The penalties imposed would be deposited as miscellaneous receipts in the treasury and not be recovered by the citizens bringing the suit.")

M. Standing

Lujan v. Defenders of Wildlife, 500 U.S. 915 (1991) (citizens did not have standing to sue under Endangered Species Act where third parties, not plaintiffs, were ones who suffered harm)

Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 108 S. Ct. 376, 98 L. Ed. 2d 306 (1987) (citizens may not sue under the Clean Water Act for purely past violations of the Act)

Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472, 102 S. Ct. 752, 758, 70 L. Ed. 2d 700 (1982) ("[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' . . . and that injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'")

Friends of the Earth v. Gaston Copper Recycling Corp., 179 F.3d 107, 48 ERC 1641 (4th Cir. 1999) (citizen's group lacks standing to sue for smelting company violations of CWA where evidence failed to establish that the waters they recreated in or used were actually or in imminent threat of being adversely affected by pollution, or that the waterway contained effluents of the type that the smelting facility discharges; mere violation of permit effluent limits does not give rise to inference that plaintiffs were harmed)

Sierra Club v. Cedar Point Oil Co., 73 F.3d 546, 41 ERC 1897, 1903 (5th Cir. 1996) ("injury in fact" found where members of plaintiff's organization, who lived near point of discharge of produced water, claimed to use those waters and be concerned about pollution in them; "That this injury is couched in terms of future impairment rather than past impairment is of no moment. The Supreme Court has expressly held that a

'threatened injury' will satisfy the 'injury in fact' requirement for standing.")

Save Our Community v. EPA, 971 F.2d 1155, 35 ERC 1937 (5th Cir. 1992) (applying 3-part standing test from Valley Forge, held that citizens group has standing to challenge draining of wetlands without a 404 permit)

Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 71, 31 ERC 1905 (3d Cir. 1990), cert. denied, 498 U.S. 1109 (1991) (finding sufficient injury where plaintiff organization submitted affidavit of member who stated that he was offended by brown color and bad odor of water body adjacent to part where he went bird watching)

United States v. Metropolitan St. Louis Sewer Dist., 883 F.2d 54, 56 (8th Cir. 1989) (finding sufficient injury where complainant alleged that defendant had discharged pollutants into Mississippi River without a permit, that many of the intervenor organization's members used the river for recreational purposes , and that pollution of the water adversely affected this recreational interest)

Sierra Club v. Simkins Industries, 847 F.2d 1109, 27 ERC 1881 (4th Cir. 1988), cert. denied, 491 U.S. 904, 109 S. Ct. 3185 (1989) (finding injury to aesthetic and environmental interests sufficient where pollution would affect river along which a single group member hiked)

Friends of the Earth v. Consolidated Rail Corp., 768 F.2d 57, 61, 22 ERC 2224 (2d Cir. 1985) (holding that two affidavits testifying to the recreational use of the river and finding the pollution offensive to aesthetic values sufficient to demonstrate injury)

Friends of the Earth v. Consolidated Rail Corp., 768 F.2d 57, 61, 22 ERC 2224 (2d Cir. 1984) (finding sufficient injury where organization submitted affidavit of member who regularly drove on bridge over river and was offended by pollution in the river)

Public Interest Research Group v. Magnesium Electron, Inc., 123 F.3d 111, 119, 45 ERC 1001 (3d Cir. 1977) ("Congress' power to authorize suits [under the CWA] and draft citizens as private attorneys general is inherently limited by the 'case or controversy' clause of Article III of the Constitution.")

Ecological Rights Fdn. V. Pacific Lumber Co., 1999 U.S. Dist. LEXIS 13518 (N.D.Cal. 1999) (plaintiffs in CWA citizen suit failed to show standing where plaintiffs' only visits to affected water were for purpose of preparing lawsuit)

Piney Run Preservation Ass'n v. Carroll County, Md., 50 F. Supp.2d 443 (D. Md. 1999) (at least one member of the plaintiff's group has standing, therefore the group as a whole has standing; in denying request to take deposition of affiant, held that "courts have often relied on affidavits to establish standing in citizen suits.")

San Francisco Baykeeper v. Vallejo Sanitation & Flood Control Dist., 36 F. Supp. 2d 1214, 29 ELR 21041 (E.D. Cal. 1999) (environmental group has standing to seek civil penalties for present and future NPDES permit violations; rejects argument that Steel Co.

v. Citizens for Better Environment, 523 U.S. 83 (1998) precludes CWA cases that otherwise comply with the Gwaltney standard)

American Canoe Assoc., Inc. v. EPA, 30 F. Supp. 2d 908, 47 ERC 2100 (E.D. Va. 1998) (in challenge to EPA failure to write TMDLs where state had failed to do so, claim by plaintiffs that EPA violated CWA § 106 grant procedures dismissed on grounds that citizens lacked standing to bring the claim; no standing found because of no causation and no redressability)

Sierra Club v. Raytheon Co., 22 ERC 1050 (D. Mass. 1984) (plaintiff found to have standing where plaintiffs' members live near the receiving water, recreate in and near it and plaintiffs are willing to disclose those members' names)

J.E. Brenneman Co. v. Schramm, 473 F. Supp. 1316, 1318, 14 ERC 1173 (E.D. Pa. 1979) (suit by contractor against EPA for failure to exercise a nondiscretionary duty to withhold funds for a wastewater treatment plant dismissed for lack of standing)

John D. Echeverria and Jon T. Zeidler, *Barely Standing: The Erosion of Citizen "Standing" to Sue to Enforce Federal Environmental Law*, Environmental Policy Project, Georgetown University Law Center, Washington D.C. (1999)

N. States, Suits Against

Froebel v. Meyer, 13 F. Supp. 2d 843, 47 ERC 1359 (E.D. Wis. 1998) (citizen suit against State of Wisconsin alleging unpermitted discharges of sediment from decommissioned dam dismissed on grounds that CWA did not waive State's sovereign immunity)

O. Statute of Limitations

Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517, 1521, 1523-24 & n.5 (9th Cir. 1987) (5-year statute also applies to citizen's actions; statute is tolled by filing of 60-day letter)

Mutual Life Insurance Co. v. Mobil Corp., 1998 U.S. Dist. LEXIS 4513 (N.D.N.Y. March 31, 1998) (Mobil gas truck mistakenly pumped 750 gallons of gas into a monitoring well, thinking it was a fill pipe for an UST; held that SOL accrues not when the violations occur, but when citizen plaintiffs discover them)

Natural Resources Defense Council, Inc. v. Fox, 909 F. Supp. 153 (S.D.N.Y. December 12, 1995) ("[A] citizen suit to enforce a failure by the Administrator to perform a non-discretionary duty under 33 U.S.C. § 1365(a)(2) is not subject to any statute of limitations.")

Atlantic States Legal Foundation v. Al Tech Specialty Steel Corp., 635 F. Supp. 284, 287, 24 ERC 1506 (N.D.N.Y. 1986) (held that CWA claim accrues not when the violations occur, but when citizen plaintiffs discover them)

Student Public Interest Research Group of New Jersey, Inc. v. Tenneco Polymers, Inc.,

602 F. Supp. 1394, 1400, 22 ERC 1327, 1331 (D.N.J. 1985) ("in the context of the FWPCA, it could not have been the intent of Congress to have the federal courts borrow statutes of limitation and certainly not statutes as short as two years for the bringing of citizen suits.")

See also STATUTE OF LIMITATIONS

COASTAL ZONE MANAGEMENT ACT

16 U.S.C. §§ 1451 - 1464

§ 307(c)(3)(A) ("No licence or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the State's failure to act, the concurrence is conclusively presumed")

40 C.F.R. § 122.49(d) (The [CZMA] and implementing regulations (15 C.F.R. Part 930) prohibit EPA from issuing a permit for an activity affecting land or water use in the coastal zone until the applicant certifies that the proposed activity complies with the State Coastal Zone Management program, and the State or its designated agency concurs with the certification (or the Secretary of commerce overrides the State's nonconcurrence))

Clare F. Saperstein, *State Solutions to Nonpoint Source Pollution: Implementation and Enforcement of the 1990 Coastal Zone Amendments Reauthorization Act Section 6217*, 73 B.U. L. Rev. 889, 890 (1995)

See also 40 C.F.R. §§ 124.10(c)(1) and 125.59(a)(3)

COMBINED SEWER OUTFALLS (CSOs)

Northwest Environmental Advocates v. City of Portland, 56 F.3d 979, 40 ERC 1801 (9th Cir. 1995), request for rehearing en banc denied, 74 F.3d 945, 42 ERC 1286 (9th Cir. 1996) (permit that did not specifically list 54 CSOs as permitted outfalls, but which referred to CSO discharges, held to authorize such discharges)

Northwest Environmental Advocates v. City of Portland, 11 F.3d 900 (9th Cir. 1993), vacated, 56 F.3d 979, 40 ERC 1801 (9th Cir. 1995), cert. denied, 518 U.S. 1018 (1996) (city not liable for CSO discharges that violated state water quality standards)

Montgomery Environmental Coalition v. Costle, 646 F.2d 568 (D.C. Cir. 1980) ("CSOs are point sources subject to NPDES permit requirements including both technology-based and water quality-based requirements of the CWA. CSOs are not subject to secondary treatment regulations applicable to publicly owned treatment works.")

Upper Chattahoochee Riverkeeper v. Atlanta, 1997 U.S. Dist. LEXIS 20334 (N.D. Ga. 1997) (held that City of Atlanta's CSO discharges violated state water quality standards for fecal and metals, and violated the CWA)

Georgia v. City of East Ridge, Tenn., 1996 U.S. Dist. LEXIS 18862 (N.D. Ga. 1996) (held that sewer overflow via manhole violates CWA and that penalty must be imposed once CWA liability is established)

Upper Chattahoochee Riverkeeper v. Atlanta,46 ERC 1135 (N.D. Ga. 1987) (three of Atlanta's CSOs found to violate fecal and heavy metals limits during storm overflows)

In re District of Columbia, 6 E.A.D. 470 (EAB 1996) (held that combined sewer overflow conditions in city's NPDES permit are not "attributable to State certification" and, therefore, are appealable to the Regional Administrator)

National Combined Sewer Overflow Control Strategy, 54 Fed. Reg. 37370, 37371 (1989) (proposed regulations to "control effluents from combined systems which are not regulated under the sanitary system standards nor as discharges from separate storm sewer regulations")

COMMERCE CLAUSE

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133-34 (1985) (in defining "navigable waters" as "waters of the United States," Congress intended "to exercise its powers under the Commerce Clause to regulate classical understanding of that term. . . . Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term.")

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 282, 16 ERC 1027 (1981) ("[W]e agree with the lower federal courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State.")

Kaiser Aetna v. United States, 444 U.S. 164, 173-174, 100 S. Ct. 383, 389, 62 L. Ed. 2d 332 (1979) (discusses Congress' power to regulate navigable waters under the Commerce Clause; Commerce Clause may reach water-related activities apart from those affecting navigable waterways)

United States v. Rands, 389 U.S. 121, 122-23 (1967) ("The Commerce Clause confers a unique position upon the Government in connection with navigable waters. 'The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States. . .'")

United States v. Edison, 108 F.3d 1336, 44 ERC 1550 (11th Cir. 1997), cert. denied, 118 S. Ct. 248 (1997) (discharge of sludge from truck to storm water ditch that led to drainage canal to emptied into Tampa Bay held to be discharge to navigable waters; held that it is "well established that Congress intended to regulate the discharge of pollutants into all waters that may eventually lead to waters affecting interstate commerce.")

United States v. Wilson, 133 F.3d 251, 45 ERC 1801 (4th Cir. 1997) (criminal conviction for

unlawful dredge and fill overturned and remanded; court held that Corps definition of wetlands, which forbade activities that "could affect" interstate commerce, was invalid; "The regulation [33 CFR 328.3(a)(3)] requires neither that the regulated activity have a substantial affect on interstate commerce, nor that the covered waters have any sort of nexus with navigable, or even interstate, waters. Were this regulation a statute, because, at least at first blush, it would appear to exceed congressional authority under the Commerce Clause.")

Hoffman Homes, Inc. v. EPA, 999 F.2d 256, 36 ERC 2098 (7th Cir. 1993) (EPA regulations on isolated wetlands upheld; migratory bird test O.K., although held that there was not substantial evidence on the record to support a conclusion that the wetland in question was likely to be used by migratory birds; the court agreed with the CJO that the "regulation covers waters whose connection to interstate commerce may be potential rather than actual, minimal rather than substantial. . . It is reasonable to interpret the regulation as allowing migratory birds to be the connection between a wetland and interstate commerce.")

Rueth v. EPA, 13 F.3d 227, 230, 24 ELR 20214 (7th Cir. 1993) ("Decisions such as Hoffman Homes, give full effect to Congress' intent to make the Clean Water Act as far-reaching as the Commerce Clause permits.")

Leslie Salt Co. v. United States, 896 F.2d 354, 358, 31 ERC 1139 (9th Cir. 1990) ("The commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species.")

Swanson v. United States, 789 F.2d 1368, 1371 (9th Cir. 1986) ("The public right of navigation follows the stream . . . and the authority of Congress goes with it.")

Utah v. Marsh, 740 F.2d 799, 804, 21 ERC 2142 (10th Cir. 1984) (held that discharge of dredged or fill material into Utah lake could well have a substantial economic effect on interstate commerce; water from lake is used to irrigate crops that are used in interstate commerce, etc.; "[T]he power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce. This is so irrespective of whether such an effect is what at some earlier time was defined as 'direct' or 'indirect.' Moreover, the triviality of an individual's act is irrelevant so long as the class of such acts might reasonably be deemed nationally significant in their aggregate economic effect." (citations omitted))

United States v. Ashland Oil and Transp. Co., 504 F.2d 1317, 1325, 7 ERC 1114 (6th Cir. 1974) (holding that pollution of non-navigable waterways can be properly regulated by Congress under the Commerce Clause)

United States v. Hartz Construction Co., 1999 U.S. Dist. LEXIS 9126 (N.D. Ill. 1999) (held that recent Supreme Court decision in Lopez did not overrule law of 7th Cir. that "other waters" provision in regulations falls within authority to regulate interstate waters: constitutionality of wetlands regulations upheld)

Jackson, *Wetlands the Commerce Clause: The Constitutionality of Current Wetland Regulation*

Under Section 404 of the Clean Water Act, 7 Va. J. Nat. Resources L. 307 (1988)

See also WETLANDS: Isolated Wetlands

COMPLIANCE ORDERS (§ 309(a))

33U.S.C. § 1319(a) (3) ("Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311 . . ., or is in violation of any permit condition or limitation implementing any of such sections in a [402 or 404] permit . . ., he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.")

5 U.S.C. § 701(a)(1) (judicial review may be obtained for final agency action under the APA "except to the extent that . . . statutes preclude judicial review . . .")

Abott Laboratories v. Gardner, 387 U.S. 136, 139-40, 87 S. Ct. 1507, 1510-11, 18 L. Ed. 2d 681 (1967) (in determining whether to review a regulation that had not been enforced, the Court first considered whether or not Congress intended to forbid pre-enforcement review)

United States v. Chapman, 146 F.3d 1166, 1170, 46 ERC 1968 (9th Cir. 1998) (CERCLA case; held that an order issued by EPA is an agency action subject to review on the "arbitrary and capricious" standard)

Laguna Gatuna, Inc. v. Browner, 58 F.3d 564, 40 ERC 2054 (10th Cir. 1995), cert. denied, 516 U.S. 1071 (1995) (administrative cease and desist order to prevent brine discharges to salt playa not reviewable in federal court because of lack of subject matter jurisdiction (no pre-enforcement review))

Southern Ohio Coal v. Office of Surface Mining, 20 F.3d 1418, 1426 (6th Cir. 1994) (district court lacks jurisdiction to review EPA compliance order prior to commencement of enforcement proceedings; court was "persuaded that Congress meant to preclude judicial review of compliance orders under the CWA.")

Southern Ohio Coal v. Office of Surface Mining, 831 F. Supp. 1324, 1335 (S.D. Ohio 1993), rev'd, 20 F.3d 1418, 1426 (6th Cir. 1994) (EPA enjoined from issuing compliance order to mine to halt bypass of treatment facility)

Rueth v. EPA, 13 F.3d 227, 24 ELR 20214 (7th Cir. 1993) (jurisdiction over isolated waters upheld; complaint seeking injunction against enforcement of compliance order to cease discharges to wetlands dismissed for lack of jurisdiction)

Southern Pines Assocs. v. United States, 912 F.2d 713, 715-16 (4th Cir. 1990) (district court lacks jurisdiction to review EPA compliance order prior to commencement of enforcement proceedings; "The structure of [CWA, CAA and CERCLA] indicates that Congress intended to allow EPA to act to address environmental problems quickly and without becoming immediately entangled in litigation.")

Hoffman Group Inc. v. EPA, 902 F.2d 567, 569 (7th Cir. 1990) ("In drafting the Clean Water Act, Congress chose to make assessed administrative penalties subject to review while at the same time it chose not to make a compliance order judicially reviewable unless the EPA decides to bring a civil suit to enforce it. . . Having provided a detailed mechanism for judicial consideration of a compliance order via an enforcement proceeding, Congress has impliedly precluded judicial review of a compliance order except in an enforcement proceeding.")

Solid State Circuits, Inc. v. United States EPA, 812 F.2d 383, 391-92, 25 ERC 1617 (8th Cir. 1987) (CERCLA 106 case; held that an order issued by EPA is an agency action subject to review on the arbitrary and capricious standard)

In re Marshall C. Sasser, 3 E.A.D. 703 (CJO 1991) (EPA may, but need not, issue a compliance order prior to bringing a penalty action)

See also PRE-ENFORCEMENT REVIEW; WETLANDS: Compliance Orders

COMPLIANCE SCHEDULES

See NPDES PERMITS; STATE CERTIFICATION

CONCENTRATED ANIMAL FEEDING OPERATIONS (CAFOs)

33 U.S.C. § 1362(14) ("The term point source means . . . concentrated animal feeding operation.")

40 C.F.R. § 122.21(i) (NPDES permit application requirements for CAFOs)

40 C.F.R. § 122.23(a)(3) and Appendix B to Part 122 (definition of CAFO)

40 C.F.R. § 122.23(c) (Case-by-case designation of concentrated animal feeding operations (aka significant contributor of pollutants or "SCP" status))

40 C.F.R. Part 412 (Feedlot Point Source Category)

40 C.F.R. § 412.11(c) ("The term *process waste water* shall mean any process generated waste water and any precipitation (rain or snow) which comes into contact with any manure, litter or bedding, or any other raw material or intermediate or final material or product used in or resulting from the production of animals or poultry or direct products (e.g. milk, eggs).")

40 C.F.R. §§ 412.12 & 412.13 ("There shall be no discharge of process waste water pollutants to navigable waters" under BPT and BAT, respectively)

Concerned Area Residents for the Environment v. Southview Farm, 34 F.3d 114, 39 ERC 1385 (2d Cir. 1994), cert. denied, 115 S. Ct. 1793 (1995) (held that dairy farm with 700 cattle that lived in barns was a CAFO and the runoff from the fields to which their manure was applied was not nonpoint source runoff)

Carr v. Alta Verde Industries, Inc., 931 F.2d 1055, 33 ERC 1361 (5th Cir. 1991) (discharge from a feedlot holding pond that was designed for 25-year/24-hr storm made the lot subject to NPDES permit requirements because the "design" criteria set forth in 40 C.F.R. § 412.13(b) effect only discharge criteria and not whether a discharge has occurred under 40 C.F.R. § 122.23 that renders the feedlot a CAFO)

United States v. Rockview Farms, Inc., No. CRF 98-5331 OWW (E.D. Ca. Apr. 26, 1999) (dairy farm ordered to pay criminal fine of $250,000 for discharging 1.7 million gallons of wastewater from waste pond into the desert for 2 days, from where it ran overland for 8 miles to the Amargosa River)

Community Assoc. for Restoration of the Environment v. Bosma Dairy, No. CY-98-3011-EFS (E.D. Wash. July 29, 1999) (clarifying earlier May 21 ruling, held that "it is correct to define a CAFO as the confinement area including the milk production area, cow pens, feeding area, truck wash area, calf pens, and fields therein on which manure is stored and any ditches therein. . . This would include, but not be limited to, trucks, wheel lines, center pivot irrigation, and spray guns. Any discharge therefrom would be a violation of the NPDES permit and the CWA. By 'discharge therefrom', the Court means an over application of manure or animal wastewater in violation of the [Dairy Waste Management Plan] which causes a discharge to the waters of the United States"; also held that irrigation canal to which a CAFO was discharging is waters of the U.S.)

Community Assoc. for Restoration of the Environment v. Bosma Dairy, No. CY-98-3011-EFS (E.D. Wash. May 21, 1999) (held that notice letter sufficiently apprized defendant of location and nature of violations; held that plaintiffs had standing)

Community Association for Restoration of the Environment v. Sid Koopman Dairy, 48 ERC 1763 (E.D. Wash. 1999) ("The Defendants CAFOs include not only the ground where the animals are confined but also the lagoons and systems used to transfer the animal wastes to the lagoons and systems as well as equipment which distributes and/or applies the animal wastes produced at the confinement area to fields outside the animal confinement area.")

State v. DeCoster, No. 148/97-666 (Iowa July 8, 1999) (upholding $59,000 civil penalty imposed against owner of several hog confinement facilities where state water pollution and animal waste control requirements were violated)

American Canoe Ass'n v. Murphy Farms, Inc., 1998 U.S. Dist. LEXIS 21402 (E.D.N.C. Dec. 21, 1998) (pig farm must apply for permit because it is a CAFO and there have been two unauthorized discharges)

Cross Timbers Concerned Citizens v. Saginaw and Johnson, No.3-97-CV-1564-H (N.D. Tex. Dec. 16, 1997) (EPA dismissed from a lawsuit brought by a citizens group in Texas concerning discharges of animal wastes from CAFOs; plaintiff challenged EPA for failing to take action against the State's program and for allegedly supporting that program with grants; held that there is no jurisdiction for a citizen suit that simply alleges faulty administration of a statute; addressing various provisions of the CWA in detail, the court found that the citizens also could not allege that EPA had violated a nondiscretionary duty for failing to rein in the allegedly faulty Texas program)

Concerned Area Residents for the Environment v. Southview Farm and Richard Popp, 834 F. Supp. 1410 (W.D.N.Y. 1993), rev'd on other grounds, 34 F.3d 114 (2d cir. 1994), cert. denied, 115 S. Ct. 1793 (1995) (argument rejected that manure is not a pollutant because it was not "discarded" but is instead used as a fertilizer)

Higbee v. Starr, 598 F. Supp. 323, 21 ERC 2215 (E.D. Ak. 1984) (in suit by neighbor against hog farm, CWA held not to apply to hog farm, which was not a CAFO, because it was "no discharge" system)

In re Luis Bettencourt, 1994 EPA RJO LEXIS 5 (Region 10 RJO Hamill 1994) (only CAFO's that submit NOI are covered under GP; manure is a pollutant; lateral is waters of U.S.)

In re Donald J. Aardema and Joe Pacheco, 1992 EPA RJO LEXIS 17 (Region 10 RJO Hamill 1992) (CAFO general permit for Idaho applies to all CAFOs even if they do not submit an NOI)

S. Rep. No. 92-414, at 100 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3761 (Sen. Dole) ("Animal and poultry waste, until recent years, has not been considered a major pollutant . . . The picture has changed dramatically, however, as development of intensive livestock and poultry production on feedlots and in modern buildings has created massive concentrations of manure in small areas. The recycling capacity of the soil and plant cover has been surpassed. . . . The present situation and the outlook for future developments in livestock and poultry production show that waste management systems are required to prevent waste generated in concentrated production areas from causing serious harm to surface and ground waters.")

64 Fed. Reg. 15158 (1999) (announcement by EPA of preliminary study of aquiculture industry)

63 Fed. Reg. 50192 (1998) (proposed joint strategy on CAFO between EPA and Dept. of Agriculture); discussed at Environmental Law Reporter, Vol. 29, No. 21 at 1064 (September 25, 1998)

62 Fed. Reg. 20177, 20180 (1997) (EPA Region 10, Idaho CAFO General Permit, Response to Comments: "Canals and laterals which empty into (or connect with) waters of the United States such as rivers, streams, lakes, etc. are themselves waters of the United States in accordance with the definition of waters of the United States in 40 CFR 122.2(e). As a result, discharges into canals and laterals are considered point source discharges which must be regulated under the NPDES permitting program.")

41 Fed. Reg. 11303 (1976) (Final CAFO regulations)

41 Fed. Reg. 11458 (1976) (Final storm water regulations)

41 Fed. Reg. 7963 (1976) (proposed regulations for agricultural activities (irrigation return flow))

40 Fed. Reg. 56932 (1975) (proposed storm water regulations)

40 Fed. Reg. 54182 (1975) (proposed CAFO regulations)

38 Fed. Reg. 1800 (1973) (Form and Guidelines for agricultural and silvicultural activities)

38 Fed. Reg. 10960 (1973) (proposal of Form and Rulemaking regarding agricultural, silvicultural activities addressing CAFO's)

EPA, *Efforts to Improve Controls on Concentrated Animal Feeding Operations (CAFOs)* (1998) (results of 1998 Survey of States and Regions compiled by Office of Water)

NRDC, *American's Animal Factories: How States Fail to Prevent Pollution from Livestock* (1998)

Pendergast, "Applicability of the NPDES Program to Discharges of Storm Water Associated with Construction Activity at, or Construction of, Livestock Feeding Facilities" (February 5, 1998)

Office of Inspector General, EPA, "Animal Waste Disposal Issues" (Apr. 21, 1997)

Larry C. Frarey and Staci J. Pratt, *Environmental Regulation of Livestock Production Operations*, 9 Nat. Resources & Env't. 8 (1995) ("The character of livestock production in many parts of the world, however, is changing rapidly and dramatically. Economies of scale, specialization, and regional concentration in all major livestock production sectors have fueled a trend toward fewer, larger operations that confine thousands of animals on limited acreage.")

Agena, Ubbo, *Animal Waste Control Programs of Iowa and Eight Other States*, Iowa Department of Natural Resources, Environmental Protection Division (1994)

EPA Office of Water, *The Report of the EPA/State Feedlot Workgroup* (1993)

EPA General Counsel Opinion No. 21 (June 27, 1975) (discussion of whether irrigation return flows are waters of U.S. or point sources)

See also DAIRIES; POINT SOURCES; NONPOINT SOURCES

CONFIDENTIAL BUSINESS INFORMATION ("CBI")

40 C.F.R. Part 2, Subpart B (Confidentiality of Business Information)

40 C.F.R. § 122.7 (Confidentiality of information submitted in an NPDES permit application)

RSR Corp. v. Browner, 924 F. Supp. 504, 42 ERC 2146 (S.D.N.Y. 1996) (EPA did not act arbitrary or capricious in finding average monthly production data submitted by co. under CWA was subject to disclosure in response to FOIA request, because, even though company claimed data constituted CBI, agency reasonably determined that data was effluent data subject to disclosure)

CONSTRUCTION GRANTS

See GRANTS

CONTRACTOR SUSPENSION/DEBARMENT

33 U.S.C. § 1368 ("No federal agency may enter into any contract with any person, who has been convicted of any offense under section 1319(c) of this title, for the procurement of goods, materials, and services if such contract is to be performed at any facility at which the violation which gave rise to such conviction occurred, and if such facility is owned, leased, or supervised by such person.")

40 C.F.R. Part 32 (Government wide Debarment and Suspension (Nonprocurement) . . . Clean Water Act Ineligibility of Facilities in Performance of Federal Contracts, Grants and Loans)

COST-BENEFIT ANALYSIS (§ 304(b)(1)(B))

33 U.S.C. § 1314(b)(1)(B) ("Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 1311 of this title shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application . . .")

Natural Resources Defense Council, Inc. v. EPA, 822 F.2d 104, 126 (D.C. Cir. 1987) (CWA requires EPA to undertake a cost-benefit calculus in establishing effluent limitations guidelines)

118 Cong. Rec. 33,696 (1972), reprinted in 1972 Legislative History at 169-170

See also EFFLUENT GUIDELINES

CREDENTIALS

33 U.S.C. § 1318(a)(B) ("the Administrator or his authorized representative (including an authorized contractor acting as a representative of the Administrator), *upon presentation of his credentials* -

(i) shall have a right of entry to, upon, or through any premises in which an effluent source is located or in which any records required to be maintained under clause (A) of this subsection are located, and

(ii) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under clause (A), and sample any effluents which the owner or operator of such source is required to sample under such clause." (emphasis added))

United States v. Shaffer Equipment Co., 11 F.3d 450, 37 ERC 2078 (4th Cir. 1993) (failure to timely disclose to court that EPA inspector may have lied about college degree considered "egregious" breach of duty of candor to the court; lower court dismissal of action reversed and

remanded for trial on merits)

United States v. Shaffer Equipment Co., 796 F. Supp. 938 (S.D. W.Va. 1992) (superfund cost recovery action dismissed for failure of DOJ attorneys to timely disclose false college degrees of EPA inspector)

See also INFORMATION REQUESTS

CRIMINAL VIOLATIONS (§ 309(c))

A. Generally

United States v. M/G Transport, 173 F.3d 584, 48 ERC 1603 (6th Cir. 1999) (barge company can be criminally liable for discharge without an NPDES permit without violating due process, even though the company never could have received a permit for its discharges)

United States v. TGR Corp., 171 F.3d 762, 29 ELR 21059 (2nd Cir. 1999) (conviction for unpermitted discharge of slurry from asbestos removal project affirmed; held that brook into which slurry was discharged is waters of U.S.; rejected defendant's argument that brook is a "municipal storm sewer" and therefore not waters of the U.S. because testimony at trial showed that the brook was not "owned or operated" by a public body as required under 40 C.F.R. § 122.26(b)(8))

United States v. Cooper, 173 F.3d 1192, 48 ERC 1477 (9th Cir. 1999) (upholding conviction for illegal disposal of sludge; sludge regulations do not supersede NPDES permits; non-permittees can be liable for violations of NPDES permit)

United States v. Ellis, 48 ERC 1168 (4th Cir. 1999) (district court's failure to instruct jury about appropriate mens rea required for a CWA conviction for discharge of asbestos without a permit was harmless error – it was uncontested that the Baltimore Harbor constituted a water of the United States & defendant knew he was violating the Act)

United States v. Iverson, 1998 U.S. App. LEXIS 31062 (9th Cir. 1998) (affirming jury convictions of the president of a chemical company for unlawfully discharging wastewater into a municipal sewage system; a corporate officer can be held responsible for the violation if he "has authority to exercise control over the corporation's activity that is causing the discharges."; held that local water laws prohibit the discharges and do not require the government to prove that the discharges affected water)

United States v. Moore, 46 ERC 1350 (4th Cir. 1998) (individual was properly convicted of knowing violations of NPDES permit issued for residential subdivision because district court did not abuse its discretion in excluding financial records as evidence where individual's financial ability to maintain plant was irrelevant; court did not err in declining to instruct jury of lesser offense of negligently discharging pollutants where no evidence showed individual simply may have been negligent)

United States v. Hartsell, 127 F.3d 343, 45 ERC 1356 (4th Cir. 1997) (conviction for illegal discharges to sewer system in violation of pretreatment standards 1upheld, holding that sewer systems fall within the jurisdiction of the CWA)

United States v. TGR Corp., 171 F.3d 762, 29 ELR 21059 (D. Conn. 1998) (criminal liability found for unpermitted discharge to navigable waters found where contractor dumped asbestos wastes down a storm drain in the basement of a school building, and the storm drain emptied into a tributary of a navigable waterway; held that the tributary constituted navigable waters even if it was man-made, and constructed for the purpose of carrying water from the storm water system to the natural creek)

United States v. Wilson, 133 F.3d 251, 262 (4th Cir. 1997) (held that "the Clean Water Act, 33 U.S.C. § 1319(c)(2)(A) requires the government to prove the defendant's knowledge of facts meeting each essential element of the substantive offense, but need not prove that he knew his conduct to be illegal.")

United States v. Sinskey, 1997 U.S. Appeals LEXIS 17353 (8th Cir. 1997) (convictions of two Morrell Ham workers for falsifying DMRs and knowingly discharging in excess of permit limits upheld; argument that defendants did not *knowingly* violate the CWA reject; court held that it is enough for defendants knew they engaged in the underlying conduct)

United States v. Hopkins, 35 F.3d 1275, 38 ERC 1365 (2d Cir. 1995) (conviction affirmed under 309(c)(2)(A) and (c)(4) for knowingly falsifying monitoring reports and knowingly violating a wastewater discharge permit)

United States v. Michael Weitzenhoff and Thomas Mariani, 35 F.3d, 38 ERC 1365 (9th Cir. 1994) (POTW plant managers convicted conspiracy to violate CWA for discharging sludge out the plant's outfall at night; court held that conviction did not require proof that the defendants knew that their conduct violated the permit; CWA is a public welfare statute)

United States v. Curtis, 988 F.2d 946, 36 ERC 2062 (9th Cir. 1993) (federal employees are not immune from being prosecuted criminally for violations of the CWA, even if the alleged violations have occurred in the course of the defendant's federal employment)

United States v. Schallom, 998 F.2d 196 (4th Cir. 1993), cert. denied, 510 U.S. 902, 114 S. Ct. 277, 126 L. Ed. 2d 228 (1993) (contractor held criminally liable for dumping waste concrete into creek below bridge construction project)

United States v. Strandquist, 993 F.2d 395 (4th Cir. 1993) (manager of campground found guilty for discharging raw sewage into a storm grate; court upheld government's use of dye test to prove sewage reached waters of U.S.)

United States v. Law, 979 F.2d 977 (4th Cir. 1992) (owners of coal preparation plant found criminally liable for discharge of leachate from slag pile without a permit; water treatment system is not waters of U.S., but is a point source)

United States v. Rockview Farms, Inc., No. CRF 98-5331 OWW (E.D. Ca. Apr. 26, 1999) (dairy farm ordered to pay criminal fine of $250,000 for discharging 1.7 million gallons of wastewater from waste pond into the desert for 2 days, from where it ran overland for 8 miles to the Amargosa River)

United States v. Hagberg, No. CR 98-79-BLG-JDS (D. Mont. Feb. 12, 1999) (dismissing indictment against person charged with dumping domestic septage onto a county road – septage is not "sludge" under section 405(e) of the CWA)

United States v. Darling International, No. CR 4-96-162 (D.C. Minn. April 7, 1998) (company assessed fine of $4 million and employee sentenced to six months in prison for falsifying effluent samples at rendering plant)

United States v. Pasquariello, 40 ERC 1009 (S.D. Fla. 1994) (developer held criminally liable for unpermitted fill of two small lakes with construction debris; "[T]he scienter element of the violation . . . is satisfied if the Government proves beyond a reasonable doubt that the Defendant acted voluntarily and intentionally, and not because of mistake or accident. In other words, the Government need not prove that the Defendant knew that h is conduct was illegal.")

United States v. Frezzo Bros., Inc., 461 F. Supp. 268, 12 ERC 1481, aff'd, 602 F.2d 1123, 1125-1126, 13 ERC 1403 (3d Cir. 1979) (there are no civil or notice prerequisites to maintenance of criminal proceedings under the CWA)

29 Envir. Rptr. 2375, 2376 (April 2, 1999) ($36,171,595 in criminal penalties assessed by EPA under the CWA in 1998)

See also WETLANDS: Criminal Violations

B. Parallel Proceedings

Barry Farm Resident Council v. U.S. Department of the Navy, 45 ERC 1599 (D.D.C. 1997) (District court denies motion to stay civil proceedings pending the conclusion of criminal investigations regarding contamination of the Anacostia River by the U.S. Navy; following factors should be used to decide if a stay should be allowed: 1) a balancing of the interests of the plaintiffs in proceeding expeditiously and the prejudice to them from delay; 2) the pubic interest in the pending civil and criminal suit; 3) the interests and burdens on the defendant; 4) the interests of people not party to the suit; and 5) judicial efficiency)

DAIRIES

40 C.F.R. Part 405 (Dairy Products Processing Point Source Category)

United States v. Municipal Authority of Union Township & Dean Dairy Products, Inc., 929 F. Supp. 800 (M.D. Pa. 1996) (penalty of $4,031,000 based on ill-gotten profits during period of non-compliance; defendant violated BOD and TSS limits 54 of 68 months)

United States v. Municipal Authority of Union Township & Dean Dairy Products, Inc., No. 1-94-621 (M.D. Pa. Dec. 14, 1995) (summary judgment granted to U.S. on interference case, rejecting IU's arguments that there were QA/QC problems with the lab causing potentially incorrect results to be reported on their DMRs; also rejected argument that conventional pollutants cannot interfere with a POTW and that problems at the POTW were caused by operation of the POTW not by the IU)

United States v. Tillamook Co. Creamery Association, consent decree (D. Or. 1992) ($260,000 plus $160,000 SEPs & promises to construct new WWTP at cheese plant; DMR violations - mostly BOD and TSS; penalty reduced based on inability to pay)

United States v. Western Dairymen Cooperative, Inc., 1983 EPA Consent LEXIS 22, No. C-83-1227A (D. Utah 1983) ($12,000 penalty paid for whey discharges in violation of NPDES permit)

United States v. Consolidated Dairies of Lake Co., Inc., No. CV-76-119BU (D. Mont. 1976) ($1,000 paid for whey discharges to creek)

See also CONCENTRATED ANIMAL FEEDING OPERATIONS

DAMS

33 U.S.C. § 1344(f)(1)(B) ("Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material . . . for the purposes of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, . . . is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title. . .)

Tennessee Valley Authority v. Hill, 437 U.S. 153, 174 (1978) (decision halting construction and operation of a dam which would jeopardize the existence of endangered species of fish; "Congress intended endangered species to be afforded the highest priorities.")

Committee to Save Mokelumne River v. East Bay Municipal Utility Dist., 13 F.3d 305, 38 ERC 1001 (9th Cir. 1993), cert. denied, 513 U.S. 873 (1994) (mine drainage into impoundment behind hydropower dam held to be covered by CWA)

National Wildlife Federation v. FERC, 912 F.2d 1471, 1483, 20 ELR 21098 (D.C. Cir. 1991) (a 401 certification is needed only from the state in which the discharge originates, not affected downstream states)

Keating v. FERC, 927 F.2d 616, 624 (D.C. Cir. 1991) (§ 401(a)(3) "creates a presumption that a state certification issued for purposes of a federal construction permit will be valid for purposes of a second federal license related to the operation of the same facility.")

Fredericksburg v. FERC, 876 F.2d 1109 (4th Cir. 1989) (license issued by FERC to hydroelectric co. to build powerhouse at dam was invalid, since co. never submitted required application to state water control board, and thus did not "request" certification within meaning of Commission's regulations)

National Wildlife Fed. v. Consumers Power Co., 862 F.2d 580, 583 (6th Cir. 1988) (in case involving discharge of dead fish entrained in dam turbine water, court held that "discharge" as used in the definition of "point source" required a facility must "add" pollutants to navigable waters)

> Cf. Oregon Natural Desert Ass'n v. Dombeck, 151 F.3d 945, 46 ERC 1993 (9th Cir. 1998) (held that 401 certification does not apply to nonpoint source pollutants, such as manure from grazing on public lands; distinguished dam cases (Consumers Power et al.) on grounds that dams are point sources but they don't discharge pollutants)

National Wildlife Federation v. Gorsuch, 693 F.2d 156, 18 ERC 1105 (D.C. Cir. 1982) (pipes and spillways of dams are "point sources" under the CWA, and therefore subject to the Act discharge permit requirements. Id. at 165 n.22; "addition from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world. Id. at 175)

> Cf. United States v. Sinclair, 767 F. Supp. 200, 203 (D. Mont. 1990) (defendant moved cobbles around in stream; held that redeposition of indigenous materials in a streambed constitutes discharge of pollutants)

Missouri ex rel. Ashcraft v. Department of the Army, 672 F.2d 1297, 1304, 17 ERC 101 (8th Cir. 1982) (district court did not err in holding that operation of dam did not result in discharge of pollutant as discharge requires "addition" of pollutant from "point source" and neither term applied to soil erosion or oxygen content of water)

Appalachian Power Co. v. Train, 545 F.2d 1351, 1377 (4th Cir. 1976) (regulations struck down that required power plant operators to remove naturally-occurring pollutants in addition to pollutants added during power generation; "Those constituents occurring naturally in the waterways, or occurring as a result of other industrial discharges, do not constitute an addition of pollutants by a plant through which they pass.")

American Rivers, Inc. v. FERC, 129 F.3d 99, 45 ERC 1563 (2nd Cir. Nov. 5, 1997) (court rejected the position of FERC that it has authority to decide whether conditions of a state certification under § 401 of the CWA are unlawful and, therefore, not include such conditions as part of a hydropower license. The court held, instead, that FERC "is bound by the language of § 401 to incorporate all state-imposed certification conditions into hydropower licenses and that the legality of such conditions can only be challenged by the licensee in a court of appropriate jurisdiction." slip op. at 6)

Froebel v. Meyer, 13 F. Supp. 2d 843, 47 ERC 1359 (E.D. Wis. 1998) (citizen suit alleging sediment discharges from former impoundment area after dam was removed dismissed; "Whether or not a dam qualifies as a point source appears to turn on the existence of the other disputed element in this case -- an addition of pollutants to the water. . . .[T]he continuing sediment transfer through Frank's Dam cannot be considered an 'addition' of a pollutant from a point source, requiring a § 402 permit.")

EPA, "The Control of Pollution from Hydrographic Modifications" (1973), EPA Doc. No. 403/9-73-017

EPA, "Impact of Hydrologic Modifications on Water Quality" (1975), EPA Doc. No. 600/2-75-007

Michael T. Pyle, *Beyond Fish Ladders: Dam Removal as a Strategy for Restoring American's Rivers*, 14 Stan. Envt'l L.J. 97, 107-17 (1995)

See also "DISCHARGES OF POLLUTANTS;" "POINT SOURCE"

DELEGATED STATES

33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . .")

33 U.S.C. § 1318(c) (Records and reports; inspections – Application of State law)

33 U.S.C. § 1319(a) (State enforcement; compliance orders)

33 U.S.C. § 1370 (States are free to adopt and enforce limitations on the discharge of pollutants more stringent than those established by the CWA)

33 U.S.C. § 1342(b) (State permit programs)

33 U.S.C. § 1344(h) (Determination of State's authority to issue permits under State program; approval; notification; transfers to State program)

American Forest and Paper Ass'n v. EPA, 137 F.3d 291 (5th Cir. 1998) (held that EPA cannot condition delegation of CWA program to State of Louisiana on adherence to ESA consultation procedures)

American Forest & Paper Ass'n v. EPA, 1998 U.S. App. LEXIS 21396 (10th Cir. 1998) (petition for review of EPA approval of Oklahoma NPDES program dismissed for lack of standing)

Southern Ohio Coal v. Office of Surface Mining, 20 F.3d 1418, 1428 (6th Cir. 1994) (EPA retains independent enforcement authority in primacy states)

National Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580, 582 (6th Cir. 1988) (the CWA authorizes EPA to delegate authority to a state to implement its own NPDES program under the Act, 33 U.S.C. § 1342(b), although EPA retains oversight and enforcement authority. 33 U.S.C. § 1342(i))

Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517, 1519, 27 ERC 1001 (9th Cir. 1987) (under §§ 1319(a)(1) and (a)(3), the EPA is empowered to commence enforcement actions if the delegated state has failed to fulfill its obligations under the delegation)

United States v. Puerto Rico, 721 F.2d 832, 838 (1st Cir. 1983) ("states are the prime bulwark in the effort to abate water pollution")

Aminoil U.S.A., Inc. v. Cal. State Water Resource Contr. Bd., 674 F.2d 1227, 1229-1230, 17 ERC 1702 (9th Cir. 1982) (under §§ 1319(a)(1) and (a)(3), the EPA is empowered to commence enforcement actions if the delegated state has failed to fulfill its obligations under the delegation)

United States v. ITT Rayonier, 627 F.2d 996, 1000-1001 (9th Cir. 1980) (§ 1342(i) preserves federal enforcement authority despite state permit-issuing power)

Shell Oil Co. v. Train, 585 F.2d 408, 12 ERC 1547, 1548 (9th Cir. 1978) ("Under § 1342(b), a state may submit to the EPA a proposed permit program governing discharges into navigable waters within its borders. If the state can demonstrate that it will apply the effluent limitations and the amendments' other requirements in the permits it grants and that it will monitor and enforce the terms of those permits, then, unless the Administrator of the EPA determines that a state program does not meet the requirements, he must approve the proposal.")

Southern Ohio Coal v. Office of Surface Mining, 831 F. Supp. 1324, 1335 (S.D. Ohio 1993), rev'd, 20 F.3d 1418, 1426 (6th Cir. 1994) (EPA has authority to act in delegated states only where state has failed to act)

United States v. Sharon Steel Corp., 30 ERC 1778, 1779 (N.D. Ohio 1989) (EPA must take independent enforcement action in the event that the state fails to fulfill its enforcement responsibility)

District of Columbia v. Schramm, 203 U.S. App. D.C. 272, 631 F.2d 854, 860 (D.C. Cir. 1980) (legislative history of CWA reflects congressional desire to "put maximum responsibility for the permit process in the States.")

Froebel v. Meyer, 13 F. Supp. 2d 843, 47 ERC 1359 (E.D. Wis. 1998) ("Inarguably, Congress intended states to play the leading role in administering and enforcing the NPDES permit programs.")

United States v. Colorado Springs, 455 F. Supp. 1364, 1366 (D.C. Colo. 1978) (EPA Administrator may unilaterally enforce a NPDES permit under 33 U.S.C. § 1319(a) notwithstanding that the enforcement action takes place in a state to which NPDES permit authority has been delegated)

Chesapeake Bay Foundation v. Va. State Water Control Bd., 453 F. Supp. 122, 11 ERC 1897 (E.D. Va 1978) (no NEPA review required for NPDES permit issued in delegated state; held that failure of EPA to object to permit does not constitute a federal action necessary to invoke NEPA)

Senate Report No. 92-414, 92nd congress, 2nd Session (1972), U.S. Code cong. & Amin. News 1972, p. 3668 (where the approved state agency has already taken action, Congress intended for EPA to act only "in cases where states and other appropriate enforcement agencies are not acting expeditiously and vigorously to enforce control requirements.")

DISCHARGE MONITORING REPORTS (DMRs)

A. Defendant's Challenges to Accuracy of DMRs

United States v. Ward, 448 U.S. 242, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (defendant's report of oil spill compiled in compliance with Clean Water Act could be used to establish liability for civil penalties under Act)

Sierra Club v. Union Oil Co., 813 F.2d 1480, 1492, 25 ERC 1801 (9th Cir. 1987), vacated on other grounds, 108 S. Ct. 1102-03 (1988), judgment reinstated, 853 F.2d 667, 28 ERC 1333 (9th Cir. 1988) (permittee may not challenge the accuracy of the data it submitted in the DMR; self-monitoring reports constitute conclusive evidence of an exceedance of a permit limitation; self-monitoring is critical to effective operation of the Act)

United States v. Union Township, Civil Action No. 1:CV-94-0621 (M.D. Pa. 1995) (court rejected defendant's argument that a factual issue involving the accuracy of its reported data (which sampling was conducted under contract with the municipality) so as to defeat summary judgment; court deemed defendant's DMRs to be accurate and granted summary judgment for plaintiff)

Public Interest Research v. Elf Atochem, 817 F. Supp. 1164, 177-78, 36 ERC 1855 (D.N.J. 1993) ("It is well-established that DMRs and laboratory reports may be relied on in Clean Water Act cases to establish liability on summary judgment. . . .[I]f a defendant wishes to contest the accuracy of its DMRs, it 'has a heavy burden to establish faulty analysis.'"; discusses legislative history at 1178)

United States v. Aluminum Co. of America, 824 F. Supp. 640, 648-49 (E.D. Tenn. 1993) (a reported exceedance of an effluent limitation is a violation of the CWA no matter what the potential for statistical error in the sampling and analysis methodology)

Public Interest Research Group v. Rice, 774 F. Supp. 317, 325 (D.N.J. 1991) (DMRs, laboratory reports, and supplemental operating logs showing violations of NPDES permit used to establish liability under CWA)

Connecticut Fund for the Environment v. Upjohn Co., 660 F. Supp. 1397, 26 ERC 1495, 1510 (D. Conn. 1987) ("Congress did not intend the courts to be the forums for determining the adequacy or inadequacy of scientific measurements . . . Defendant was required to monitor its discharges . . . and attest to the accuracy of its reports . . . In fulfillment of those obligations it chose to rely on the GC/CD testing system. It may not now refute its own report on the results of its testing. Accordingly, although a basis for defendant's challenge of the accuracy of its reports may exist as a matter of fact, that defense has no basis as a matter of law.")

Atlantic States Legal Foundation v. Al Tech Specialty Steel Corp., 635 F. Supp. 284, 289, 24 ERC 1506 (N.D.N.Y. 1986) (claim of measurement error is insufficient to defeat summary judgment "for the simple reason that a defendant could always claim that [its] reports. . . were inaccurate")

Student Public Interest Research Group v. P.D. Oil & Chemical Co., 627 F. Supp. 1074, 1089 (D.N.J. 1986) ("Defendants may not avoid summary judgment as to liability under the Act simply by challenging the accuracy of the data set forth in the DMRs.")

Student Public Interest Research Group v. Georgia-Pacific, 615 F. Supp. 1419, 1429 (D.N.J. 1985) ("[T]here can be no question that the data disclosed in [a] defendant's DMRs may be accepted as true.")

Chesapeake Bay Foundation v. Bethlehem Steel Corp., 608 F. Supp. 440, 452-53 (D. Md. 1985) ("Given the heavy emphasis on accuracy in the Act and the clear Congressional policy that DMRs should be used for enforcement purposes, the Court will not accept claims of inaccurate monitoring as a defense to this action. . .")

United States v. City of Moore, 24 ERC 1542 (W.D. Okl. 1985) (defendant's claims of testing inaccuracies in its own DMRs enough to defeat summary judgment motion by plaintiff)

Student Public Interest Research Group v. Fritzsche, Dodge & Olcott, Inc., 579 F. Supp. 1528, 1538-39 (D.N.J. 1984), aff'd, 759 F.2d 1131 (3d Cir. 1985) ("Defendant's last minute claims that it may have been erroneously overzealous in documenting its own transgressions will not deter our entering an order of summary judgment in favor of plaintiffs on the issue of liability.")

Friends of the Earth v. Facet Enterprises, 618 F. Supp. 532, 536 (W.D.N.Y. 1984) (defendant's "multitude of justifications for the alleged violations, along with convincing argument why many . . . should not actually constitute violations (e.g. typographical mistakes in the DMRs)" sufficient to defeat summary judgment)

In re City of Salisbury, Maryland, Docket No. CWA-III-219 (ALJ Biro July 30, 1999) (motion for accelerated decision on liability for violations reported in sludge reports denied on grounds of disputed issues of material facts regarding accuracy of sludge report submitted to EPA)

In re Battelle Memorial Inst., Inc., Docket No. CWA-IV 94-509 (ALJ Vanderheyden July 1, 1995) (respondent's attempt to impeach it's own DMR data to show that no discharge of pollutants occurred rejected)

See also MONITORING/REPORTING REQUIREMENTS

B. DMRs Are Admissions of Liability

United States v. Ward, 448 U.S. 242, 100 S. Ct. 2636, 65 L. Ed. 2d 742, 14 ERC 1673 (1980) (notification to EPA that discharge of oil had occurred could be used against defendant without implicating the 5th Amendment because penalty assessed was civil not criminal penalty)

Garner v. United States, 424 U.S. 648, 665, 96 S. Ct. 1178, 47 L. Ed. 2d 370, (1976) (tax case: records required to be kept by law may be deemed admissions for purposes of establishing liability)

Sierra Club v. Simkins Industries, 847 F.2d 1109, 1112 n.8, 27 ERC 1881 (4th Cir. 1988), cert. denied, 491 U.S. 904, 109 S. Ct. 3185 (1989) ("Required reports such as DMRs may be used as admissions in court to establish a defendant's liability.")

Sierra Club v. Union Oil Co. of California, 813 F.2d 1480, 1492, 25 ERC 1801 (9th Cir. 1987), vacated on other grounds, 108 S. Ct. 1102-03 (1988), judgment reinstated, 853

F.2d 667 (9th Cir. 1988) ("We conclude that when a permitee has exceeded permit limitations, the permitee may not impeach its own reports by showing sampling error.")

Public Interest Research Group v. N.J. Dept. Env. Prot. and Energy, 37 ERC 1317 (D.N.J. 1993) ("Whether or not the DMRs/laboratory reports relied upon by plaintiffs were required by defendant's permit, we find that they do establish liability unless defendant can present direct evidence of inaccuracies.")

Public Interest Research Group v. GAF Corp., 770 F. Supp. 943, 952 (D.N.J. 1991) ("It is well established that records required to be kept by law, such as DMRs, may be deemed admissions for purposes of establishing civil liability.")

Public Interest Research Group v. Yates Industries, Inc., 757 F. Supp. 438, 447 (D.N.J. 1991) (DMRs may be deemed admissions when establishing liability for discharge violations; "Mere verbal representations by officials that certain portions of a permit will not be enforced, without formal modifications in the permit, will not excuse the holder from the terms of the permit." *Id.* at 445)

United States v. CPS Chemical Co., 779 F. Supp. 437 (E.D.Ark. 1991) ("For enforcement purposes, a permittee's DMRs constitute admissions regarding the levels of effluents that the permittee has discharged.")

United States v. City of Hoboken, 675 F. Supp. 189, 192 (D.N.J. 1987) (for enforcement purposes, a permittee's DMRs constitute admissions regarding the levels of effluents that the permittee has discharged)

Natural Resources Defense Council, Inc. v. Texaco Refining, 719 F. Supp. 281, 289 (D. Del. 1989), vacated in part on unrelated grounds, 906 F.2d 934 (3d Cir. 1990) (undisputed DMRs constitute sufficient evidence of a permit holder's liability under the Act to warrant granting a motion for summary judgment on that issue)

Student Public Interest Research Group of New Jersey, Inc. v. P.D. Oil & Chemical Storage, Inc., 627 F. Supp. 1074, 1090, 23 ERC 1894 (D.N.J. 1986) ("Here, defendant admitted in official reports that its discharges have exceeded the effluent limitations in its permit. The courts have long approved the use of report or records which the law requires to be kept as admissions in establishing civil liability.")

Student Public Interest Research Group of New Jersey, Inc. v. Monsanto Co., 600 F. Supp. 1479, 1485, 22 ERC 1137 (D.N.J. 1985) ("Reports or records which are required to be kept by law (such as DMRs and NCRs) may be used as admissions to establish a defendant's civil liability.")

Student Public Interest Research Group of New Jersey, Inc. v. Georgia-Pacific Corporation, 615 F. Supp. 1419, 1429-30, 23 ERC 1338 (D.N.J. 1985) ("It is long established that records required to be kept by law, such as DMRs, may be deemed to be admissions for purposes of establishing civil liability.")

United States v. Town of Lowell, Indiana, 637 F. Supp. 254, 257, 24 ERC 1184 (N.D.

Ind. 1985) ("The DMRs submitted by [defendant] show the effluent which passed through the treatment plant consistently violated the acceptable permit parameters.")

Chesapeake Bay Foundation v. Bethlehem Steel Corp., 608 F. Supp. 440, 451-53, 22 ERC 1894, 1904 (D. Md. 1985) ("Generally, reports or records which are required to be kept by law, such as DMRs, may be used to establish a defendant's liability.")

Student Public Interest Research Group of New Jersey, Inc. v. Tenneco Polymers, Inc., 602 F. Supp. 1394, 1400, 22 ERC 1327, 1332 (D.N.J. 1985) (DMRs may be used to establish liability)

Friends of the Earth v. Facet Enterprises, Inc., 618 F. Supp. 532, 536, 22 ERC 1143 (W.D.N.Y. 1984) (summary judgment inappropriate when defendant disputes DMRs)

United States v. Alcoa, 824 F. Supp. 640, 648-49 (E.D. Tenn. 1993) (held that DMRs are admissions of liability after thorough review of case law)

S. Rep. No. 414, 92nd Cong. 1st Sess. 64, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3668, 3730 ("The bill . . . establishes and makes precise new requirements imposed on persons and subject to enforcement. One purpose of these new requirements is to avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement. Enforcement of violations of requirements under this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay.")

"DISCHARGE OF POLLUTANTS" (§ 502(12))

33 U.S.C. § 1362(12) ("The term `discharge of a pollutant' and the term `discharge of pollutants' each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.")

40 C.F.R. § 401.11(h) ("The term `discharge of pollutant(s)' means: (1) The addition of any pollutant to navigable waters from any point source and (2) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft. The term `discharge' includes either the discharge of a single pollutant or the discharge of multiple pollutants.")

Dubois v. USDA, 102 F.3d 1273, 43 ERC 1824 (1st Cir. 1996) (water taken from creek for use in snow-making equipment with excess discharged to pond on other side of ridge held to be discharge of pollutants; court rejected EPA's position that moving the creek water to the pond without adding pollutants was not a discharge of pollutants to waters of U.S.)

United States v. Law, 979 F.2d 977, 978-79, 23 ELR 20466 (4th Cir. 1993), cert. denied, 507 U.S. 1030, 113 S. Ct. 1844 (1993) (defense that Act does not impose liability "upon persons over whose property preexisting pollutants are passed along to flow finally into navigable waters" specifically rejected; distinguishing the dam cases, court held that "Unlike the river and later

waters diverted in Consumers Power, Gorsuch, and Train, appellants' water treatment system collected runoff and leachate subject to an NPDES permit under the CWA, and therefore was not part of the `waters of the United States.'")

National Wildlife Fed. v. Consumers Power Co., 862 F.2d 580, 583, 28 ERC 1572 (6th Cir. 1988) (in case involving discharge of dead fish entrained in dam turbine water, court held that "discharge" as used in the definition of "point source" required a facility must "add" pollutants to navigable waters)

United States v. Huebner, 752 F.2d 1235, 1243 (7th Cir. 1985) ("[t]he redeposit of materials excavated from a wetland is the addition of pollutants under the CWA.")

United States v. M.C.C. of Florida, 772 F.2d 1501, 23 ERC 1318 (11th Cir. 1985) (barge propellers churning up river bottom constitute discharge of pollutants)

Avoyelles Sportsman's League, Inc. v. Marsh, 715 F.2d 897, 19 ERC 1841, 1864 (5th Cir. 1983) (defendant held liable for filling wetlands with debris cleared from the wetlands; "The word 'addition', as used in the definition of the term 'discharge,' may reasonably be understood to include 'redeposit.'")

National Wildlife Federation v. Gorsuch, 693 F.2d 156, 18 ERC 1105 (D.C. Cir. 1982) (pipes and spillways of dams are "point sources" under the CWA, and therefore subject to the Act discharge permit requirements. 693 F.2d at 165 n.22; "addition from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world." 693 F.2d at 175)

Appalachian Power Co. v. Train, 545 F.2d 1351, 1377 (4th Cir. 1976) (regulations struck down that required power plant operators to remove naturally-occurring pollutants in addition to pollutants added during power generation; "Those constituents occurring naturally in the waterways, or occurring as a result of other industrial discharges, do not constitute an addition of pollutants by a plant through which they pass.")

Borden Ranch Partnership v. U.S. Army Corps. of Engineers, ?? (E.D. Cal. June 9, 1998) (held that redeposit of earth during plowing and discing operation in wetland can constitute the "addition of a pollutant" and that the purpose of the activity is irrelevant)

San Francisco Baykeeper v. Tidewater Sand & Gravel Co., 46 ERC 1780, 1784 (N.D. Ca. 1997) (defendant held liable for violations of storm water permit; discharge of a pollutant not a predicate to a CWA violation so long as a permit has been violated)

City of New York v. Anglebrook Ltd. Partnership, 891 F. Supp. 900, 903-04, 40 ERC 1813 (S.D.N.Y. 1995) (permit violation constitutes violation of the CWA even in the absence of a discharge of pollutants)

United States v. Sinclair, 767 F. Supp. 200, 203 (D. Mont. 1990) (defendant moved cobbles around in stream; held that redeposition of indigenous materials in a streambed constitutes discharge of pollutants)

Sierra Club v. Simkins Industries, Inc., 617 F. Supp. 1120, 23 ERC 1018 (D. Md. 1985), aff'd, 847 F.2d 1109, 27 ERC 1881 (4th Cir. 1988), cert. denied, 491 U.S. 904 (1989) (permit violation constitutes violation of the CWA even in the absence of a discharge of pollutants)

State of Missouri ex rel. Ashcroft v. Department of the Army Corps of Engineers, 526 F. Supp. 660, 678 (W.D. Mo. 1980), aff'd, 672 F.2d 1297, 1304, 17 ERC 1001 (8th Cir. 1982) (erosion of soil as a result of releases of water is not a discharge regulated by the CWA)

In re Slinger Drainage, Inc.,8 E.A.D. ___ (EAB 1999) (rejecting NMA case as inapplicable, held that fall-back from drain tile laying machine to be "addition of pollutants" subject to regulation under CWA, and not "incidental fallback"; distinguished NMA on grounds that discharge in NMA was merely incidental to removal of materials from wetlands, whereas in Slinger, the discharge was part of the operation to remove wetlands material, insert a drain pipe, then redeposit all of the excavated material)

In re J & L Specialty Products Corp., 5 E.A.D. 333 (EAB 1994) (held that respondent "discharged" cyanide because it collected storm water containing cyanide and diverted it for use in its industrial process before discharging to the receiving water via its wastewater outfall; surface runoff is subject to NPDES permitting requirements where it is collected and channeled by man)

In re General Motors Corp., No. CWA-A-O-011-93 (ALJ Hoya June 28, 1996), aff'd, 7 E.A.D. 465 (EAB 1997), aff'd, 168 F.3d 1377, 48 ERC 1257 (D.C. Cir. 1999) (held that metals found in respondents storm water that leached from surfaces of respondent's buildings by rainwater to constitute addition of pollutants)

In re Battelle Memorial Inst., Inc., Docket No. CWA-IV 94-509 (ALJ Vanderheyden July 1, 1995) (respondent, who's NPDES permit had expired, held to discharge without a permit where it ran sea water over paint samples to develop less-toxic anti-fouling agents and discharged seawater to river; argument rejected that no discharge of pollutants occurred because respondent did not add pollutants to flow-through seawater, held that pollutants picked up off paint chips were added to waste stream)

1 A Legis. Hist. of the Federal Water Pollution Control Act Amendments of 1972 (January 1973) at 255 (remarks of Cong. Dingell, Oct. 4, 1972) ("It is quite clear that section 502(12) of the bill, in defining the term 'discharge of pollutants,' does not in any way contemplate that the discharge be directly from the point source to the waterway. The situation is analogous to the court's holding in United States v. Esso Standard Oil Co. of Puerto Rico, 375 F.2d 621 (CA 3, 1967) [Refuse Act], where a discharge from a shore facility flowed 'indirectly,' that is by force of gravity over land into a waterway.")

See also POINT SOURCE; POLLUTANT; DAMS; WETLANDS: Dredge and Fill

DISCHARGE WITHOUT A PERMIT (§ 301(a))

A. Generally

33 U.S.C. § 1311(a) ("Except as in compliance with this section and section 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.")

33 U.S.C. § 1311(b) ("The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. . .")

33 U.S.C. § 1311(g) ("Whenever on the basis of any information available -
(A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or has violated any permit condition or limitation implementing any of such section in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by a State, or
(B) the Secretary of the Army . . . . finds that any person has violated any permit condition or limitation in a permit issued under section 1344 of this title by the Secretary,
the Administrator or Secretary , as the case my be, my, after consultation with the state in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.")

40 C.F.R. § 122.21(b) ("it is the operator's duty to obtain a permit.")

Weinberger v. Romero-Barcelo, 456 U.S. 305, 319, 72 L. Ed. 2d 91, 103 (1982) (discharge without a permit is illegal)

Milwaukee v. Illinois, 451 U.S. 304, 310-11, 68 L. Ed. 2d 114, 122, 15 ERC 1912 (1981) (it is illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit)

EPA v. California State Water Resources Control Bd., 426 U.S. 200, 205, 96 S. Ct. 2022, 2025, 48 L. Ed. 2d 578 (1976) ("it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms.")

United States v. M/G Transport, 173 F.3d 584, 48 ERC 1603 (6th Cir. 1999) (barge company can be criminally liable for discharge without an NPDES permit without violating due process, even though the company never could have received a permit for its discharges)

Amigos Bravos v. Molycorp Inc., 1998 U.S. App. LEXIS 28576 (10th Cir. 1998) (suit against mine for discharging without a permit dismissed on grounds that claim should have been brought as a challenge to the permit; mine had disclosed to EPA that it had seeps draining from its waste rock pile, and EPA chose not to regulate the discharges in

the reissued permit)

Missouri v. City of Glasgow, 152 F.3d 802, 47 ERC 1241 (8th Cir. 1998) (city liable for discharge of sludge from its drinking water treatment facility without a permit; city was denied permit when it refused to pay a state-required permit fee which the city claimed violated the Missouri Constitution)

United States v. Schallom, 998 F.2d 196 (4th Cir. 1993), cert. denied, 510 U.S. 902, 114 S. Ct. 277, 126 L. Ed. 2d 228 (1993) (contractor held criminally liable for dumping waste concrete into creek below bridge construction project)

American Petroleum Institute v. EPA, 787 F.2d 965, 969 24 ERC 1233 (5th Cir. 1986) (the CWA makes it unlawful to discharge any pollutant from any point source without an NPDES permit)

Natural Resource Defense Counsel v. Costle, 568 F.2d 1369, 1374-1376 (D.C. Cir. 1977) ("Any discharge of a pollutant without a permit . . .is unlawful. Any discharge of a pollutant not in compliance with the conditions or limitations of such a permit is also unlawful. . . .There are innumerable references in the legislative history [of the CWA] to the effect that the Act is founded on the 'basic premise that a discharge of pollutants without a permit is unlawful and that discharges not in compliance with the limitations and conditions for a permit are unlawful.' Even when infeasibility arguments were squarely raised, the legislature declined to abandon the permit requirement." (quoting 118 Cong. Rec. 10215 (1972))

United States v. TGR Corp., 1998 U.S. Dist. LEXIS 9354 (D. Conn. 1998), aff'd, 171 F.3d 762, 29 ELR 21059 (unpermitted discharge to navigable waters found where contractor dumped pollutants down a storm drain in the basement of a school building, and the storm drain emptied into a tributary of a navigable waterway; held that the tributary constituted navigable waters even if it was man-made, and constructed for the purpose of carrying water from the storm water system to the natural creek)

Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300, 1318, 44 ERC 2031 (S.D. Iowa 1997) ("The CWA prohibits the unpermitted discharge by any person of any pollutant into navigable waters in the absence of an NPDES permit.")

Long Island Soundkeeper Fund v. New York Athletic Club, 42 ERC 1421, (S.D.N.Y. 1995) (CWA does not require any showing that a pollutants cause environmental damage to enforce permitting requirement; CWA requirement for a permit is unconditional and absolute)

Buchholz v. Dayton International Airport, 41 ERC 2000 (D. Ohio 1995) (injunction issued against airport to prevent unpermitted discharges of de-icing fluids to surface waters)

Orange Environment, Inc. v. County of Orange, 811 F. Supp. 926, 934, 36 ERC 1974 (S.D.N.Y. 1993) (held that EPA § 309(a) compliance order does not relieve operator of need to acquire a § 404 permit in order to place fill in a wetlands as part of a landfill

expansion project; "'[T]he CWA's requirement that all discharges covered by the statute must have a NPDES permit "is unconditional and absolute. Any discharge except pursuant to a permit is illegal."'")

Legal Environmental Assistance Foundation v. Hodel, 586 F. Supp. 1163, 1169 (E.D. Tenn. 1984) (discharge from a point source not specifically listed as an outfall in the facility's NPDES permit is discharging without a permit)

Kitlutsisti v. Arco Alaska, Inc., 592 F. Supp. 832, 839 (D. Ak. 1984) (CWA's requirement that all discharges covered by the statute must have a NPDES permit is "unconditional and absolute;" "[W]hen an action is illegal absent an agency-issued permit, the agency has a mandatory duty to act promptly upon license applications.")

B. Application for a Permit As a Defense

Driscoll v. Adams, 181 F.3d 1285, 48 ERC 2093 (11th Cir. 1999) (defendant undertook extensive tree cutting and construction project that resulted in large sediment runoff into neighboring property owners' ponds; defendant applied for storm water GP, but none could be issued where GP had been challenged in court; held that Hughey 4-part exception to CWA prohibition against discharging without a permit not met in this case)

Hughey v. JMS Dev. Corp., 78 F.3d 1523, 42 ERC 1449 (4th Cir. 1996) (defendant developer held not liable for storm water unpermitted discharges from construction site where storm water permit was not available from state; court reasoned it would be absurd to hold developer liable when it was impossible for it to obtain a permit because the state had not begun issuing storm water permits; four-part test established for exception to prohibition of discharging without a permit: 1) compliance with the zero-discharge standard was factually impossible because there would always be some storm water runoff from an area of development; 2) there was no NPDES permit available to cover such discharge; 3) the discharger was in good-faith compliance with local pollution control requirements, which substantially mirrored the proposed NPDES discharge standards; and 4) the discharges were minimal. 78 F.3d at 1530)

Weber v. Trinity Meadows Raceway, Inc., 42 ERC 2063 (N.D.Tex. 1996) ("A pending permit application . . . is insufficient to avoid the consequences of the Act.")

Beartooth Alliance v. Crown Butte Mines, 904 F. Supp. 1168 (D. Mont. 1995) (held that the fact that defendants had applied to the state for a general storm water permit, did not relieve defendants from liability under the Act)

United States v. Sharon Steel Corp., 30 ERC 1778, 1780-1781 (N.D. Ohio 1989) (EPA can levy a penalty for discharge without a permit when the discharger has applied for, but not received its NPDES permit)

United States v. Tom-Kat Development, Inc., 614 F. Supp. 613, 614 (D.C. Ak. 1985) ("In concluding that Tom-Kat's act of applying for the requisite federal permit did not statutorily prevent EPA from instituting this action against Tom-Kat, the court does not mean to imply it countenances EPA's apparent failure to process Tom-Kat's application

in an expeditious manner. Had Tom-Kat petitioned the court for mandamus to require EPA to reach a determination on Tom-Kat's permit request, I may well have concluded such an action had merit.")

S. Rep. No. 414, 92nd Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 3668, 3730 ("It should be noted that the Administrator is partially limited in acting under Section 301(a). The Administrator is precluded from acting where the allegation is for failure to acquire a necessary permit under Section 402, if the owner or operator of a discharge has filed an application for such required permit . . . The distinction between enforcement for violation of an unlawful discharge and enforcement for operating without a required permit under Section 402 is intended to cause the Administrator to act expeditiously to issue permits under Section 402 . . .")

Note: this legislative history was rejected as not controlling in United States v. Sharon Steel Corp., 30 ERC 1778 (N.D. Ohio 1989)

See also NPDES PERMITS: Mandatory Duty to Issue Permit

EFFLUENT GUIDELINES (§ 304(b))

A. Generally

33 U.S.C. § 1314(b) (requires EPA to issue "regulations providing guidelines for effluent limitations.")

33 U.S.C. § 1314(m)(1)(C) (requires the EPA to identify and categorize all point sources warranting effluent guidelines)

40 C.F.R. § 125.3(c) (Methods of imposing technology-based treatment requirements in permits)

EPA v. National Crushed Stone Association, 449 U.S. 64, 101 S. Ct. 295, 66 L. Ed. 2d 268, 15 ERC 1209 (1980) (discusses the bases of effluent guidelines to limit the discharge of pollutants)

DuPont v. Train, 430 U.S. 112, 97 S. Ct. 965, 51 L. Ed. 2d 204, 9 ERC 1753 (1977) (upheld EPA's authority to promulgate effluent guidelines under §§ 301 and 304)

Texas Oil & Gas Assoc. v. EPA, 161 F.3d 923 (5th Cir. 1998) (upholding EPA's BAT determination for produced sands from coastal oil & gas producers; the CWA was designed to achieve its goals of cleaning the nation's waters through a system of effluent limit guidelines and NPDES permits)

American Paper Institute v. EPA, 996 F.2d 346, 350, 36 ERC 2025 (D.C. Cir. 1993) (the "rubber hits the road" only when effluent limit guidelines are incorporated into NPDES permits)

Carr v. Alta Verde Industries, Inc., 931 F.2d 1055, 33 ERC 1361, 1363 (5th Cir. 1991)

("Among other conditions, an NPDES permit must incorporate effluent limitations for point sources based on guidelines 'promulgated by EPA on an industry-by-industry basis under 33 U.S.C. §§ 1311(b), 1314.' . . . The guidelines do not specify the use of a particular technology. Rather, they establish effluent limitations that can be achieved only through the use of a certain quality of technology.")

Natural Resources Defense Council v. EPA, 859 F.2d 156, 200-201 (D.C. Cir. 1988) ("[N]othing in all this specifies that the EPA *must* apply these uniform guidelines uniformly to *all* point sources within industry categories, no matter what. . . . [A]lthough exalting the value of uniformity, the statute simply does not *require* uniformity in all circumstances.")

Natural Resources Defense Council, Inc. v. EPA, 822 F.2d 104, 126 (D.C. Cir. 1987) (CWA requires EPA to undertake a cost-benefit calculus in establishing effluent limitations guidelines)

American Petroleum Institute v. EPA, 787 F.2d 965, 24 ERC 1233, 1235 (5th Cir. 1986) ("NPDES permits must incorporate applicable technology-based effluent limitations guidelines promulgated by EPA on an industry-by-industry basis under [sections 301(b) and 304]. Where EPA has not promulgated applicable technology-based effluent limitations guidelines, the permits must incorporate, on a case-by-case method, 'such conditions as the Administrator determines are necessary to carry out the provisions of the Act.'")

American Petroleum Institute v. EPA, 661 F.2d 340, 344, 16 ERC 1690 (5th Cir. 1981) (NPDES permits "transform . . . generally applicable effluent limitations . . . into obligations (including a timetable for compliance) of the individual discharger.")

American Meat Institute v. EPA, 526 F.2d 442, 450, 8 ERC 1369 (7th Cir. 1975) (challenge to effluent guidelines for meat packers and slaughterhouse rejected, holding that EPA has authority under § 301 to promulgate effluent limitations guidelines for existing point sources; the language in 304(b)(2)(A) "is difficult to reconcile with the view that individual effluent limitations are to be set when each permit is issued.")

Natural Resources Defense Council, Inc. v. EPA, No. 89-2980 (D.D.C. Apr. 23, 1991) (consent decree requires EPA to promulgate effluent guidelines for iron and steel industry by December, 1998)

Congressional Research Service, *A Legislative History of Water Pollution Control Amendments of 1972* (1973) at 172 ("the factors described in section 304(b) [cost, age of equipment, type of manufacturing process, engineering aspects of pollution control techniques] be considered only within classes or categories of point sources and that such factors not be considered at the time of the application of an effluent limitation to an individual point source within such a category or class.")

57 Fed. Reg. 19748 (1992) (Effluent Guidelines Plan)

EPA Memo from R. Perry to B. Barrett, "Basic Legal Requirements Concerning Effluent

Guidelines Under the Clean Water Act" (October 19, 1981)

EPA General Counsel Opinion 74 (January 10, 1979)

See also "EFFLUENT LIMITATION"

B. Best Available Technology ("BAT")

33 U.S.C. § 1314(b)(2)(A) (by 1983 "effluent limitations for categories and classes of point sources" are to be achieved which will require "application of the best available technology economically achievable for such category or class.")

33 U.S.C. § 1314(b)(2)(B) ("Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate . . . .")

40 C.F.R. § 125.3(d)(3) (EPA shall take into account (or apply) certain factors in making a BAT determination, including "the age of equipment and facilities involved.")

EPA v. National Crushed Stone Association, 449 U.S. 64, 69-71, 101 S. Ct. 295, 66 L. Ed. 2d 268, 15 ERC 1209 (1980)("in assessing BAT total cost is [not] to be considered in comparison to effluent reduction benefits")

Texas Oil & Gas Assoc. v. EPA, 161 F.3d 923 (5th Cir. 1998) (upholding EPA's BAT determination for produced sands from coastal oil & gas producers; "BAT is the CWA's most stringent standard . . . EPA has significant leeway in determining how the BAT standard will be incorporated into final [effluent limit guidelines].")

Chemical Mfrs. Ass'n v. EPA, 870 F.2d 177, 226, 29 ERC 1273 (5th Cir. 1989) ("Congress intended these limitations to be based on the performance of the single best-performing plant in an industrial field.")

American Petroleum Inst. v. EPA, 858 F.2d 261, 265 (5th Cir. 1988) ("[A] direct cost/benefit correlation is not required [for BAT], so even minimal environmental impact can be regulated, so long as the prescribed alternative is 'technologically and economically achievable.'")

Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1045 (D.C. Cir. 1978) (Congress left the EPA "discretion to decide how to account for the [BAT] factors, and how much weight to give each factor.")

State Water Control Bd. v. Train, 559 F.2d 921, 925-27 (4th Cir. 1977) (". . . EPA must act quickly in determining whether particular point sources must satisfy the technology-base standards of Section 301(b)(1)(A) and (B) or more stringent water quality-based effluent limits under Section 301(b)(1)(A). . . . [I]n the exercise of its prosecutorial

discretion, EPA will decline to bring enforcement proceedings against [municipalities that are economically or physically unable to comply with the 1977 deadline.")

American Iron & Steel Inst. v. EPA, 526 F.2d 1027, 1048 (3d Cir. 1975), cert. denied, 435 U.S. 914 (1978) (remanding agency rule to EPA where EPA failed to consider a statutory age factor (under BAT) as it bore on the cost or feasibility of retrofitting certain older steel mills)

American Meat Institute v. EPA, 526 F.2d 442, 8 ERC 1369, 1384 (7th Cir. 1975) ("No formal cost-benefit analysis is required in determining the 'best available' technology, though the Administrator is to take cost into consideration.")

See also COST-BENEFIT ANALYSIS (§ 304(B)(1)(B))

C. Best Practicable Control Technology Currently Available ("BPT")

33 U.S.C. § 1311(b)(1) (BPT)

Texas Oil & Gas Assoc. v. EPA, 161 F.3d 923 (5th Cir. 1998) ("BPT is the CWA's least stringent standard.")

D. New Sources

33 U.S.C. § 1316(b)(1)(B) (EPA is to promulgate "regulations establishing Federal standards of performance for new sources.")

DuPont v. Train, 430 U.S. 112, 97 S. Ct. 965, 51 L. Ed. 2d 204, 9 ERC 1753, 1764 (1977) (reversing court of appeals ruling requiring EPA to provide variance procedure to new source performance standards, held: "It is clear that Congress intended these regulations to be absolute prohibitions. . . In striking contrast to § 301(c), there is no statutory provision for variances, and a variance provision would be inappropriate in a standard that was intended to insure national uniformity and 'maximum feasible control of new sources.'")

See also NEW SOURCES

"EFFLUENT LIMITATION" (§ 502(11))

33 U.S.C. § 1362(11) ("effluent limitation" is "any restriction . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources . . .")

Texas Oil & Gas Assoc. v. EPA, 161 F.3d 923 (5th Cir. 1998) (effluent limitations described in 502(11) are "are technology-based rather than harm-based; that is, they reflect the capabilities of available pollution control technologies to prevent or limit different discharges rather than the impact that those discharges have on the waters.")

See also EFFLUENT GUIDELINES

EMERGENCY POWERS (§ 504)

33 U.S.C. § 1364 ("Notwithstanding any other provision of this title, the Administrator upon receipt of evidence that a pollution source or combination of sources is presenting an imminent and substantial endangerment to the health of persons or to the welfare of persons where such endangerment is to the livelihood of such persons, such as inability to market shellfish, may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person causing or contributing to the alleged pollution to stop the discharge of pollutants causing or contributing to such pollution or to take such other action as may be necessary.")

Weinberger v. Romero-Barcelo, 456 U.S. 305, 317-318 (1982) ("The [CWA] directs the Administrator of the EPA to seek an injunction to restrain immediately discharges of pollutants he finds to be presenting `an imminent and substantial endangerment' to the health of persons or to the welfare of persons. 33 USC § 1364(a) (1976 ed, Supp IV). This rule of immediate cessation, however, is limited to the indicated class of violations. For other kinds of violations, the FWPCA authorizes the administrator of the EPA `to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order . . . .' 33 USC § 1319(b). This provision makes clear that Congress did not anticipate that all discharges would be immediately enjoined. Consistent with this view, he administrative practice has not been to request immediate cessation orders. `Rather, enforcement actions typically result, by consent or otherwise, in a remedial order setting out a detailed schedule or compliance designed to cure the identified violation of the Act.'"

United States v. Hooker Chemicals & Plastics Corp., 749 F.2d 968, 21 ERC 1961, 1970 (2nd Cir. 1984) ("The district judge held that a suit brought under the emergency powers provisions is not one that a citizen could have commenced, and thus is not one in which he is given a statutory right to intervene. . . Our analysis of the language, structure and legislative history of these acts leads us to agree with Chief Judge Curtin that neither the CWA nor the SDWA nor the RCRA affords NEA a statutory right to intervene in a government initiated action under the emergency provisions of those acts.")

Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp., 1984 U.S. Dist. LEXIS 16623 (D.R.I. 1984) (no cause of action for citizens under § 504)

See also INJUNCTIVE RELIEF

ENDANGERED SPECIES ACT

16 U.S.C. §§ 1536(a)(2) (EPA must "insure that any action authorized, funded, or carried out . . . is not likely to jeopardize the continued existence of any endangered species.")

16 U.S.C. §§ 1536(b) (biological opinion from DOI required "detailing how the agency action affects the species or its critical habitat")

16 U.S.C. §§ 1536(b)(3)(A) (if the proposed action is likely to jeopardize a listed species or adversely modify its habitat, the agency must evaluate what reasonable and prudent alternatives are available to avoid such a result)

16 U.S.C. §§ 1538(a)(1)(B), (C) ("takes" of endangered species generally prohibited)

40 C.F.R. § 6.605(b)(3) (an EIS is required for a new source NPDES permit if "[a]ny major part of the new source will have significant adverse effect on the habitat of threatened or endangered species")

40 C.F.R. § 122.49(c) (requirement to adhere to requirements of ESA, where applicable, when issuing an NPDES permit)

40 C.F.R. § 132.5(h) (submission by a Great Lake State must show compliance with ESA)

40 C.F.R. § 1502.25 ("To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related studies required by the . . . Endangered Species Act.")

50 C.F.R. § 402.14(h) (the biological opinion is to include: "(1) A summary of the information on which the opinion is base; (2) A detailed discussion of the efforts of the action on listed species or critical habitat; (3) The Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat . . .; or, the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat.")

50 C.F.R. § 404.02 (an action would "jeopardize" a species if it "reasonably would be expected to reduce the reproduction, numbers or distribution of a listed species to such an extent as to appreciably reduce the likelihood of the survival and recovery of that species in the wild.")

Tennessee Valley Authority v. Hill, 437 U.S. 153, 174 (1978) (decision halting construction and operation of a dam which would jeopardize the existence of endangered species of fish; "Congress intended endangered species to be afforded the highest priorities.")

American Forest and Paper Association v. EPA, 137 F.3d 291 (5th Cir. 1998) (held that EPA cannot condition delegation of CWA program to State of Louisiana on adherence to ESA consultation procedures)

American Forest & Paper Assoc. v. EPA, 1998 U.S. App. LEXIS 21396 (10th Cir. 1998) (challenge to EPA approval of Oklahoma NPDES program that was conditioned upon ESA consultation dismissed for lack of standing)

American Iron & Steel Inst. v. EPA, 115 F.3d 979, 44 ERC 1769 (D.C. Cir. 1997) (challenge to EPA's Great Lakes Guidance on grounds that it cannot require states to protect endangered species; held that Guidance has authority to protect endangered species under authority of CWA § 118(c)(2), so ESA need not be considered)

Dioxin/Organochlorine Center v. Clarke, 57 F.3d 1517, 40 ERC 1961, 1965 (9th Cir. 1995) (held

that EPA-issued TMDL for dioxin on the Columbia River "satisfied any obligation the EPA had under the [ESA] and was sufficiently protective of wildlife.")

Roosevelt Campobello International Park Commission v. EPA, 684 F.2d 1041, 1056, 17 ERC 2023, 2028-35 (1st Cir. 1982) (challenge to EPA issuance of NPDES permit upheld on grounds that EPA did not comply with ESA requirements; good discussion of applicability of ESA to NPDES permitting)

American Canoe Assoc., Inc. v. EPA, 30 F. Supp. 2d 908, 927, 47 ERC 2100 (E.D. Va. 1998) (cause of action against EPA for failure to comply with ESA when approving state water quality standards dismissed on grounds that APA does provide grounds for review of agency action where specific provision in ESA already provides adequate remedy through its citizen's suit provision)

Natural Resources Defense Council v. Walker, No. 98-CV-0560 (N.D. Cal. filed Feb. 11, 1998) (challenge to nationwide permits on grounds that the permitting program violates the ESA as well as other statutes)

Idaho Rivers United v. NMFS, No. C94-1576R (W.D. Wash. Nov. 8, 1995) (review of agency action under the ESA is governed by the arbitrary and capricious standard of the APA; government not entitled to presumption that compliance with an NPDES permit will automatically meet the requirements of the ESA; remanded to agency for determination as to whether compliance with relevant permits will ensure that the no-jeopardy standard of the ESA is met)

Pacific Legal Foundation v. Watt, 539 F. Supp. 841, 17 ERC 1801 (C.D. Cal. 1981), aff'd in part, rev'd in part, 703 F.2d 576, 19 ERC 1602 (9th Cir. 1983) (held that EPA could not release construction grant for pilot project at wastewater treatment plant without first complying with consultation requirements of ESA)

In re Dos Republicas Resources Co., Inc., 6 E.A.D. 643, 665 (EAB 1996) (in upholding denial of evidentiary hearing on issuance of NPDES permit, held that "[i]f the project would have violated the ESA, the Region would have been required to deny the permit.")

In re The Pittston Co., 1 E.A.D. 677 (Administrator 1981) (motion by NOAA to reopen evidentiary hearing re NPDES for oil refinery denied on grounds that new study re the effects of oil pollution on species of endangered whale would not be likely to change the outcome of the appeal)

64 Fed. Reg. 2741 (1999) (draft MOA between EPA and Services re coordination of ESA and water quality efforts)

ENVIRONMENTAL ASSESSMENT

See NEPA

FEDERAL FACILITIES (§ 313)

33 U.S.C. § 1323 (federal facilities provisions)

United States Department of Energy v. Ohio, 112 S. Ct. 1627, 118 L. Ed. 2d 255, 34 ERC 1489; 1992 US LEXIS 2547 (1992) (a state is a citizen for the purposes of § 505 of the CWA; Congress did not intend to waive sovereign immunity for penalties in section 1323(a) of the CWA)

EPA v. California, 426 U.S. 200, 222 n.37, 8 ERC 2098 (1976) ("Section 301(a) simply makes it 'unlawful' for 'any person' not to have the required permit. That federal agencies, departments, and instrumentalities are not 'persons' within the meaning of § 301(a) and the Amendments . . . does not mean either that federal dischargers are not required to secure NPDES permits, or that their obligation to secure an NPDES permit derives from a different provision of the Amendments. A federal discharger without a permit is no less out of compliance with § 402 than a nonfederal discharger; the federal discharge is however not 'unlawful.'")

Pennsylvania Department of Environmental Resources v. U.S. Postal Service, 13 F.3d 62 (3d Cir. 1993) (U.S. Postal Service is not immune from imposition of civil penalties by Pennsylvania environmental agency under State's Clean Streams Law)

United States v. Curtis, 988 F.2d 946 (9th Cir. 1993) (federal employees are not immune from being prosecuted criminally for violations of the CWA, even if the alleged violations have occurred in the course of the defendant's federal employment)

Sierra Club v. Lujan, 972 F.2d 312, 35 ERC 1684, 23 ELR 20079 (August 7, 1992) (federal facilities section of the CWA does not allow imposition of punitive penalties)

Marble Mountain Audubon Society v. Rice, 914 F.2d 179, 32 ERC 1249, 1253, 21 ELR 20023 (9th Cir. 1990) (the CWA requires the Forest Service to comply with all state water quality requirements)

Oregon Natural Resources Council v. U.S. Forest Service, 834 F.2d 842, 27 ERC 1068, 18 ELR 20450 (9th Cir. 1987) (held that citizen suit alleging that timber sale (a non-point-source discharge) would violate state water quality standards, while not enforceable under § 505 of the CWA, was actionable under the APA)

Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 19 ERC 2115, 13 ELR 20793 (N.D. Cal. 1983), aff'd in part, vacated in part, 764 F.2d 581, 15 ELR 20682 (9th Cir. 1985) (under § 313, federal agencies must comply with state water quality standards)

Fisheries Association v. Callaway, 387 F. Supp. 292, 306 (D.R.I. 1974) ("Congressional intent that the permit issuance procedures apply to Corps projects is . . . clear from Section 301(a) of the FWPCA.")

National Wildlife Federation v. Bureau of Land Management, No. EA A2-026-92-24 (Dept. of Interior, Interior Board of Land Appeals Nov. 18, 1996) (administrative stay of proposed grazing based on potential impacts on "outstanding natural resource water")

FUNDAMENTALLY DIFFERENT FACTORS ("FDF")

33 U.S.C. § 1311(n) (Fundamentally different factors)

40 C.F.R. § 122.21(m)(1) (Fundamentally different factors variance requests by non-POTWs)

40 C.F.R. § 124.63 (procedures for ruling on FDF requests)

40 C.F.R. § 124.64(b) or 124.114(b) (procedures for appeal of Administrator's final decision on an FDF request)

40 C.F.R. § 125.3(c)(1) (FDF variance available to dischargers subject to EPA-promulgated effluent limitations)

40 C.F.R. Part 125, Subpart D (Criteria and Standards for Determining Fundamentally Different Factors Under Sections 301(b)(1)(A), 301(b)(2)(A) and (E) of the Act)

Chemical Mfrs. Ass'n v. Natural Resources Defense Council, 470 U.S. 116, 120, 105 S. Ct. 1102, 1105 (1984) (Court approved the fundamentally-different-factor ("FDF") variance procedure "as a mechanism for insuring that [the EPA's] necessarily rough-hewn categories do not unfairly burden atypical plants.")

EPA v. National Crushed Stone, 449, U.S. 64, 77, 101 S. Ct. 295, 66 L. Ed. 2d 268, 279 (1980) ("In terms of the scheme implemented by BPT limitations, the factors that the Administrator considers in granting variances do not suggest that economic capability must also be a determinant.")

Texas Oil & Gas Assoc. v. EPA, 161 F.3d 923 (5th Cir. 1998) ("There are only two way for an individual discharger to avoid the incorporation of applicable [effluent guidelines] into an NPDES permit: first, where the discharger is operating under a permit that was issued prior to the promulgation of the ELGs; or second, in rare cases, where EPA grants the discharger a variance based on the discharger's demonstration that it is 'fundamentally different' from other dischargers in the category or subcategory.")

Alton Box Board v. EPA, 592 F.2d 395 (7th Cir. 1979) (EPA's permit denial (on grounds of 401 certification denied by state) reversed and Agency ordered to grant a hearing to Alton Box Board on its request for an FDF variance from BPT guidelines)

William funk, *The Exception That Approves the Rule; FDF variances under The Clean Water Act*, 13 B.C. Envtl. Aff. L. Rev. 1 (1985)

GENERAL PERMITS

33 U.S.C. § 1369(b)(1)(F) (appeal of permit is to Court of Appeals within 120 days of final agency action)

40 C.F.R. § 122.28 (conditions for issuing a general permit)

40 C.F.R. § 124.58 (notice to Deputy Assistant Administrator for Water Enforcement required upon issuance of draft general permit)

40 C.F.R. § 124.71(a) ("A formal hearing is available to challenge any NPDES permit issued under § 124.15 except for a general permit. Persons affected by a general permit may not challenge the conditions of a general permit as of right in further agency proceedings. They may instead challenge the general permit in court, or apply for an individual NPDES permit under § 122.21. . .")

Texas Oil & Gas Assoc. v. EPA, 161 F.3d 923 (5th Cir. 1998) (challenge to EPA-issued general permit for oil & gas facilities dismissed as moot after court upheld effluent guidelines upon which the permit was based; "NPDES permits may be either individual or general; that is, either site-specific or generally applicable to a whole category or subcategory of point sources. General NPDES permits are permissible only where the point sources 1) all involve the same or similar types of operations, 2) discharge the same types of wastes, and 3) require the same or similar monitoring. 40 C.F.R. § 122.28. The EPA frequently uses such general permits for the oil and gas industry.")

Kitlutsisti v. Arco Alaska, Inc., 592 F. Supp. 832, 839 (D. Ak. 1984) (general permits cannot be administratively extended under the APA)

Alaska Center for the Environment v. West, 47 ERC 1225 (9th Cir. 1998) (general wetlands permit upheld in part on grounds that the activities it covered were similar in nature and would have minimal impact on the environment)

In re Donald J. Aardema and Joe Pacheco, Docket No. 1091-08-06-309(g) (Order Granting Partial Summary Determination, June 24, 1992, J. Hamill) (terms of the CAFO general permit apply to CAFO owners regardless of whether they filed a notice of intent to be covered, as required by the general permit)

GRANTS

33 U.S.C. § 1263 (Grants to Alaska to improve sanitation in rural and Native Villages)

33 U.S.C. § 1281 et seq. Subchapter II - Grants for Construction of Treatment Works

40 C.F.R. Part 35 (Grants for Construction of Treatment Works - Clean Water Act)

Michigan v. Allen Park, 954 F.2d 1201, 34 ERC 1501 (6th Cir. 1992) (EPA ordered to fund 80% of sewer evaluation study as part of grant awarded to municipality)

Town of Orangetown v. Ruckelshaus, 740 F.2d 185, 21 ERC 1765, 1766 (2d Cir. 1984) (allegations that grant impermissibly given to town for sewer construction based on political influence unfounded, and challenge to grant dismissed; "To support a claim of improper political influence on a federal administrative agency, there must be some showing that the political pressure was intended to and did cause the agency's action to be influenced by factors not relevant under the controlling statute.")

Town of Orangetown v. Gorsuch, 718 F.2d 29, 20 ERC 1125 (2d Cir. 1983), cert. denied, 465 U.S. 1099 (1984) (EPA not arbitrary and capricious for deciding to not to prepare EIS prior to granting construction grant for sewer project because there would be no adverse effects on waterways or land use and is not controversial)

American Canoe Assoc., Inc. v. EPA, 30 F. Supp. 2d 908, 47 ERC 2100 (E.D. Va. 1998) (in challenge to EPA failure to write TMDLs where state had failed to do so, claim by plaintiffs that EPA violated CWA § 106 grant procedures dismissed on grounds that citizens lacked standing to bring the claim)

Pacific Legal Foundation v. Watt, 539 F. Supp. 841, 17 ERC 1801 (C.D. Cal. 1981), aff'd in part, rev'd in part, 703 F.2d 576, 19 ERC 1602 (9th Cir. 1983) (held that EPA could not release construction grant for pilot project at wastewater treatment plant without first complying with consultation requirements of ESA)

GREAT LAKES (§ 118)

33 U.S.C. § 1268 (Great Lakes provisions)

40 C.F.R. Part 132 (Water Quality Guidance for the Great Lakes System)

American Iron & Steel Inst. v. EPA, 115 F.3d 979, 44 ERC 1769 (D.C. Cir. 1997) (in lengthy decision involving multiple challenges to final rule, court struck down in part and upheld in part EPA's Final Water Quality Guidance for the Great Lakes)

64 Fed. Reg. 2490 (1999) (Pennsylvania's efforts to comply with provisions of the Great Lakes Water Qaulity Initiative will not receive federal approval until the state modifies certain elements of its program)

GROUND WATER, DISCHARGES TO

40 C.F.R. § 130.6(c)(9) (Water Quality Management Plans: Groundwater)

Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 38 ERC 1760 (7th Cir. 1994) (discharges to artificial pond connected only to groundwater are not regulated under Act)

Town of Norfolk v. Corp. Engineers, 968 F.2d 1438, 1451, 35 ERC 1013 (1st Cir. 1992) (held that CWA's permitting provisions do not apply to any groundwater, deferring to Corps definition, which limited CWA coverage to surface waters)

Hoffman Homes, Inc. v. Administrator, U.S. E.P.A., 961 F.2d 1310, 34 ERC 1865 (7th Cir. 1992), vacated, 975 F.2d 1554, 35 ERC 1328 (7th Cir. 1992) (isolated wetlands with non hydrologic connection to navigable waters fall nevertheless within jurisdiction of CWA because of effect on interstate commerce)

Leslie Salt Co. v. United States, 896 F.2d 354, 358, 31 ERC 1139 (9th Cir. 1990) (CWA

jurisdiction existed over salt flat even though hydrologic connection between salt flat and navigable waters was man-made; "The fact that third parties, including the government, are responsible for flooding Leslie's property is irrelevant. The Corps' jurisdiction does not depend on how the property at issue became a water of the United States. Congress intended to regulate local aquatic ecosystems regardless of their origin.")

Inland Steel Co. v. EPA, 901 F.2d 1419, 1422-23, 31 ERC 1527 (7th Cir. 1990) ("the legal concept of navigable waters might include ground waters connected to surface waters -- though whether it does or not is an unresolved question. . . [A] well that ended in such connected ground waters might be within the scope of the Act.")

Quivira Mining Co. v. United States EPA, 765 F.2d 126, 129-130, 22 ERC 2003 (10th Cir. 1985), cert. denied, 474 U.S. 1055 (1986) (affirmed EPA's decision that a CWA permit was required for discharges of pollutants into surface arroyos which, during storms, channeled rainwater both directly to navigable-in-fact streams and into underground aquifers that connected with such streams)

United States v. City of Fort Pierre, S.D., 747 F.2d 464, 466-67, 21 ERC 2054 (8th Cir. 1984) (Corps had no jurisdiction over slough that was completely separate from (although formerly a side channel of) the Missouri R. and was not hydrologically connected to the river; although some river water got into the slough, it was the result of Corps activities, which could not act to extend the Corps jurisdiction)

United States v. Byrd, 609 F.2d 1204, 1209-1211, 13 ERC 1954 (7th Cir. 1979) (a well that ended in such connected groundwaters might be within the scope of the Act, but the waters at the bottom of these wells are not connected to surface waters)

United States v. Earth Sciences, Inc., 599 F.2d 368, 373, 13 ERC 1417 (10th Cir. 1979) (held that unpermitted leach mining waste escaping into the Rito Seco Creek through overflow of a reserve sump and through groundwater seeps violated the CWA which "was designed to regulate to the fullest extent possible those sources emitting pollution into rivers, streams and lakes.")

Exxon Corp. v. Train, 554 F.2d 1310, 1329, 10 ERC 1289 (5th Cir. 1977) (EPA does not have the authority to regulate discharges into deep wells as a condition to a permit that regulates discharges into navigable waters; case limited to isolated groundwaters)

Patterson Farm, Inc. v. City of Britton, 22 F. Supp.2d 1085 (D.S.D. 1998) (held that court lacked subject matter jurisdiction over alleged discharges into groundwater because groundwater not included within CWA definition of "navigable waters")

Wilson v. AMOCO Corp., 46 ERC 1998, 2001 (D. Wy. 1998) (dismissing case on *Gwaltney* grounds, held that "migration of residual contamination from previous releases [at an oil refinery] does not constitute an ongoing discharge.")

Allegany Evt'l Action v. Westinghouse Elec. Corp., 1998 U.S. Dist. LEXIS 1838 (W.D. Pa. 1998) (claim of unpermitted discharge from groundwater to lake dismissed on grounds that groundwater is not a point source; relied on Umatilla)

Mutual Life Insurance Co. v. Mobil Corp., 1998 U.S. Dist. LEXIS 4513 (N.D.N.Y. March 31, 1998) (Mobil gas truck mistakenly pumped 750 gallons of gas into a monitoring well, thinking it was a fill pipe for an UST; upholding jurisdiction over groundwater, court held "It is now well established that Congress intended to regulate the discharge of pollutants into all waters that may eventually lead to navigable waters.")

Potter v. ASARCO, Inc., (D. Neb. Mar. 3, 1998) ("in light of judicial precedent, Congress' remedial purpose, the absence of any specific legislative intent pertaining to hydrologically connected groundwater and the informal pronouncements of EPA, any pollutants that enter navigable waters, whether directly or indirectly through a specific hydrological connection, are subject to regulation by the CWA")

Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300, 1318 (S.D. Iowa 1997) (held that hydrologically-connected groundwater covered by the CWA)

Friends of the Coast Fork v. Co. of Lane, OR, 1997 U.S. Dist. LEXIS 22705 (D. Or. 1997) (held that defendant had "violated the CWA by discharging pollutants in the form of leachate and condensate into navigable waters" and that this discharge resulted in part "from leaking of the leachate from the pile of garbage and lagoons into the groundwater which is hydrologically connected to the surface waters of the Camas Swale Creek." Id. at 6)

Umatilla Water Quality Protective Assoc., Inc. v. Smith Frozen Foods, Inc., Civ. No. 96-657-AS (D. Or. Apr. 9, 1997) (CWA does not regulate discharges to groundwater even where hydrologic connections exists; held, however, had EPA opined on the issue, court would consider the Agency's position persuasive)

United States v. ConAgra, 1997 U.S. Dist. LEXIS 21401 (D. Id. 1997) (ConAgra discharged in one summer 45 million gallons of wastewater to a 4-acre field with a high water table on a hill next to a creek; relying on Umatilla, held that discharges to surface waters via groundwater outside jurisdiction of CWA; french drain discharges of groundwater, however, may be point sources)

United Anglers v. East Bay Municipal Utility, No. C-95-2671 SI (N.D. Cal. Oct. 24, 1996) (court held that plaintiffs had not met burden of proof for Summary judgment on issue of hydrologic connection between defendant's impoundment and surface waters)

Friends of Sante Fe Co. V. LAC Minerals, 892 F. Supp. 1333, 1357-58 (D.N.M. 1995) (held that Quivira Mining Co. v. EPA, 765 F.2d 126 (10th Cir. 1985) forecloses "any argument that the CWA does not protect groundwater with some connection to surface waters" because the 10th Cir. has expansively interpreted the CWA's jurisdictional reach in a non-groundwater context)

Washington Wilderness Coalition v. Hecla Mining Co., 870 F. Supp. 983, 40 ERC 1134 (E.D. Wash. 1994) (disagreed with Oconomowoc and ruled, after surveying the case law that the "logic of these cases is compelling: since the goal of the CWA is to protect the quality of surface waters, any pollutant which enters such waters, whether directly or through groundwater, is subject to regulation . . . .")

Sierra Club v. Colorado Refining Co., 838 F. Supp. 1428 (D. Col. 1993) ("[The] Clean Water

Act's preclusion of the discharge of any pollutant into `navigable waters' includes such discharge which reaches `navigable waters' through groundwater.")

Slagle v. U.S. by and through Baldwin, 809 F. Supp. 704, 709 (D. Minn. 1992) (wetland is adjacent where there is no dispute that hydrologic connection exists between wetland and river)

Martin v. Kansas Board of Regents, 32 ERC 1944 (D.Kan. 1991) ("Groundwater . . . that is naturally connected to surface waters constitute 'navigable waters' under the Act.")

Werlein v. United States, 746 F. Supp. 887, 897 (D.Minn. 1990) (citing MESS with approval for the proposition that determinations of discharges to waters of the U.S. through a direct hydrological connection are factual)

McClellan Ecological Seepage v. Weinberger, 707 F. Supp. 1182, 1194 (E.D. Cal. 1988) (EPA has no statutory authority to regulate discharges to isolated wetlands; the legislative history of the CWA also demonstrates that "Congress did not intend groundwater and navigable waters to be synonymous", however, NPDES permit may be required)

McClellan Ecological Seepage v. Cheney, 763 F. Supp. 431, 437 (E.D. Cal. 1988) (held that groundwater was isolated and does not presently discharge pollutants to American R. or Sacramento R. and has not done so since 1968; the legislative history of the CWA also demonstrates that "Congress did not intend groundwater and navigable waters to be synonymous.")

Kelley v. United States, 618 F. Supp. 1103, 1107, 23 ERC 1494 (W.D. Mich 1985) (discharges of toxic chemicals into migrating groundwater that "eventually" would reach the bay not illegal; "Congress did not intend the [CWA] to extend federal regulatory and enforcement authority over groundwater contamination.")

United States v. GAF Corp., 389 F. Supp. 1379, 1383, 7 ERC 1581, 1583 (S.D. Tex. 1975) ("The disposal of chemical wastes into underground waters which have not been alleged to flow into or otherwise affect surface waters does not constitute a `discharge of a pollutant' within the meaning of § 1311(a). . . . The question before the Court is whether, in its breadth, the FWPCA applies to subsurface wells. The legislative history shows conclusively that it does not.")

Preamble, NPDES Permit Application Regulations for Storm Water Discharges, EPA Final Rule, 55 Fed. Reg. 47990, 47997 (1990) ("[T]his rulemaking only addresses discharges to waters of the United States, consequently discharges to ground waters are not covered by this rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water body)")

NPDES General Permit and Reporting Requirements for Discharges from Concentrated Animal Feeding Operations, EPA Region 6 Public Notice of Final Permitting Decision, 58 Fed. Reg. 7610, 7631 (1993) (feedlots required to obtain NPDES permit for discharges to groundwater unless permittee can demonstrate lack of hydrologic connection to surface water)

Amendments to the Water Quality Standards Regulations that Pertain to Standards on Indian Reservations, Final Rule, 56 Fed. Reg. 64,876, 64892 (1991) ("Notwithstanding the strong

language in the legislative history of the Clean Water Act to the effect that the Act does not grant EPA authority to regulate pollution of groundwaters, EPA and most courts addressing the issue have recognized that . . . the Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwater and surface waters. In these situations, the affected groundwaters are not considered "waters of the United States" but discharges to them are regulated because such discharges are effectively discharges to the directly connected surface waters.")

Senate Report No. 92-414, U.S. Code Cong. & Admin. News (1972) p. 3739 ("Several bills pending before the Committee provided authority to establish Federally approved standards for groundwaters which permeate rock, soil, and other subsurface formations. Because the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt this recommendation.")

118 Cong. Rec. 10668 (1972) (remarks of Rep. Harsha) ("[T]his amendment purports to require water-quality standards for groundwater.")

118 Cong. Rec. 10666 (1972) (remarks of Rep. Aspin) ("If we do not stop pollution of ground waters through seepage and other means, ground water gets into navigable waters, and to control only the navigable water and not the ground water makes no sense at all.")

EPA, "President Clinton's Clean Water Initiative," (aka "Greenbook") EPA doc. No. 800-R-94-001 (1994) (Clinton administration's proposals for amendments to the CWA; would clarify that a point source discharge to groundwater or to water that has a hydrologic connection with surface waters is subject to regulation as an NPDES point source discharge if (1) a reasonably foreseeable direct hydrologic connection to surface water in the proximity of the release exists, (2) a significant quantity of the pollutant must reasonably be able to reach the surface water, and (3) no other Federal statute directly addresses the activity causing the release)

General Counsel Opinion (December 13, 1973) (disposal of pollutants into a well O.K. because EPA has no statutory authority to regulate discharges to isolated wetlands)

62 Fed. Reg. 20177, 20178 (1997) ("The EPA agrees that groundwater contamination is a concern around CAFO facilities. However, the Clean Water Act does not give EPA the authority to regulate groundwater quality through NPDES permits. The only situation in which groundwater may be affected by the NPDES program is when a discharge of pollutants to surface waters can be proven to be via groundwater. . . [T]he EPA agrees that the Clean Water Act does not give EPA the authority to regulate groundwater quality through NPDES permits. However, the permit requirements . . . are not intended to regulate groundwater. Rather, they are intended to protect surface waters which are contaminated via a groundwater (subsurface) connection.")

60 Fed. Reg. 44489, 44493 (1995) (in promulgating proposed draft CAFO permit, EPA stated: "[D]ischarges that enter surface waters indirectly through groundwater are prohibited")

58 Fed. Reg. 7610, 7631 (1993) (feedlots required to obtain NPDES permit for discharges to ground water unless permittee can demonstrate lack of hydrologic connection to surface water)

56 Fed. Reg. 64,876, 64892 (1991) (Amendments to the Water Quality Standards Regulations

that Pertain to Standards on Indian Reservations, Final Rule: "Notwithstanding the strong language in the legislative history of the Clean Water Act to the effect that the Act does not grant EPA authority to regulate pollution of groundwaters, EPA and most courts addressing the issue have recognized that . . . the Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwater and surface waters. In these situations, the affected groundwaters are not considered "waters of the United States" but discharges to them are regulated because such discharges are effectively discharges to the directly connected surface waters.")

55 Fed. Reg. 47990, 47997 (1990) (Preamble, NPDES Permit Application Regulations for Storm Water Discharges, EPA Final Rule: "[T]his rulemaking only addresses discharges to waters of the United States, consequently discharges to ground waters are not covered by this rulemaking unless there is a hydrological connection between the ground water and a nearby surface water body.")

Comment, *Groundwater Jurisdiction Under the Clean Water Act: The Tributary Groundwater Dilemma*, 23 B.C. Envtl. Aff. L. Rev. 603 (1996)

Mary Christina Wood, *Regulating Discharges into Groundwater: The Crucial Link in Pollution Control under the Clean Water Act*, 12 Harv. Envtl. L. Rev. 569 (1988)

See also NAVIGABLE WATERS; WETLANDS: Adjacent Wetlands; UIC

GUIDANCE

American Iron & Steel Inst. v. EPA, 115 F.3d 979 (D.C. Cir. 1997) (held that CWA § 118 gave the EPA authority to issue EPA's water quality guidance for the Great Lakes in the form of regulations)

See individual sections in this Digest for specific guidance documents.

HISTORY/PURPOSE OF CLEAN WATER ACT

33 U.S.C. § 1251(a) (the CWA is intended to "maintain the chemical, physical, and biological integrity of the Nation's waters.")

EPA v. National Crushed Stone Association, 449 U.S. 64, 101 S. Ct. 295, 66 L. Ed. 2d 268, 15 ERC 1209 (1980) (discussion of statutory framework of CWA)

EPA v. California, 426 U.S. 200, 202-209, 96 S. Ct. 2022 48 L. Ed. 2d 578, 8 ERC 2089 (1976) (good summary of history of Act)

Texas Oil & Gas Assoc. v. EPA, 161 F.3d 923 (5th Cir. 1998) ("Congress enacted the CWA in 1972 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' 33 U.S.C. § 1251(a). As part of this mission, the Act declared a national goal that the discharge of pollutants into the navigable waters be eliminated by 1985. 33 U.S.C. § 1251(a)(1).

It was designed to achieve this goal through a system of effluent limitations guidelines ("ELGs") and National Pollutant Discharge Elimination System ("NPDES") permits that set technology-based discharge limits for all categories and subcategories of water pollution point sources.")

Dubois v. U.S.D.A., 102 F.3d 1273, 43 ERC 1824, 1840 (1st Cir. 1996) ("The Clean Water Act was 'a bold and sweeping legislative initiative,' enacted to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' 'This objective incorporated a broad, systemic view of the goal of maintaining and improving water quality; as the House Report on the legislation put it, 'the word "integrity" . . . refers to a condition in which the natural structure and function of ecosystems [are] maintained.' In contrast to NEPA's focus on the process, the CWA is substantive, focusing upon the 'integrity of the Nation's Waters, not the permit process." (citations omitted))

Texas Municipal Power Agency v. Administrator, 836 F.2d 1482, 27 ERC 1249, 1254 (5th Cir. 1988) ("The CWA is strong medicine.")

United States v. Akers, 785 F.2d 814, 823 (9th Cir. 1986), cert. denied, 479 U.S. 828 (1986) ("public interest requires strict enforcement of the Act to effectuate its purpose of protecting sensitive aquatic environments.")

Trustees for Alaska v. EPA, 749 F.2d 549, 552-554, 21 ERC 2222, 2223 (9th Cir. 1984) (good short review of history and summary of CWA)

American Petroleum Institute v. EPA, 661 F.2d 340, 16 ERC 1690 (5th Cir. 1981) (detailed discussion of statutory framework of CWA)

Montgomery Environmental Coalition v. Costle, 646 F.2d 568, 15 ERC 1118, 1119-21 (D.C. Cir. 1980) (good summary of history of Act)

American Frozen Food Inst. v. Train, 539 F.2d 107, 8 ERC 1993 (D.C. Cir. 1976) (good discussion of history and intent of the CWA -- long opinion)

H.Rep. No. 92-911, 92d Cong., 2d Sess. 76-77 (1972), reprinted in 1 Legislative History, 753, 763--764 ("Subsection (a) of section 101 declares the objective of this legislation to be the restoration and maintenance of the chemical, physical, and biological integrity of the Nation's waters. The word 'integrity' as used is intended to convey a concept that refers to a condition in which the natural structure and function of ecosystems is maintained.

. . . .

Although man is a 'part of nature' and a production of evolution, 'natural' is generally defined as that condition in existence before the activities of man invoked perturbation which prevented the system from returning to its original state of equilibrium.

This definition is in no way intended to exclude man as a species from the natural order of things, but in this technological age, and in numerous cases that occurred before industrialization man has exceeded nature's homoeostatic ability to respond to change. Any change induced by man which overtaxes the ability of nature to restore conditions to 'natural' or 'original' is an unacceptable perturbation.")

"A Legislative History of the Water Pollution Control Act Amendments of 1972," Congressional Research Service, Library of Congress (January 1973), Serial No. 93-1, Committee Print

"A Legislative History of the Clean Water Act of 1977, a Continuation of the Legislative History of the Federal Water Pollution Control Act," Congressional Research Service, Library of Congress (October 1978) Serial No. 95-14, Committee print

"A Legislative History of the Water Quality Act of 1987," Congressional Research Service, Library of Congress (November 1988), Committee Print

HYDROLOGIC CONNECTION

See GROUNDWATER, DISCHARGES TO

IMMINENT AND SUBSTANTIAL ENDANGERMENT

See EMERGENCY POWERS

IMPAIRED WATER BODIES (§ 303(d))

33 U.S.C. § 1313(d) ("Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters.")

40 C.F.R. Part 130 (Water Quality Planning and Management)

Dioxin/Organochlorine Center v. Clarke, 57 F.3d 1517, 40 ERC 1961 (9th Cir. 1995) (held that 303(d) allows EPA to establish TMDLs for waters contaminated with toxic pollutants without prior development of BAT limitations; distinguished with NRDC v. EPA, 915 F.2d 1314, holding that it dealt only with the question of whether waters contaminated by toxics *had to* be listed under 303(d), not whether they *may* be listed)

Natural Resources Defense Council v. EPA, 915 F.2d 1314, 1322 n.9, 31 ERC 2089 (9th Cir. 1990) ("Section 1313(d) . . . requires States to identify only those waters for which limitations based on the best *practicable* technology would not be stringent enough to implement the water quality standards. Those waters for which limitations based on the more demanding best *available* technology - the required level of technology to control toxics - were insufficient did *not* have to be listed.")

EPA, "National Clarifying Guidance for 1998 State and Territory Section 303(d) Listing Decisions" (Aug. 17, 1997)

See also INDIVIDUAL CONTROL STRATEGIES ("ICS"), TMDLs and WATER QUALITY STANDARDS

INDIAN TRIBES

33 U.S.C. § 1377(a) ("Indian tribes shall be treated as States for purposes of such § 1251(g) of this title) and (e) (Treatment as States)

40 C.F.R. Part 35, Subpart Q (General Assistance Grants to Indian Tribes)

40 C.F.R. § 130.6(d) (Water Quality Mangement Plans: Indian Tribes)

40 C.F.R. § 130.15 (Water Quality Planning and Management: Processing application for Indian Tribes)

40 C.F.R. § 131.8 (Requirements for Indian Tribes to administer a water quality standards program)

40 C.F.R. § 131.35 (federally-promulgated water quality standards for the Colville Confederated Tribes Indian Reservation)

Montana v. EPA, 137 F.3d 1135, 46 ERC 1161 (9th Cir. 1998) (under § 518 of the CWA, EPA may authorize Indian tribes to set water quality standards that regulate activities of non-Indians who own property within reservations)

Montana v. EPA, 42 ERC 1922 (D. Mont. 1996), aff'd, 137 F.3d 1135, 46 ERC 1161 (9th Cir. 1998) (Montana's challenge to EPA's approval of the Flathead TAS application was dismissed; because the Tribes had explicitly asserted that impairment of tribal waters by activities of non-members would have serious and substantial effect on the health and welfare of the Tribes, and because that assertion corresponded to the EPA's generalized findings, the EPA found that the Tribes' possessed inherent authority to set water quality standards for all surface waters within the reservation; since EPA found sufficient facts to support the Tribes' claims that pollution of the surface waters traversing or appurtenant to non-member land would have serious and substantial impact on the Tribe's health and welfare, that fact finding is due substantial deference by the court)

City of Albuquerque v. Browner, 865 F. Supp. 733 (D. N.M. 1993), 38 ERC 2062 aff'd, 97 F.3d 415, 43 ERC 1276 (10th Cir. 1996) (court upheld EPA's regulations for treating Indian Tribes in the same manner as States for purposes of the water quality standards program; rejected city's argument that Tribe may not develop water quality standards that are more stringent then Federal standards)

64 Fed. Reg. 37072 (1999) (Proposed 40 C.F.R. Part 131, EPA Review of State and Tribal Water Quality Standards)

58 Fed. Reg. 67980 (1993) (new definitions for "Federal Indian reservation" and "Indian Tribe" added to § 122.2 definitions)

See also WATER QUALITY STANDARDS: Indian Tribes

INDIVIDUAL CONTROL STRATEGY ("ICS")

33 U.S.C. § 1314(l)(1)(D) (for each point sources listed in 304(l) list, the state must devise an individual control strategy calculated to bring about compliance with the water quality standards within three years of the adoption of the ICS)

40 C.F.R. § 123.46(c) (an ICS is to be submitted in the form of a final NPDES permit)

Roll Coater Inc. v. EPA, 932 F.2d 668, 33 ERC 1313 (7th Cir. 1991) (court may not review EPA decision approving ICS that state proposed for company identified as source of toxic water pollution because: (1) CWA requires strategies developed by states, and approved by EPA , to be included in state-issued discharge permit for each source; (2) act only allows federal court review if strategies are issued by EPA directly to source in federal discharge permit; and (3) source may obtain review of its claims in state court after state includes specific strategy in revising permit)

Boise Cascade Corp. v. EPA, 942 F.2d 1427, 33 ERC 1693 (9th Cir. 1991) (challenges to EPA approval of Calif. and Or. ICSs dismissed for lack of jurisdiction)

Natural Resources Defense Council, Inc. v. EPA, 915 F.2d 1314, 31 ERC 2089 (9th Cir. 1990) (EPA rule requiring listing of only point sources on some portions of polluted water body held under inclusive under 304(l); regulations had to include requirement that states identify all sources discharging any pollutant believed to be impairing water quality into a listed body of water)

Westvaco Corp. v. EPA, 899 F.2d 1383, 1385, 20 ELR 20816 (4th Cir. 1990) (good summary of ICS program)

In re J & L Specialty Products Corp., 5 E.A.D. 333 (EAB 1994) (held that EAB can consider petitioner's collateral attack on the Agency's actions in implementing CWA § 304(l) as part of the NPDES permit review, where the listing decision is material to the permit condition at issue)

Oliver A. Houck, *TMDLs: The Resurrection of Water Quality Standards-Based Regulation Under the Clean Water Act*, 27 ELR 10329 (1997) ("By July of 1994 states had converted 588 ICSs into permit limitations. . . . As of 1997 . . . more than 675 ICSs had been completed under the toxic hotspot program.")

INFORMATION REQUESTS/INSPECTIONS (§ 308)

33 U.S.C. § 1318(a) ("Whenever required to carry out the objective of this chapter, including but not limited to (1) developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance under this chapter; (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance; (3) any requirement established under this section; or (4) carrying out sections [305, 311, 402, 404 (relating to State permit programs), 405, 405, and 504] of this title -

(A) the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and

maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require; and

(B) the Administrator or his authorized representative (including an authorized contractor acting as a representative of the Administrator), upon presentation of his credentials -

(i) shall have a right of entry to, upon, or through any premises in which an effluent source is located or in which any records required to be maintained under clause (A) of this subsection are located, and

(ii) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under clause (A), and sample any effluents which the owner or operator of such source is required to sample under such clause.")

Oscar Mayer & Co. v. Evans, 441 U.S. 750, 755-56 (1979) (the CWA's section 308(a) was explicitly modeled after 114(a)(2) of the CAA)

Sierra Club v. Simkins Industries, Inc., 847 F.2d 1109, 27 ERC 1881, 1882 (4th Cir. 1988), cert. denied, 491 U.S. 904, 109 S. Ct. 3185 (1989) ("Section 308 of the Clean Water Act . . . authorizes the EPA Administrator or his or her authorized representatives a right of entry to an effluent source location or to premises where required records or monitoring equipment are kept.")

Mobil Oil Corp. v. EPA, 716 F.2d 1187, 19 ERC 2043, 2046 (7th Cir. 1983) (giving due deference to EPA's interpretation of § 308, held that EPA did not violate Mobil's 4th Amendment rights when it collected effluent sample because § 308 expressly authorizes EPA to collects such samples; "Policing compliance with EPA pollution standards is critical to the achievement of [the CWA's goal of eliminating the discharge of pollutants], and Section 308(a) eliminates any doubts on that score by expressly authorizing the EPA to check whether someone, such as Mobil, holding a permit to pollute is complying with the pollution limits set forth in its permit. . . Section 308(a) also expressly authorizes the EPA to collect samples whenever required to develop new permit limits on the discharge of pollutants.")

United States v. Stauffer Chemical Co., 684 F.2d 1174, 17 ERC 1753 (6th Cir. 1982) (held that "words 'authorized representative' in section 114(a)(2) of the Clean Air Act . . . means officers or employees of the EPA, and cannot include employees of private contractors;" Stauffer Chemical was proper in denying access during inspection to EPA contractors)

Bunker Hill Co. Lead & Zinc Smelter v. EPA, 658 F.2d 1280, 1285 (9th Cir. 1981) (under § 308, the EPA has the authority to seek an ex parte administrative search warrant)

United States v. Tivian Laboratories, Inc., 589 F.2d 49, 12 ERC 1568 (1st Cir. 1978), cert. denied, 442 U.S. 942 (1979) (information request by EPA under CWA § 308 does not violate the 4th Amendment protections against unlawful search and seizure)

United States v. Hartz Construction Co., 1999 U.S. Dist. LEXIS 9126 (N.D. Ill. 1999) (defendants motion to dismiss claims for failure to respond to § 308 information request denied on grounds that EPA had properly alleged cause of action; rejected argument that EPA could not

request information about wetlands fill until it proved it had jurisdiction over wetland; "Hartz's interpretation frustrates the purposes of the CWA and the plain language of the statute. Section 308 provides that 'whenever required to carry out the objective of [the CWA]' the EPA, in 'determining whether any person is in violation' of the Act, 'shall require the owner or operator of any point source to . . . provide such . . . information as he may reasonably require.' 33 U.S.C. § 1318(a). The government has alleged that Hartz is a point source as a discharger of pollutants (fill dirt) and Hartz has not disputed this assertion in its motion. Thus, on its face, Section 308 gives EPA jurisdiction to determine whether the point source is in violation of the Act.")

Gersh & Danielson v. U.S., 871 F. Supp. 407, 41 ERC 1286 (D. Colo. 1994) (held that information given to EPA by defendant in settlement negotiations is FOIAable; held that FOIA exemptions are not applicable to information that EPA could have obtained under § 308; acknowledges EPA's broad authority under § 308 to obtain information re economic benefit)

Alameda County Assessor's Parcel Nos. 537-801-2-4 And 537-850-9, 672 F. Supp. 1278, 26 ERC (BNA) 1119 (N.D. Cal. 1987) (held that EPA properly obtained warrant under § 308 to investigate whether land farmer was filling was jurisdictional wetlands)

In re Simpson Paper Co. and Louisiana-Pacific Corp., 3 E.A.D. 541, 549 (CJO 1991) ("Section 308(a) is an information gathering tool that is not oriented exclusively towards permittees: it applies to any owner or operator of a point source, without reference to whether such person has a permit. The Agency may issue orders pursuant to CWA § 308(a) to aid enforcement, to develop permit limitations and effluent standards, and to generate whatever information it needs to carry out its statutory responsibilities. . . The authority conferred by the section may be exercised by the Agency at any time, and the lawfulness of orders issued pursuant thereto is subject only to a reasonableness standard.")

S. Rep. No. 92-414, 92nd Cong., 2d Sess. (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 3668, 3729 ("It should also be noted that the authority to enter [under 308], as under the Clean Air Act, is reserved to the Administrator and his authorized representatives which such representatives must be full time employees of the Environmental Protection Agency. The authority to enter is not extended to contractors with the EPA in pursuit of research and development.")

See also CREDENTIALS

INJUNCTIVE RELIEF

33 U.S.C. § 1319(f) (Administrator may bring an action in district court "for appropriate relief, including, but not limited to, a permanent or temporary injunction, against the owner or operator of such treatment works . . . Such court shall have jurisdiction to restrain such violation and to require the owner or operator of the treatment works and the owner or operator of the source to take such action as may be necessary to come into compliance with this title.")

33 U.S.C. § 1364 ("Notwithstanding any other provision of this title, the Administrator upon receipt of evidence that a pollution source or combination of sources is presenting an imminent and substantial endangerment to the health of persons or to the welfare of persons where such

endangerment is to the livelihood of such persons, such as inability to market shellfish, may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person causing or contributing to the alleged pollution to stop the discharge of pollutants causing or contributing to such pollution or to take such other action as may be necessary.")

United States v. Romero-Barcelo, 456 U.S. 305, 307 (1982) (held that CWA does not require a district court to enjoin immediately all discharges of pollutants that violate the Act's permit requirements)

Sierra Club v. Georgia Power Co., 180 F.3d 1309, 48 ERC 2119 (11th Cir. 1999) (upholding denial of preliminary injunction against continued violations of temperature limit in NPDES permit; public interest not served by requiring power plant to cut production to comply)

United States v. Banks, 115 F.3d 916, 918 45 ERC 1281 (11th Cir. 1997) (held that the five year statute of limitations under 28 USC § 2426 did not apply to injunctive relief requested by the United States in its sovereign capacity; § 2426 on its face applies only to penalties and similar relief, but defendants had argued for application of the concurrent remedy rule, under which equitable relief is barred if a statute of limitations would bar a concurrently sought penalty; held that the concurrent remedy rule was inapplicable to claims for injunctive relief brought by the U.S. in enforcing the CWA)

Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 31 ERC 1905 (3d Cir. 1990), cert. denied, 498 U.S. 1109 (1991) (no statute of limitations for injunctive relief under CWA)

United States v. Akers, 785 F.2d 814, 823 (9th Cir. 1986), cert. denied, 479 U.S. 828 (1986) ("public interest requires strict enforcement of the Act to effectuate its purpose of protecting sensitive aquatic environments.")

Natural Resources Defense Council, Inc. v. Texaco Refining and Marketing Inc., 1998 U.S. Dist. LEXIS 14941 (D. Del. 1998) (held that refinery owner must conduct environmental sampling to determine the impact of past and future discharges to the river in excess of the limits in the refinery's NPDES permit)

United States v. Roll Coater, Inc., 21 ELR 21073 (S.D. Ind. 1991) (EPA is not limited to one remedy and may seek both penalties for past violations and prevention of future violations)

United States v. Ciampitti, 615 F. Supp. 116, 122 (D.N.J. 1984), aff'd, 772 F.2d 893 (3d Cir. 1985) ("There can be no doubt that his court has the power under the Clean Water Act to order the restoration proposed by the government.")

United States v. Robinson, 20 ERC 1181 (M.D. Fla. 1983) (judgment requiring defendants to restore filled wetlands)

Weiszmann v. District Engineer, United States Corps of Engineers, 545 F. Supp. 721 (S.D. Fla. 1982) (judgment requiring developer to restore canal)

United States v. Carter, 18 ERC 1810, 1813 (S.D. Fla. 1982) ("Review of the purpose of

Congress in fashioning the Clean Water Act, plus the above body of case law, leads this Court to the conclusion that restoration is an authorized and appropriate remedy under the Clean Water Act.")

United States v. Louisiana-Pacific Corp., 18 ERC 2020, 2026-27 (N.D. Cal. 1982) (distinguishing Romero Barcelo, held that "even if the lack of evidence of harm to water quality from defendant's discharges is a factor to be considered in this case, it does not outweigh the overwhelming equities in favor of an injunction.")

United States v. Outboard Marine Corp., 549 F. Supp. 1036 (N.D. Ill. 1982) (court discussed the difference between injunctions that are intended to prevent future violations, and injunctions that are intended to remedy the harm caused by past violations; held that both types of injunctions are available under the CWA, and denied Outboard Marine's motion to dismiss)

See also COMPLIANCE ORDERS; WETLANDS: Injunctive Relief

JOINT AND SEVERAL LIABILITY

See OWNER/OPERATOR LIABILITY

JUDICIAL REVIEW (§ 509)

33 U.S.C. 1369(b)(1) ("review of the Administrator's action . . . (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, or 1316 of this title . . . may be had by any interested person in the Circuit Court of Appeals of the United States.")

33 U.S.C. § 1369(b)(1)(F) (appeal of permit is to Court of Appeals within 120 days final agency action)

American Forest & Paper Assoc. v. EPA, 1998 U.S. App. LEXIS 21396 (10th Cir. 1998) (challenge to EPA approval of Oklahoma NPDES program dismissed for lack of standing; held that plaintiff had not established "injury in fact" required by Article III; "Although the Association has asserted that its members include current NPDES permit holders in Oklahoma, it has not alleged that any of its members hold permits to discharge into sensitive waters nor has it alleged that any of its members intend to apply for such a permit. . . . 'It is a long-settled principle that standing cannot be inferred argumentatively from [the party's] averments . . . but rather must affirmatively appear in the record.'")

American Forest & Paper Assoc. v. EPA, 137 F.3d 291, 46 ERC 1385 (5th Cir. 1998) (held that plaintiff had standing - - contrary to 10th Cir. - - and EPA exceeded its authority in making ESA consultation a condition of approval of Louisiana NPDES program)

Maier v. EPA, 114 F.3d 1032, 44 ERC 1705 (10th Cir. 1997) (EPA may control nitrogenous oxygen demand on a case-by-case basis through the permitting process rather than through a generally applicable rule. EPA's denial of a petition for a rulemaking to establish secondary

NOD treatment standards was not arb. or capricious. CWA § 301(b)(1)(B) does not require EPA to promulgate secondary treatment regulations for every pollutant that can be controlled by secondary treatment, and EPA's position is a reasonable and permissible reading of the statute, to which the court must defer)

South Holland Metal Finishing Co. v. Browner, 97 F.3d 932, 27 ELR 20325 (7th Cir. 1996) (citing American Paper, case dismissed for lack of jurisdiction where co. sought judicial review of EPA position that co. that moved old pretreatment equipment from previous site to new one was subject to the new source standards in 40 CFR 433.17; court held that Region's interpretative ruling here was not a decision by the Administrator, was never promulgated, and was not an effluent standard or other limitation under § 509(b)(1)E))

Longview Fibre Co. v. Rassmussen, 980 F.2d 1307, 23 ELR 20454 (9th Cir. 1993) (challenge to EPA's dioxin TMDL by pulp mills and citizens' groups dismissed on jurisdictional grounds; held that TMDLs may not be challenged in the Courts of Appeals, since § 509(b) of the CWA does not specifically list EPA actions under § 303(d) as reviewable in those courts)

Spokane River Assoc. v. EPA, CA No. 90-70672 (9th Cir. 1990) (motion for leave to adduce additional evidence in permit appeal granted pursuant to § 509(c) of the CWA)

American Paper Institute v. EPA, 882 F.2d 287, 30 ERC 1177 (7th Cir. 1989) (challenge to Region V "policy statement concerning the tolerances for dioxin in new and renewed permits of paper mills using chlorine bleaching" dismissed on grounds that 509(b)(1)(E) does not cover policy statements)

American Paper Institute, Inc. v. EPA, 890 F.2d 869, 30 ERC 1313 (7th Cir. 1989) (challenge to antidegradation regulation through CWA § 509 failed where court held that 509(b)(1)(E) did not provide an avenue for judicial review of antideg. regulations because they are not "effluent limitations" within the meaning of 509)

Texas Municipal Power Agency v. EPA, 836 F.2d 1482, 27 ERC 1249, 1251 (5th Cir. 1988) ("Congress did not intend petitions for modification to provide a second chance for full review of an NPDES permit *after* the statute of limitations [§ 509] has run from the issue or renewal of the permit.")

Texas Municipal Power Agency v. EPA, 799 F.2d 173, 25 ERC 1062 (5th Cir. 1986) (failure to contest permit condition within 120 time limit set out in 509(b)(1) is fatal to later challenge; "Statutory time limits on petitions for review of agency actions are jurisdictional in nature. . .")

Trustees for Alaska v. EPA, 749 F.2d 549, 558, 21 ERC 2222 (9th Cir. 1984) (the CWA establishes a bifurcated system of judicial review. Section 1365 "confers jurisdiction on the federal district courts, not courts of appeal, to review any action 'where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.'")

City of Baton Rouge v. EPA, 620 F.2d 478, 480 (5th Cir. 1980) (§ 509 review provisions are very specific)

Montgomery Envt'l Coalition v. Costle, 646 F.2d 568, 577-78, 15 ERC 1118 (D.C. Cir. 1980) (§ 509 of the CWA incorporates injury-in-fact rule for standing)

Exxon Corp. v. Train, 554 F.2d 1310, 1315-17, 10 ERC 1209 (5th Cir. 1977) (§ 509(b)(1) gives the court jurisdiction, if timely petitioned, to review directly EPA denial of a requested modification)

Lubrizol Corp. v. Train, 547 F.2d 310, 318-19 (6th Cir. 1976) (§ 509(b) vests exclusive jurisdiction in the federal courts of appeals to review specified final actions of the EPA)

Sun Enterprises, Ltd. v. Train, 532 F.2d 280, 287 (2d Cir. 1976) (§ 509(b) vests exclusive jurisdiction in the federal courts of appeals to review specified final actions of the Administrator)

DuPont v. Train, 528 F.2d 1136, 1142 (4th Cir. 1975), aff'd, 430 U.S. 112 (1977) (§ 509(b) vests exclusive jurisdiction in the federal courts of appeals to review specified final actions of the Administrator)

American Petroleum Inst. v. Train, 526 F.2d 1343, 1344 (10th Cir. 1975) (jurisdictional grant in § 1369 is exclusive)

United States v. Gulf States Steel Inc., 1999 U.S. Dist. LEXIS 8834 (N.D. Ala. 1999) (when State issues NPDES permit state law, not CWA § 509, governs availability of review of permit terms in enforcement action)

United States v. Avatar Holdings Inc., & Florida Cities Water Co., No. 93-281-21 (M.D. Fla. June 21, 1995) (held that 509(b) of the CWA precludes the defendants from challenging a permit denial in the context of an enforcement action)

Public Interest Research Group v. Circuit Foil USA, Inc., 1993 U.S. Dist. LEXIS 4875, 4945 (D.N.J. 1993) (§ 509(b)(2) bars evidence concerning the propriety of defendant's permit limitations)

S.Rep. No. 414, 92nd Cong., 2d Sess. 85, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3668, 3751 (discussing § 509 limits on judicial review of EPA action and the limited use of petitions for modification)

Annotation, *What Constitutes "Issuing or Denying" Permit for Discharge of Pollutants within Meaning of § 509(b)(1)(F) of the Federal Water Pollution Control Act*, 67 A.L.R.Fed. 365 (1984)

See also NPDES PERMITS: Appeals; Modifications

LOG TRANSFER FACILITIES ("LTF's")

§ 407 of the CWA as Amended by the Water Quality Act of 1987, Public Law 100-4, 100th Cong., 2d Sess, Committee Print (March 1988) at 202. Note comment on p. 197: "The following provisions of Public Law 100-4 do not amend the Clean Water Act."

City of Angoon v. Hodel, 803 F.2d 1016, 25 ERC 1235 (9th Cir. 1986), cert. denied, 484 U.S. 870 (1987) (EIS for LTF permit was adequate, despite its failure to consider in detail alternative that ANVC could exchange its holding for land elsewhere, where exchange alternative was too remote and speculative)

United States v. Kennebec Log Driving Co., 399 F. Supp. 754, 8 ERC 1026 (D. Me. 1975), aff'd, 530 F.2d 446 (1st Cir. 1976), cert. denied, 429 U.S. 821 (1976) (court interpreted term "refuse" as used in Refuse Act to specifically include "peeled bark and sunken logs" from log driving activities)

In re Shee Atika, Inc., 2 E.A.D. 487 (CJO 1988) (issues whether EPA has regulatory authority over log sorting and storage area and whether permit condition requiring three-fps log entry speed is reasonable; further briefing ordered)

Congressional Record - Senate (June 13, 1985) (comments of Senators Stevens and Murkowski re § 407 of the CWA)

MARINE SANITATION DEVICES ("MSDs")

33 U.S.C. § 1322 (Marine sanitation devices)

33 U.S.C. § 312(b)(2) (vessel discharges are not subject to NPDES)

33 U.S.C. § 312(f)(1)(B) (houseboat exemption)

40 C.F.R. Part 140 (EPA regulations)

33 C.F.R. Part 159 (Coast Guard regulations)

United States v. West Indies Transport Inc., 127 F.2d 299, 45 ERC 1417, 1424 (3d Cir. 1997) (untreated sewage discharges from barge housing construction workers held subject to § 301, and not § 312, because barge was not a "vessel" and § 312 only regulates "sewage from vessels"; held that the barge, which was permanently moored to the shore, was used to house workers and was not used for transportation)

64 Fed. Reg. 25126 (1999) (proposed regulations by EPA and DOD to control discharges from naval vessels)

MARPOL

33 U.S.C. § 1901-1911 ("Marine Plastic Pollution Research and Control Act of 1987")

33 C.F.R. § 151.66 ("No person on board any ship . . . may discharge garbage into the navigable waters of the United States.")

33 C.F.R. § 151.05(3) ("garbage" is defined as "all kinds of victual, domestic and operational

waste excluding fresh fish and parts thereof, generated during the normal operation of the ship and liable to be disposed of continuously or periodically. . . ")

Chevron U.S.A., Inc. v. Hammond, 726 F.2d 483, 20 ERC 1505 (9th Cir. 1984), cert. denied, 105 S. Ct. 2686, 22 ERC 2071 (oil-contaminated ballast water discharged from tankers; cites MARPOL as the genesis for the Alaska oil spill regulation at issue in the case; no preemption by federal statute found)

MINING

33 U.S.C. § 1288(b)(2)(G) (area wide waste management plans shall include "a process to (i) identify, if appropriate, mine-related sources of pollution including new, current, and abandoned surface and underground mine run-off and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources")

33 U.S.C. §§ 1342(l)(2) (Storm water runoff from oil, gas and mining)

40 C.F.R. § 122.26(b)(10) (storm water regulation definition of overburden)

40 C.F.R. § 122.26(b)(14)(iii)("Facilities classified as Standard Industrial Classifications 10 through 14 (mineral industry) including active or inactive mining operations . . .")

40 C.F.R. § 130.6(c)(4)(iii)(D) ("BMPs shall be identified for the nonpoint sources identified in section 208(b)(2)(F)-(K) of the Act and other nonpoint sources as follows:. . . Identification of procedures to control mine-related sources of pollution in accordance with section 208(b)(2)(G) of the Act.")

40 C.F.R. Part 440 (Effluent Guidelines and Standards for Ore Mining and Dressing Point Source Category)

Rith Energy Inc. v. United States, 44 Fed. Cl. 108, 48 ERC 1951 (Fed. Cl. 1999) (takings claim by coal mining company for denial of mining permit denied where acid mine drainage from mine was contaminating drinking water supplies because under Tennessee law, such contamination is considered a nuisance)

Amigos Bravos v. Molycorp Inc., 1998 U.S. App. LEXIS 28576 (10th Cir. 1998) (suit against mine for discharging without a permit dismissed on grounds that claim should have been brought as a challenge to the permit; mine had disclosed to EPA that it had seeps draining from its waste rock pile, and EPA chose not to regulate the discharges in the reissued permit)

Southern Ohio Coal Co. v. Interior Dept., 20 F.3d 1418, 38 ERC 1393 (6th Cir. 1994) (reversed district court decision blocking EPA enforcement of CWA in delegated state where state had given coal mine permission to discharge large quantities of contaminated groundwater from mine shafts into local river)

Committee to Save Mokelumne River v. East Bay Util., 13 F.3d 305, 309, 38 ERC 1001 (9th Cir. 1993), cert. denied, 513 U.S. 873 (1994) (acid mine drainage is sufficient to satisfy the definition

of "pollutant" under the CWA; reliance on historical pollution to evade current liability misapprehends the focus of the CWA; the CWA does not impose liability only where a net increase in the level of pollution from a point source discharge is present. Rather, the CWA categorically prohibits any discharge of a pollutant from a point source without a permit)

Ackels v. EPA, 7 F.3d 862, 37 ERC 2118 (9th Cir. 1993) (court upheld EPA's placer mining permit after challenges to turbidity and arsenic limits)

United States v. Law, 979 F.2d 977, 978-79, 23 ELR 20466 (4th Cir. 1992), cert. denied, 507 U.S. 1030, 113 S. Ct. 1844 (1993) (criminal conviction for unpermitted acid mine drainage)

American Mining Congress v. EPA, 965 F.2d 759, 35 ERC 1032 (9th Cir. 1992) (upheld provision of EPA's storm water rule which classifies storm water discharges from inactive mines as "associated with industrial activity" and thus subject to NPDES permitting under § 402(p) of the CWA)

West Virginia Coal Assn. v. EPA, 932 F.2d 934, 33 ERC 1353, 1355-56 (4th Cir. 1991) (court rejected argument that Corps, not EPA should regulate discharge of mining wastes into navigable waters. "Generally, the Army has authority over the discharge [of] fill while the EPA has authority over the discharge of pollutants. . . Appellants analysis falls short, however, since the Army regulations, 33 C.F.R. § 323.2(e), provide evidence that it did not intend to regulate the disposal of mining related spoil since the primary purpose of such fills and treatment ponds is to dispose of waste and treat sediment-laden water, not to create dry land or to change the bottom elevation of the water.")

Rybachek v. EPA, 904 F.2d 1276, 31 ERC 1585 (9th Cir. 1990) (challenge to EPA placer mining effluent guidelines turned down on several grounds)

Quivira Mining Co. v. EPA, 765 F.2d 126, 130, 22 ERC 2003 (10th Cir. 1985), cert. denied, 474 U.S. 1055 (non-navigable creeks and "arroyos" affect interstate commerce because during times of "intense rainfall" there could be a surface connection between these waterways and navigable streams)

Trustees for Alaska v. EPA, 749 F.2d 549, 21 ERC 2222 (9th Cir. 1984) (appeal of placer mining permits on various grounds; held that EPA erred by failing to establish effluent limit for turbidity; held that placer mines are point sources)

Consolidation Coal Co. v. Costle, 604 F.2d 239, 250, 13 ERC 1289 (4th Cir. 1979), rev'd on other grounds sub nom EPA v. National Crushed Stone Association, 449 U.S. 64, 100 S. Ct. 1011, 62 L. Ed. 2d 750, 15 ERC 1209 (1980) (challenge to regulations on mining wastewater that is "pumped, siphoned or drained from coal storage" rejected on grounds that definition of point source "excludes unchanneled and uncollected surface waters.")

United States v. Earth Sciences, Inc., 599 F.2d 368, 18 ERC 1105 (10th Cir. 1978) (liability found where recirculation sumps at gold leaching operation were overwhelmed by greater-than-expected snow melt runoff, causing cyanide discharges; court noted that Congress rejected an amendment that would have regulated mining discharge from point sources on the ground that it duplicated the Act's general regulatory provisions, citing *Staff of Senate Comm. On Public*

Works, 93d Cong., 1st Sess., *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 530-535 (Comm. Print 1973))

Bragg v. Robertson, 54 F. Supp.2d 653, 48 ERC 1913 (S.D. W. Va. 1999) (settlement agreement on valley fills requiring U.S. to prepare programmatic EIS concerning mountaintop coal mining fair and reasonable; also contains discussion of need for 404 permits)

Bragg v. Robertson, No. 2:98-0636 (S.D. W. Va. Mar. 3, 1999) (issuing preliminary injunction against operation of mountain top coal mine in West Virginia due to possible CWA, SMCRA, and NEPA violations)

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 998 F. Supp. 946 (N.D. Ill. 1998) (upheld CWA 404 jurisdiction over a complex of isolated, intrastate waters in a former gravel mining pit)

Waste Action Project v. Dawn Mining Co., No. CV-96-00106-AAM (E.D. Wa. Aug. 30, 1996), aff'd, 137 F.3d 1426, 46 ERC 1257 (9th Cir. 1998) (held that discharges from uranium mine tailings piles exempted from definition of "pollutant" under CWA, citing Atomic Energy Act and EPA's regulation, 40 C.F.R. § 122.2)

Idaho Rivers United v. NMFS, No. C94-1476R (W.D. Wash. Nov. 9, 1995) (biological opinion issued by NMFS inadequately considered the impacts of the mining operation on salmon; FS and EPA ordered to reinitiate consultation with regard to the impacts of the Beartrack Gold Mine on 2 species of Snake R. salmon, which are classified as threatened)

Friends of Santa Fe v. LAC Minerals, Inc., 892 F. Supp. 1333, 26 ELR 20135 (D.N.M. July 14, 1995) (Dolores Arroyo, an intermittent stream bed, held to be waters of U.S.; seeps and springs at the mine site containing acid mine drainage held to be non-point source pollution; overburden material discharged to Arroyo held not be "dredge" or "fill" within meaning of 33 C.F.R. § 323.2(c); argument that state-issued permit at mine for overburden management rejected on grounds that § 309(g)(6)(A)(ii) bar applies only when administrative penalty has been collected)

United States v. Iron Mountain Mines, 881 F. Supp. 1432, 1435, 41 ERC 1042 (E.D. Cal. 1995) (noting in CERCLA context that acid mine drainage is "a pollutant harmful to fish")

Sierra Club v. Abston Construction Co., Inc., 620 F.2d 41, 45, 14 ERC 1984 (5th Cir. 1980) (sump pits into which miners channeled contaminated runoff and which sometimes overflowed into U.S. waters were point sources)

Beartooth Alliance v. Crown Butte Mines, 904 F. Supp. 1168, 26 ELR 16853 (D. Mont. 1995) (historic discharges from adits and pits that were exacerbated by recent exploration work held to be point source discharges, not storm water)

Washington Wilderness Coalition v. Hecla Mining Co., 870 F. Supp. 983, 40 ERC 1134 (E.D. Wash. 1994) (held that a tailing pond is a point source and that groundwater discharges from the pond that enter navigable waters come under jurisdiction of the CWA)

United States v. Rybachek, No. F86-059 (D. Ak. July 20, 1992) (no estoppel to enforce for

violation of DMR where EPA inspector allegedly told miners that DMRs, which formed basis of liability, would not be used as basis for enforcement because no affirmative misconduct shown)

United States v. Rybachek, 643 F. Supp. 1086 (D. Ak. 1986) (change of venue requested by Rybacheks in EPA enforcement action granted)

In re Dos Republicas Resources Co., Inc., 6 E.A.D. 643 (EAB 1996) (EAB denied request for evidentiary hearing on NPDES permit issued to coal mine, holding that the Region had sufficiently considered alternatives and nothing in NEPA provides EPA with authority to put conditions into an NPDES permit that have nothing to do with discharges to the receiving water)

In re Miners Advocacy Council, 4 E.A.D.40 (EAB 1992) (review granted on issue of whether 40 C.F.R. § 125.3 precludes Region from dividing the integrated placer mining process and authorizing discharges from one part of that process (sluicing) while not authorizing discharges from another part of the process (hydraulic overburden)

In re Miners Advocacy Council, 4 E.A.D. 230 (EAB 1992) (permit must consider the entire process, including the use of hydraulic removal of over burden, if any permit applicant so requests; actual terms of the permit would depend on a site-specific factual analysis)

In re Homestake Mining Co., 2 E.A.D. 195 (CJO 1986) (EPA may not look behind a State certification issue pursuant to § 401 of the CWA for the purpose of relaxing a requirement of certification)

In re 446 Alaska Placer Mines, 2 E.A.D. 102 (CJO 1985) (Region erred when it excluded legal questions from consideration at the evidentiary hearing)

In re NPDES Permit Systems for 170 Alaska Placer Mines, More or Less, 1 E.A.D. 616 (CJO 1980) (5th Amend. challenge to NPDES permit not proper for EPA to hear; remanded to Region for evidentiary hearing on issue of whether recycling constitutes BPT)

Kinross Copper Corp. v. State, 1999 Ore. App. LEXIS 760 (Or. Ct. App. 1999) (State's denial of a copper company's application for an NPDES permit to discharge mining wastes into state waters did not effect a taking of private property; in order for the company to have a private property right to discharge wastewater into state waters, the right must have come into existence separately after compliance with state law regarding the creation and recognition of state water rights)

MIXING ZONES

40 C.F.R. § 131.35(d)(8) (definition of mixing zone for water quality standards issued for Colville Confederated Indian Tribes Reservation: "*Mixing zone* or *dilution zone* means a limited area or volume of water where initial dilution of a discharge takes place; and where numeric water quality criteria can be exceeded but acutely toxic conditions are prevented from occurring.")

Cf. 40 C.F.R. § 125.58(dd) (zone of initial dilution [for 301(h) waivers] means the region of

initial mixing surrounding or adjacent to the end of the outfall pipe or diffuser ports, provided that the ZID may not be larger than allowed by mixing zone restriction in applicable water quality standards.")

American Iron and Steel Institute v. EPA, 115 F.3d 979, 44 ERC 1769, 1780-83 (D.C. Cir. 1997) (held that mixing-zone provisions in Great Lakes Water Qaulity Guidance, which eliminated mixing zones for bioaccumulative chemicals went beyond agency's authority)

Puerto Rico Sun Oil Co. v. EPA, 8 F.3d 73, 37 ERC 1729 (1st Cir. 1993) (whether a mixing zone is allowed is a question of state law)

Marathon Oil Co. v. EPA, 830 F.2d 1346, 26 ERC 1907 (5th Cir. 1987) (mixing zone is a cost/benefit judgment, not a scientific one)

In re Ketchikan Pulp Co., 6 E.A.D. 675 (EAB 1996) (held that absent state certification EPA properly concluded that it lacked authority to include mixing zone in an NPDES permit where state regulations reserve discretion over mixing zones to the State)

In re City of Hollywood, Florida, 5 E.A.D. 157 (EAB 1994) (where admin. record does not indicate what action, if any, State has taken in response to mixing zone request, there is no legal basis for mixing zone)

In re Broward County, Florida, 4 E.A.D. 705 (EAB 1993) (40 C.F.R. § 122.44, requires that the permit contain effluent limitations which are at least as stringent as state water quality standards; however, Region must grant evidentiary hearing on factual question regarding the 40 C.F.R. § 122.44(d)(1)(iv) reasonable potential calculation is valid and supports effluent limits)

In re Star-Kist Caribe, Inc., 2 E.A.D. 758 (CJO 1989) (whether State should have approved mixing zone and included it in the water quality certification is a matter of state law and must be challenged in state proceedings, not on appeal to the Administrator)

EPA, "Mixing Zones - Water Quality Standards Criteria Summaries: A Compilation of State/Federal Criteria" (September 1988) ("Whether to establish such a mixing zone policy is a matter of State certification.")

EPA, "Mixing Zone Guidance" (draft January 17, 1995) ("[M]ixing zones cannot be of a size or location that, when the segment is taken as a whole, the designated use is not fully attained.")

EPA, "Guidance on Application of State Mixing Zone Policies in EPA-Issued NPDES Permits" (August 6, 1998)

EPA, "Technical Support Document For Water Quality-based Toxics Control," § 2.2.2 (Mixing Zones) (March 1991) at 33-34

63 Fed. Reg. 36741 (1998) (advance notice of proposed rulemaking re mixing zones)

See also STATE CERTIFICATION

MONITORING/REPORTING REQUIREMENTS

40 C.F.R. § 122.41(j) (Monitoring and records)

40 C.F.R. § 122.41(l) (Reporting requirements)

Sierra Club v. Simkins Industries, 847 F.2d 1109, 27 ERC 1881 (4th Cir. 1988), cert. denied, 491 U.S. 904 (1989) ($977,000 penalty upheld against defendant pulp mill who failed to monitor or submit DMRs for over two years; "Simkins' monitoring requirements were not designed to be a mere academic exercise. Simkins was bound by the reporting and records retention requirements of the NPDES permit that are central to adequate administration and enforcement of limits on substantive discharges under the Clean Water Act. Unless a permit holder monitors as required by the permit, it will be difficult if not impossible for state and federal officials charged with enforcement of the Clean Water Act to know whether or not the permit holder is discharging effluent in excess of the permit's maximum levels." 27 ERC at 1885)

Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc., 956 F. Supp. 588, 603, 44 ERC 1232 (D.S.C. 1997), vacated and remanded on other grounds, 149 f.3d 303, 46 ERC 2025 (4th Cir. 1998) ("monitoring violations. . .not considered serious unless they are found to have been in bad faith")

United States v. Smithfield Foods, Inc., 972 F. Supp. 338 , 45 ERC 1387 (E.D. Va. 1997), affirmed in part, reversed in part, ___ F.3d ___, 1999 U.S. App. LEXIS 22092 (4th Cir. 1999) (monitoring violations "do impact the effectiveness of the self-reporting scheme set up by the Act. When a permittee falsifies DMRs, fails to maintain supporting records, or destroys records, the permittee may be covering up serious violations of effluent limitations. Thus, the court cannot assume that violations of monitoring and reporting requirements in a permit are trivial. Since the Clean Water Act relies on self-reporting of permittee, such violations undermine the Act and are considered serious by this court, despite the fact that they are not discharge violations.")

Public Interest Research Group v. Elf Atochem, 817 F. Supp. 1164, 36 ERC 1855 (D.N.J. 1993) (summary judgment entered against defendant for both failure to monitor and failure to report violations on DMRs)

In re City of Port St. Joe and Florida Coast Paper Co., 7 E.A.D. 275 (EAB 1997) (challenge to permit condition requiring sampling for pollutant for which there was no state water quality standard rejected; EPA has wide discretion under CWA to require effluent sampling and monitoring)

In re Anthony J. Taylor, Andover Water Corporation, Docket No. PWS-NJ-CFP-03 (Order for Accelerated Decision, Aug. 14, 1992) ("The self-submission of data is critical to the success of our public water supply program under the SDWA. Without this data, EPA and the State of New Jersey cannot know whether a drinking water supply is safe. Therefore, any failure to submit data significantly undermines the fundamental mechanism of the public water supply program and requires the use of Agency enforcement resources." Id. at 3)

EPA, *Interim Guidance for Performance-Based Reduction of NPDES Permit Monitoring*

Frequencies (April 1996)

See also DISCHARGE MONITORING REPORTS

NATIONAL TOXICS RULE

40 C.F.R. § 131.36 (Toxics criteria for those states not complying with Clean Water Act § 303(c)(2)(B))

American Paper Institute v. EPA, 996 F.2d 346, 352, 36 ERC 2025 (D.C. Cir. 1993) (held that EPA properly issued regulation requiring methods for translating narrative criteria into chemical specific effluent limits; Section 303(c)(2)(B) "required states, in their next triennial reviews, to formulate numeric criteria for certain priority toxic pollutants listed in the EPA guidelines. If numeric criteria for those listed toxics were "not available," the provision mandated that states enact criteria based on biological monitoring technique.")

Natural Resources Defense Council, Inc. v. EPA, 915 F.2d 1314, 1318, 31 ERC 2089 (9th Cir. 1990) ("CWA section 303(c)(2)(B), 33 U.S.C. § 1313(c)(2)(B), requires states to adopt 'specific numerical criteria' for toxics for which the EPA has published criteria pursuant to section 304(a) . . . . Those criteria are to be adopted when the state first reviews its water quality standards following the enactment of the 1987 amendments. The requirement of numerical criteria for toxics makes it easier for permit writers to incorporate the water quality standards into NPDES permits. Permit writers thus no longer have an excuse for failing to impose water-quality-based limitations on permit holders.")

American Forest & Paper Assoc. v. EPA, No. 93-cv-0694 (RMU) (D.D.C. 1996) (challenge to NTR largely rejected (two procedural defects remanded for further record development); court upheld EPA's decision to promulgate dioxin criteria even though the Agency had not completed its re-assessment of dioxin: held that the EPA had "recognized the diversity of scientific opinion concerning dioxin's health risks" and that it is "not the court's role to decide between conflicting scientific evidence, especially where the agency appears to have considered all the available evidence.")

Natural Resources Defense Council, Inc. v. EPA, 806 F. Supp. 1263, 1276, 35 ERC 1947 (E.D. Va. 1992) ("[T]he Clean Water Act allows narrative criteria for some uses and numeric criteria for others. See Section 303(c)(2)(B).")

60 Fed. Reg. 22228 (1995) (Stay of Federal Water Quality Criteria for Metals)

Note Fed. Reg. cites at end of § 131.36.

See also TOXICITY LIMITS; WHOLE EFFLUENT TOXICITY TESTING

"NAVIGABLE WATERS" (§ 502(7))

33 U.S.C. § 1362(7) ("'navigable waters' means the waters of the United States, including the

territorial seas")

40 C.F.R. § 122.2 ("Waters of the United States or waters of the U.S. means:

(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(b) All interstate waters, including interstate 'wetlands;'

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, 'wetlands,' sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could effect interstate or foreign commerce including any such waters:

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

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

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

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

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

(f) The territorial sea: and

(g) `Wetlands' adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States [See Note 1 of this section] Water of the United States do not include prior converted cropland. . . .")

International Paper Co. v. Ouellette, 479 U.S. 481, 484 (1987) ("[navigable waters] has been construed expansively to cover waters that are not navigable in the traditional sense.")

United States v. Riverside Bayview Homes, 474 U.S. 121, 131, 23 ERC 1561 (1985) (defendant's property is a wetland adjacent to a navigable waterway; hence it is a part of the waters of the U.S. as defined in 33 C.F.R. § 323.2)

United States v. TGR Corp., 171 F.3d 762, 29 ELR 21059 (2nd Cir. 1999) (conviction for unpermitted discharge of slurry from asbestos removal project affirmed; held that brook into which slurry was discharged is waters of U.S.; rejected defendant's argument that brook is a "municipal storm sewer" and therefore not waters of the U.S. because testimony at trial showed that the brook was not "owned or operated" by a public body as required under 40 C.F.R. § 122.26(b)(8))

United States v. Edison, 108 F.3d 1336, 44 ERC 1550 (11th Cir. 1997), cert. denied, 118 S. Ct. 248 (1997) (discharge of sludge from truck to storm water ditch that led to drainage canal to

emptied into Tampa Bay held to be discharge to navigable waters; held that it is "well established that Congress intended to regulate the discharge of pollutants into all waters that may eventually lead to waters affecting interstate commerce.")

United States v. Wilson, 133 F.3d 251, 45 ERC 1801 (4th Cir. 1997) (criminal conviction for unlawful dredge and fill overturned and remanded; court held that Corps definition of wetlands, which forbade activities that "could affect" interstate commerce, was invalid; "The regulation [33 CFR 328.3(a)(3)] requires neither that the regulated activity have a substantial affect on interstate commerce, nor that the covered waters have any sort of nexus with navigable, or even interstate, waters. Were this regulation a statute, because, at least at first blush, it would appear to exceed congressional authority under the Commerce Clause.")

United States v. Hartsell, 127 F.3d 343, 45 ERC 1356 (4th Cir. 1997) (conviction for illegal discharges to sewer system in violation of pretreatment standards upheld; court rejected defendants' argument that sewer system was not "navigable waters" and therefore not within the jurisdiction of the CWA)

Leslie Salt Co. v. United States, 55 F.3d 1388, 1391,40 ERC 1865 (9th Cir. 1995), cert. denied, 516 U.S. 955 (1995) (salt pond held to be navigable waters requiring a 404 permit to develop; navigable waters defined as "waters of U.S."; Corps. regulations define "waters of U.S.")

York Ctr. Park Dist. v. Krilich, 40 F.3d 205, 206 (7th Cir. 1994) ("Navigable waters includes wetlands.")

West Virginia Coal Assoc. v. Reilly, 33 ERC 1353, 22 ELR 20092 (4th Cir. 1991) (lower court decision reported at 728 F. Supp. 1276 (S.D.W.Va. 1989) (in-stream treatment ponds and the waters above such ponds fall within the definition of "waters of the United States" found in Part 122.2, and do not fall within the excluded "waste treatment systems." Dischargers may not appropriate a section of a river for treating their wastes)

Conant v. United States, 786 F.2d 1008, 24 ERC 1343 (11th Cir. 1986) (cease and desist order to stop unpermitted fill of adjacent wetlands to create a fish pond upheld; wetlands held to be navigable waters)

Quivira Mining Co. v. EPA, 765 F.2d 126, 130 (10th Cir. 1985), cert. denied, 474 U.S. 1055, 88 L. Ed. 2d 769, 106 S. Ct. 791 (1986) (holding that non-navigable and frequently dry arroyo and creek governed by the Act)

United States v. Texas Pipeline Co., 611 F.2d 345, 347, 14 ERC 1120 (10th Cir. 1979) (intermittent tributary to navigable water is water of the U.S.)

Leslie Salt Co. v. Froelke, 578 F.2d 742, 11 ERC 1729 (9th Cir. 1978) (diked salt water evaporation pond held to be navigable waters; navigable waters includes manmade structures and other waterways holding water from, or carrying water to, waters of the U.S.; the term "navigable waters" as used in the CWA is "to be given the broadest possible constitutional interpretation." 578 F.2d at 755)

Pacific Legal Foundation v. Costle, 586 F.2d 650, 655-56, 11 ERC 2125 (9th Cir. 1978), rev'd on

other grounds, 445 U.S. 198, 100 S. Ct. 1095, 63 L. Ed. 2d 329 (1980) (navigable waters do not include the "contiguous zone" or the "ocean," which both occupy areas beyond the territorial seas)

Cal. ex rel. State Water Res. Control Bd. v. EPA, 511 F.2d 963, 964 n.1, 7 ERC 1667 (9th Cir. 1975), rev'd on other grounds, 426 U.S. 200 (1976) (by defining "navigable waters" to include "the waters of the United States, including the territorial seas," Congress indicated it clearly meant to extend the jurisdiction of the 1972 CWA amendments to the constitutional limit to include all tributaries to navigable waters)

United States v. Ashland Oil & Transp. Co., 504 F.2d 1317, 7 ERC 1114 (6th Cir. 1974) (holding that the Act covered a waterway which was a tributary of a waterway that eventually flowed into a navigable river, 504 F.2d at 1325; "It would, of course, make a mockery of [Congress' power to abate pollution under its interstate commerce powers] if its authority to control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste." *Id.* at 1326)

Community Assoc. for Restoration of the Environment v. Bosma Dairy, No. CY-98-3011-EFS (E.D. Wash. July 29, 1999) (held that irrigation canal to which a CAFO was discharging is waters of the U.S.)

United States v. TGR Corp., 1998 U.S. Dist. LEXIS 9354 (D. Conn. 1998), aff'd, 171 F.3d 762, 29 ELR 21059 (unpermitted discharge to navigable waters found where contractor dumped pollutants down a storm drain in the basement of a school building, and the storm drain emptied into a tributary of a navigable waterway; held that the tributary constituted navigable waters even if it was man-made, and constructed for the purpose of carrying water from the storm water system to the natural creek)

Marathon Oil Co. v. U.S. EPA, No. 97-CV-267-D (D. Wyo. Aug. 20, 1998) (CWA Class I penalty order upheld – dry arroyos are "waters of the U.S." if there is sufficient evidence to show water flows at some time; the court stated that the central question before it, therefore, was whether water had actually flowed through the gulch, not whether the gulch is entitled to protection under the CWA in the event water flows through it)

United States v. Appel, Case No. CV 94-7824 LGB (C.D. Cal. Feb. 2, 1996) (held that Ventura River and its tributary San Antonio Creek constitute "waters of the United States" within meaning of 33 C.F.R. § 328.3)

Dubois v. U.S. Dept. of Agriculture, 1995 U.S. Dist. LEXIS 16608 (D.N.H. 1995), aff'd in part, rev'd in part, 102 F.3d 1273, 43 ERC 1824 (1st Cir. 1996) (water need not be actually navigable to qualify as "navigable waters"; pumping of water from river to pond not considerable addition of pollutants to waters of U.S. because the definition of navigable waters as a singular entity, the "waters of the U.S.", explains that the bodies of water are not to be considered individually in this context)

Friends of Santa Fe v. LAC Minerals, Inc., 892 F. Supp. 1333 (D.N.M. 1995) (Dolores Arroyo, an intermittent stream bed, held to be waters of U.S.)

United States v. Zanger, 767 F. Supp. 1030, 22 ELR 20231 (N.D. Cal. 1991) (Congress intended the term "waters of the U.S." be interpreted as broadly as constitutionally possible under the commerce clause)

Save our Community v. EPA, 741 F. Supp. 605 (N.D. Tex. 1990), rev'd on other grounds, 971 F.2d 1155, 35 ERC 1937 (5th Cir. 1992) (artificial ponds held to be navigable waters)

United States v. Saint Bernard Parish, 589 F. Supp. 617, 620, 21 ERC 1950 (E.D. La. 1984) ("[T]his Court believes that the Forty Arpent Canal is a tributary of the adjacent wetlands. 40 C.F.R. § 122.2(e). Congress intended to control both the discharge of pollutants directly into navigable waters and the discharge of pollutants into non-navigable tributaries which flow into navigable waters. . . . The scope of the Act's control extends to discharges into any waterway where any water which might flow therein could reasonable end up in any body of water, to which or in which there is some public interest.")

United States v. Oxford Royal Mushroom Products, Inc., 487 F. Supp. 852 (E.D. Pa. 1980) (navigable waters, as defined in §502(7), does not require navigability in fact)

United States v. Weisman, 489 F. Supp. 1331, 1343, 17 ERC 1580 (M.D. Fla. 1980) (wetlands are "navigable waters" under the CWA; the Corps' wetlands regulations "are in keeping with the purpose of the FWPCA as revealed in its legislative history. Congress fully intended that the waters subject to regulatory control of the United States under the FWPCA be given the 'broadest possible constitutional interpretation.' The scope is not limited to the traditional tests of navigability, but rather is defined in Section 502, which defines 'navigable waters' under the FWPCA as 'waters of the United States, including the territorial seas.' This definition effectively excludes from consideration any concept of navigability in law or in fact." (citations omitted).)

United States v. Velsicol Chemical Corp., 438 F. Supp. 945, 948-49 (W.D. Tenn. 1976) (holding that where the defendant knew or should have known that city sewers, into which it discharged pollutants, led directly into the Mississippi River, that was sufficient to constitute a discharge into "waters of the United States" as that term is used in the CWA)

United States v. Phelps Dodge, 391 F. Supp. 1181 (D. Ariz. 1975) (the scope of the CWA extends to all waterways, wet or dry, if water flowing therein could reasonably end up in a body of water in which there is some public interest)

United States v. GAF Corp., 389 F. Supp. 1379, 7 ERC 1581, 1583 (S.D. Tex. 1975) (definition of navigable waters "effectively excludes from consideration any concept of navigability, in law or in fact.")

United States v. Holland, 373 F. Supp. 665, 673, 6 ERC 1388 (M.D. Fla. 1974) (man-made water body used to convey pollutants is water of the U.S.; water body need not be navigable in fact to be within jurisdiction of the CWA)

In re Pepperell Associates, Docket No. CWA-2-I-97-1088 (ALJ Gunning Oct. 9, 1998) (SPCC regulations held to apply to tanks that could discharge to man-made retention basin that was connected to surface waters via a sewer conduit; these facts rendered the retention basin a

"navigable waterway.")

In re Luis Bettencourt,1994 EPA RJO LEXIS 5 (RJO Hamill 1994) (lateral is waters of U.S. despite intermittent flow and there were no irrigation waters flowing in canal at time of discharge)

In re Donald J. Aardema and Joe Pacheco, 1992 EPA RJO LEXIS 17 (Region 10 RJO Hamill 1992) (discharge from CAFO to irrigation lateral held to be discharge to waters of U.S.)

H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 131 (1972); H.R. Rep. No. 92-1465, 92d Cong., 2d Sess. 144 (1972) (the term "navigable waters" as defined in 33 U.S.C. § 1362(7) is to be given the broadest possible interpretation)

2 *Legislative History of the Water Quality Act of 1987*, at 1495 ("The control strategy of the Act extends to navigable waters. The definition of this terms means the navigable waters of the United States, portions thereof, and includes the territorial seas and the Great Lakes. Through narrow interpretation of the definition of interstates waters the implementation [of the] 1965 Act was severely limited. Water moves in hydrological cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries.")

62 Fed. Reg. 20177, 20180 (1997) (EPA Region 10, Idaho CAFO General Permit, Response to Comments: "Canals and laterals which empty into (or connect with) waters of the United States such as rivers, streams, lakes, etc. are themselves waters of the United States in accordance with the definition of waters of the United States in 40 CFR 122.2(e). As a result, discharges into canals and laterals are considered point source discharges which must be regulated under the NPDES permitting program.")

57 Fed. Reg. 45037 (1993) (definition of "waters of the United States" amended by adding 3 new sentences at end)

53 Fed. Reg. 20765 (1988) (preamble to EPA 404 regulations; "For clarification it should be noted that we generally do not consider the following water to be 'Waters of the United States.' However, EPA reserves the right on a case-by-case basis to determine that a particular water body within these categories of waters is a water of the United States. Pursuant to agreements with EPA, the permitting authority also has the right to determine on a case-by-case basis if any of these waters are 'waters of the Untied States.'
(a) Non-tidal drainage and irrigation ditches excavated on dry land.
(b) Artificially irrigated areas which would revert to upland if the irrigation ceased.
(c) Artificial lakes or ponds created by excavating and/or diking dry land to c9ollect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
(d) Artificial reflecting or swimming pools or other small ornamental of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.
(e) Water filled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States.")

51 Fed. Reg. 41217 (1986) (preamble to 33 C.F.R. Part 328, Corps' definition of "Waters of the United States;" almost identical language to language quoted above in 53 Fed. Reg. 20765)

George K. Chamberlin, Annotation, *What Are 'Navigable Waters' Subject to the Provisions of the Federal Water Pollution Control Act,* 52 ALR Fed 788 (1981)

See also STATE JURISDICTION; GROUNDWATER, DISCHARGES TO; NPDES PERMITS: Internal Waste Streams

NEPA

42 U.S.C. § 4332(c) (NEPA requires that all agencies of the federal government shall "include in ever recommendation or report on proposals for legislation or other major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action.")

33 U.S.C. § 1371(c) ("Except for the provision of the Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works . . . and the issuance of a permit under [§ 402] for the discharge of any pollutant by a new source . . . no action of the Administrator taken pursuant to this chapter shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.")

40 C.F.R. § 6.605(b)(3) (an EIS is required for a new source NPDES permit if "[a]ny major part of the new source will have significant adverse effect on the habitat of threatened or endangered species")

40 C.F.R. § 122.29(g) ("The National Environmental Policy Act . . . may require preparation of an Environmental Impact Statement and consideration of EIS-related permit conditions (other than effluent limitations) as provided in 122.29(c))

40 C.F.R. § 1502.25 ("To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related studies required by the . . . Endangered Species Act.")

Dubois v. USDA, 102 F.3d 1273, 43 ERC 1824 (1st Cir. 1996) (held that NEPA requires the Forest Service to identify in its EIA all federal permits that the ski area expansion needed to comply with federal law, e.g., NPDES permit; water taken from creek for use in snow-making equipment with excess discharged to pond on other side of ridge held to be discharge of pollutants; court rejected EPA's position that moving the creek water to the pond without adding pollutants was not a discharge of pollutants to waters of U.S.; held that Forest Service was obligated to obtain an NPDES permit before permitting the expansion on Forest Service land)

Cf., Newton County Wildlife Ass'n v. Forest Service, 141 F.3d 803, 46 ERC 1694, 1698 (8th Cir. 1998), reh'g en banc denied, 1998 U.S. App. LEXIS 16225 (1998) (suit challenging logging sale by Forest Service dismissed; "The Wildlife Association cites no authority for the proposition that the Forest Service needs an NPDES permit before

contracting to allow others to harvest timber and build roads. . . .EPA's regulations expressly provide, 'it is the operator's duty to obtain a permit.' 40 C.F.R. § 122.21(b)")

Adams v. EPA, 38 F.3d 43, 55 n.11 (1st Cir. 1994) (no requirement under NEPA that EPA consider alternative outfall locations because plant is not a new source)

Natural Resources Defense Council, Inc. v. EPA, 859 F.2d 156, 168, 28 ERC 1401 (D.C. Cir. 1988) (good discussion of EPA's authority to regulate dischargers under authority of NEPA)

Natural Resources Defense Council, Inc. v. EPA, 822 F.2d 104, 127, 26 ERC 1153 (D.C. Cir. 1987) (EPA may not ban construction of facility before it has applied for NPDES permit; until facility applies for permit, EPA's NEPA responsibility is not triggered)

Northwest Indian Cemetary Protective Ass'n v. Peterson, 795 F.2d 688, 24 ERC 1775 (9th Cir. 1986), rev'd on other grounds sub nom., Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 108 S. Ct. 1319 (1988) (held that EIS prepared for Forest Service road was inadequate in that it did not adequately address effects on water quality)

Town of Orangetown v. Gorsuch, 718 F.2d 29, 20 ERC 1125 (2nd Cir. 1983), cert. denied, 465 U.S. 1099 (1984) (EPA not arbitrary and capricious for deciding to not to prepare EIS prior to granting construction grant for sewer project because there would be no adverse effects on waterways or land use and is not controversial)

Roosevelt Campobello Intern. Park v. EPA, 684 F.2d 1041, 1047, 17 ERC 2023 (1st Cir. 1982) (challenge to NPDES permit based on NEPA and ESA; held that agency consideration of alternatives need only be reasonable)

Bragg v. Robertson, 54 F. Supp.2d 653, 48 ERC 1913 (S.D. W. Va. 1999) (settlement agreement on valley fills requiring U.S. to prepare programmatic EIS concerning mountaintop coal mining fair and reasonable; also contains discussion of need for 404 permits)

Sierra Club v. Alexander, 484 F. Supp. 455, 14 ERC 1465 (N.D.N.Y. 1980), aff'd without opinion, 633 F.2d 206 (2d Cir. 1980) (Corps failure to engage in alternatives analysis because it believed impact of construction of shopping center was insignificant held to be violation of its obligation to perform alternatives analysis under 42 U.S.C. § 4332(2)(E))

Chesapeake Bay Foundation v. Va. State Water Control Bd., 453 F. Supp. 122, 11 ERC 1897 (E.D. Va 1978) (no NEPA review required for NPDES permit issued in delegated state; held that failure of EPA to object to permit does not constitute a federal action necessary to invoke NEPA)

In re Dos Republicas Resources Co., Inc., 6 E.A.D. 643 (EAB 1996) (EAB denied request for evidentiary hearing on NPDES permit issued to coal mine, holding that the Region had sufficiently considered alternatives and nothing in NEPA provides EPA with authority to put conditions into an NPDES permit that have nothing to do with discharges to the receiving water)

In re Louisville Gas and Electric Co., 1 E.A.D. 687, 694-95 (CJO 1981) (an EIS drafted for an NPDES permit for a power plant was challenged for inadequate attention to an alternative smaller plant, based upon an additional season's power consumption data; held that the agency

was reasonable in not waiting for another season's worth of data before issuing the EIS)

Annotation, *Necessity and Sufficiency of Environmental Impact Statements Under sec. 102(2)(c) of the National Environmental Policy Act of 1969 (42 U.S.C. § 4332(2)(c)) in Cases Involving Water and Water Works Projects*, 67 A.L.R. Fed. 54, supp. sec. 4

See also NEW SOURCES

NEW SOURCES

33 U.S.C. § 1306(a)(2) ("new source" means "any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section.")

40 C.F.R. § 122.2 ("*New Source* means any building, structure, facility, or installation from which there is or may be a "discharge of pollutants," the construction of which commenced:
(a) After promulgation of standards of performance under section 306 of the CWA which are applicable to such source, or
(b) After proposal of standards of performance in accordance with section 306 of the CWA which are applicable to such source, but only if the standards are promulgated in accordance with section 306 within 120 days of their proposal.")

40 C.F.R. § 122.29(b) (definition of new sources for purposes of preparing environmental assessment's)

Natural Resources Defense Council, Inc. v. EPA, 822 F.2d 104, 112 (D.C. Cir. 1987) (EPA's new source definition and ten-year grace period provisions were harmonious with CWA; cites legislative history)

Manasuta-88, Inc. v. Thomas, 799 F.2d 687 (11th Cir. 1986) (EPA finding that construction at existing site was not "new source" not arbitrary and capricious)

See also EFFLUENT GUIDELINES; NEPA

NONPOINT SOURCES

33 U.S.C. § 1288 (Area wide waste treatment management)

33 U.S.C. § 1329 (Nonpoint source management programs)

40 C.F.R. § 130.6(c)(4)(Nonpoint source management and control)

Oregon Natural Desert Ass'n v. Dombeck, 151 F.3d 945, 46 ERC 1993 (9th Cir. 1998) (held that 401 certification does not apply to nonpoint source pollutants, such as manure from grazing on public lands; distinguished dam cases (Consumers Power et al.) on grounds that dams are point

sources but they don't discharge pollutants)

Marble Mountain Audubon Society v. Rice, 914 F.2d 179, 32 ERC 1249, 1253, 21 ELR 20023 (9th Cir. 1990) ("The judicial review provisions of the [APA], permits private citizens to sue for alleged state water quality control violations from nonpoint sources.")

Oregon Natural Resources Council v. U.S. Forest Service, 834 F.2d 842, 27 ERC 1068, 1074, 18 ELR 20450 (9th Cir. 1987) (Congress did not intend for section 301 to apply to nonpoint sources; "Nonpoint source pollution is not specifically defined in the Act, but is pollution that does not result from the 'discharge' or 'addition' of pollutants from a point source. Examples of nonpoint source pollution include runoff from irrigated agriculture and silvicultural activities." Id. at n.9)

Idaho Conservation League v. Caswell, 1996 U.S. Dist. LEXIS 21980 (D. Id. 1996) (held that Forest Service approval of the construction of two logging roads in a National Forest was not subject to state certification under § 401 on grounds that roads are nonpoint sources; "Section 401 is only intended to encompass those projects which resulted in a 'point source discharge.'")

Oregon Natural Desert Ass'n v. Thomas, 940 F. Supp. 1534, 43 ERC 1257 (D. Or. 1996), rev'd, remanded sub nom., Oregon Natural Desert Ass'n v. Dombeck, 151 F.3d 945, 46 ERC 1993 (9th Cir. 1998) (in challenge to grazing permits issued by Forest Service, court held that § 401 applies to all federally permitted activities that may result in a discharge, including discharges from nonpoint sources; court concluded that definition of point source in § 502 was not limited to discrete conveyances)

S. Rep. No. 50, 99th Cong. 1st Sess. 7-8 (1985) (pollution of navigable waters can result from diffuse precipitation, percolation, or runoff, e.g., agricultural chemicals from farmlands, urban runoff, runoff from construction activities, and other substances washed by unchanneled rain into navigable waters)

Envtl L. Instit., *Almanac of Enforceable State Laws to Control Nonpoint Source Water Pollution* (Jan. 7, 1999) (summary of laws of 50 states governing nonpoint source pollution)

Note, *Agricultural Nonpoint Source Runoff - The Effects Both On and Off the Farm: An Analysis of Federal and State Regulation of Agricultural Nonpoint Source Pollutants*, 5 Wisc. Envt'l L.J. 43 (1998)

EPA, *Clean Water Action Plan* (1998) (good discussion of nonpoint source pollution problem)

Oliver A. Houck, *TMDLs: The Resurrection of Water Quality Standards-Based Regulation Under the Clean Water Act*, 27 ELR 10329 (1997) 10342 ("Congress added § 309 to the Act to fund and stimulate state nonpoint programs. This was the epitome of a voluntary program, and it produced about the same results as its predecessor had in 1972: a volume of studies, a number of voluntary programs, and little noticeable cleanup of nonpoint source pollution.")

Envtl L. Instit., *Enforceable State Mechanisms for the Control of Nonpoint Source Water Pollution* (1997)

Clare F. Saperstein, *State Solutions to Nonpoint Source Pollution: Implementation and*

Enforcement of the 1990 Coastal Zone Amendments Reauthorization Act Section 6217, 73 B.U. L. Rev. 889, 890 (1995)

EPA, "Nonpoint Source Guidance" (1987) at 3 ("nonpoint source pollution does not result from a discharge at a specific single location (such as a single pipe) but generally results from land runoff, precipitation, atmospheric deposition, or peculations.")

V. Novotny & G. Chesters, *Handbook of Nonpoint Pollution* 2 (1981) (nonpoint sources account for more than 50% of total water quality problem)

See also "POINT SOURCE;" TMDLs; CAFOs

NOTICE OF VIOLATION

United States v. City of Colorado Springs, 455 F. Supp. 1364, 1366-67 (D. Colo. 1978) (a notice under § 309(a)(1) is not a condition precedent to federal enforcement)

See also COMPLIANCE ORDERS

NPDES PERMITS

33 U.S.C. § 1342(a) ("(1) . . .[T]he Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants . . . upon condition that such discharge will meet either (A) all applicable requirements [of the Act], or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

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

33 U.S.C. § 1342(b) (State permit programs)

A. Administrative Extensions

5 U.S.C. § 558(c) ("When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.")

40 C.F.R. § 122.6 (Continuation of Expiring Permits)

40 C.F.R. § 124.60(c) (for permit renewals, if request for formal hearing is granted, then the entire permit is stayed pending review)

Texas Oil & Gas Assoc. v. EPA, 161 F.3d 923, n.3 (5th Cir. 1998) ("No NPDES permit, however, may be issued for a term exceeding five years. 33 U.S.C. § 1342(a)(3),

(b)(1)(A). This ensures that all newly reissued permits will incorporate the most recent [effluent guidelines].")

Natural Resources Defense Council, Inc. v. EPA, 859 F.2d 156, 211 (D.C. Cir. 1988) (administrative extension regulations upheld)

In re General Motors Corporation, Pontiac Fiero Plant, 7 E.A.D. 465 (EAB 1997), aff'd,168 F.3d 1377, 48 ERC 1257 (D.C. Cir. 1999) (respondent argued that the permit expired by operation of law in 1990 when Respondent did not file a timely request for renewal; held that by requesting renewal of the 1988 permit prior to its expiration, behaving as if the permit remained in effect, and failing to file a timely objection to continuation of the permit, Respondent cannot now be heard to deny that the permit continued in effect beyond October 1, 1990)

B. Appeals

33 U.S.C. § 1369(b)(1)(F) (appeal of permit is to Court of Appeals within 120 days final agency action)

40 C.F.R. § 124.84 (any party to an evidentiary hearing may move "for summary determination in its favor upon any of the issues being adjudicated on the basis that there is no genuine issue of material fact for determination.")

40 C.F.R. § 124.91(a) (regulations do not confer an automatic right of review; rather, the petitioner has the burden of demonstrating that review should be granted)

Spokane River Assoc. v. EPA, CA No. 90-70672 (9th Cir. 1990) (motion for leave to adduce additional evidence in permit appeal granted pursuant to § 509(c) of the CWA)

Sinclair Oil Corp. v. EPA, (10th Cir. 1989) (permit applicant must first appeal permit to chief judicial officer before seeking judicial review)

Legal Environmental Assistance Foundation, Inc. v. Bay County, Florida, Civil Action No. 88-50142-LAC (March 9, 1993) (citizens' suit based on violation of permit dismissed where court held that permit had never become effective because permittee had requested a public hearing and that request had never been granted or denied by EPA; held that under EPA regulations all contested conditions of the permit are stayed until the hearing process is complete)

In re City of St. Joe and Florida Coast Paper Co., 7 E.A.D. 275 (EAB 1997) ("There is no administrative appeal as of right from a Regional Administrator's denial of an evidentiary hearing request." Slip op. at 11; "On appeal to the Board, a petitioner has the burden of demonstrating that the Region has made a clearly erroneous decision or an exercise of discretion or policy that is important and therefore should be reviewed." Slip op. at 12)

In re Florida Pulp and Paper Ass'n & Buckeye Florida, L.P., 6 E.A.D. 49, 51 (EAB

1995) (no administrative appeal as of right from a Regional Administrator's denial of an evidentiary hearing request; "Ordinarily a petition for review is not granted unless the Regional Administrator's decision is clearly erroneous or involves an exercise of discretion or policy that is important and should therefore be reviewed by the Environmental Appeals Board.")

In re J & L Specialty Products Corp., 5 E.A.D. 31, 41 (EAB 1994) (no appeal as of right from the Regional Administrator's decision)

In re City of Hollywood, Fla., 5 E.A.D. 157, 159 (EAB 1994) (no administrative appeal as of right from a Regional Administrator's denial of an evidentiary hearing request)

In re General Electric Co. Hooksett, New Hampshire, 4 E.A.D. 468 (EAB 1993) (under the rules governing an NPDES proceeding, there is no appeal as of right from the Regional Administrator's decision; ordinarily a petition for review is not granted unless the Regional Administrator's decision is clearly erroneous or involves an exercise of discretion or policy that is important and should therefore be reviewed by the Environmental Appeals Board; petitioner has the burden of demonstrating that review should be granted; with respect to appeals under Part 124 regarding NPDES permits, Agency policy is that most permits should be finally adjudicated at the Regional level, citing 44 Fed. Reg. 32,887 (1979); while the Board has broad power to review decisions in NPDES permit cases, the Agency intended this power to be exercised "only sparingly." Id.; see 57 Fed. Reg. 5320, 5336 (1992))

In re City & County of San Francisco, 4 E.A.D. 559 (EAB 1993) (no appeal as matter of right from decision by RA; "Ordinarily, a petition for review is not granted unless the Regional Administrator's decision is clearly erroneous or involves an exercise of discretion or policy that is important, and should therefore be reviewed by the EAB." citing Sequoyah)

In re Puerto Rico Sun Oil, Inc., 4 E.A.D. 302 (EAB 1992), vacated, 8 F.3d 73 (1st Cir. 1993) (there is no appeal as a right from the RA's decision to issue a final permit; ordinarily a petition for review is not granted unless the RA's decision is clearly erroneous or involves an exercise of discretion or policy that is important, and should therefore be reviewed by the EAB. Id. at 5)

In re Sequoyah Fuels Corporation, 4 E.A.D. 215 (EAB 1992) (under the rules governing an [sic] NPDES permit proceeding, there is no appeal as of right from the Regional Administrator)

In re Miners Advocacy Council, 4 E.A.D. 40 (EAB 1992) (no appeal as matter of right from decision by RA; the petitioner has the burden of demonstrating that review should be granted)

In re Adcom Wire, d/b/a Adcome Wire Co., 4 E.A.D. 221, 228-29 (EAB 1992) ("[M]ere incorporation of hearing request in petition for review, without statement of 'supporting reasons' as required by Section 124.91(a)(1), is not sufficient to demonstrate clear error or important policy considerations.")

In re Lone Star Steel Co., 3 E.A.D.713 (CJO 1991) ("[A] petition for review of a permit is not normally accepted unless the decision is clearly erroneous or involves an exercise of discretion or policy that is important and therefore should be reviewed as a discretionary matter.")

In re Mayaguez Water Treatment Co., 4 E.A.D. 772, 779 (EAB 1993), aff'd sub nom, Puerto Rico Aquadcut & Sewer Auth. v. EPA, 35 F.3d 600 (1st Cir. 1994), cert. denied, 513 U.S. 1148 (1995) (review is discretionary)

In re 1989 NPDES Permits for Alaska Placer Miners et al., 1990 EPA App. LEXIS 61 at n.2 (CJO Sept. 4, 1990) ("[A] request alone cannot serve as a statement of the 'supporting reasons' for reviewing the Regional Administrator's decision . . . It is incumbent upon Petitioner in its petition to state why the denial of the request was improper.")

In re Star-Kist Caribe, Inc., 2 E.A.D. 758 (CJO 1989) (a petition for review is usually not granted unless the RA's decision is clearly erroneous or involves an important policy issue or exercise of discretion)

In re Georgetown Kentucky Municipal Water and Sewer Services, 1987 U.S. EPA App. LEXIS 21 (CJO 1987) (review is discretionary)

In re Champion International Corp., NPDES Docket No. NC0000272 (ALJ Yost Feb. 12, 1992) (Whether or not the permitting Agency complied with this regulation is a procedural one to be determined by an examination of the facts in the record; where the Agency has made a prima facies case on any issue, the burden shifts to the one who raised it to prove his case pursuant to 40 CFR § 124.85(a)(3))

See also JUDICIAL REVIEW; NPDES PERMITS: Stays; Evidentiary Hearings

C. Challenges to Permit in Enforcement Proceeding

33 U.S.C. § 1369(b)(2) (dischargers may not challenge the conditions of a valid NPDES permit in an enforcement proceeding)

General Motors v. EPA, 168 F.3d 1377, 48 ERC 1257 (D.C. Cir. 1999) (upheld ruling by EAB that General Motors violated its storm water permit and General Motors cannot collaterally attack the state-issued permit in an EPA enforcement proceeding; "[P]recluding collateral attacks ensures that 'the States [have] the opportunity as a threshold matter to address objections' to the permits they issue. . . . If the EPA cannot preclude a collateral attack upon a state-issued permit, then it will find enforcement proceedings burdened by all manner of objections to the state proceedings leading up to issuance of the permit. Enforcement will become a protracted rather than an expedited undertaking.")

Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 77-78 (3d Cir. 1990) (§ 309(b)(2) prohibits judicial review in any civil

enforcement proceeding of any action of the administrator for which review could have been obtained in an NPDES permit proceeding; "By failing to challenge a permit in an agency proceeding, PDT has lost `forever the right to do so, even though that action might eventually result in the imposition of severe civil or criminal penalties.'")

Texas Mun. Power Agency v. EPA, 836 F.22d 1482, 1484-85, 27 ERC 1249 (5th Cir. 1988) ("Congress intended that anyone wishing to challenge the terms of an NPDES permit must do so within the period prescribed by section 509(b)(1) or 'lose forever the right to do so, even though that action might eventually result in the imposition of severe civil or criminal penalties.' The rule is 'now or never.' If no timely challenge is filed, the permit stands until its expiration-at most, five years.")

Sierra Club v. Union Oil Co., 813 F.2d 1480 (9th Cir. 1987), vacated on other grounds, 485 U.S. 931 (1988), opinion reinstated, 853 F.2d 667 (9th Cir. 1988) (defendant could not challenge the terms of its permit in the enforcement lawsuit brought against it by Sierra Club because it had not exhausted its administrative remedies with the State of California, which had issued the permit)

United States v. Gulf States Steel Inc., 1999 U.S. Dist. LEXIS 8834 (N.D. Ala. 1999) (held permit limits on internal waste streams enforceable and should have been challenged when the permit was issued, not in the action to enforce the permit)

United States v. Avatar Holdings Inc., 42 ERC 1902 (M.D. Fla. 1995) (owner may not challenge stringency of discharge limits in context of enforcement action)

Public Interest Research Group of N.J. v. Circuit Foil USA, Inc., 1993 U.S. Dist. LEXIS 4875, 4945, 37 ERC 1331 (D.N.J. 1993) (§ 509(b)(2) bars evidence concerning the propriety of defendant's permit limitations)

California Public Interest Research Group v. Shall Oil Co., 840 F. Supp. 712, 718 (N.D. Cal. 1993) ("any challenge to effluent limits in an NPDES permit presents a matter for the [Calif.] Water Board, not this Court, to address")

Public Interest Research Group of N.J., Inc. v. Magnesium Elektron, Inc., 34 ERC 2077, 2084 (D.N.J. 1992) (defendant should have challenged measurement procedures as inappropriate within 30 days of issuance of permit through administrative process and state courts)

United States v. City of Beaumont, 786 F. Supp. 634, 35 ERC 1106 (E.D. Tex. 1992) (city ordered to pay $400,000 for failure to implement pretreatment program; city cannot challenge pretreatment program provisions in discharge permit in context of enforcement action)

Public Interest Research Group v. Yates Indus., Inc., 757 F. Supp. 438, 445-46 (D.N.J. 1991) (defendant may not challenge permit provision except through administrative review)

Legal Environmental Assistance Foundation, Inc. v. Board of County Commissioners of

Bay County, Fl., Civ. No. 88-50142-RV (Oct. 30, 1989) (dischargers may not challenge the conditions of a valid NPDES permit in an enforcement proceeding)

Connecticut Fund for the Environment v. Raymark Industries, 631 F. Supp. 1283, 1285 (D. Conn. 1986) (granting summary judgment against defendant where defendant had failed to pursue state administrative appeals to challenge permit conditions)

Connecticut Fund for the Environment v. Job Plating Co., 623 F. Supp. 207, 216 (D. Conn. 1985) ("defendant did not commence an administrative challenge to the NPDES permit within 30 days of its issuance" as allowed by state law and was therefore precluded from doing so in later citizen suit)

United States v. Metropolitan District Commission, 23 ERC 1350 (D. Mass. 1985) ("A reviewing court, presented with alleged violations, need not inquire into the wisdom of particular effluent limits or other conditions of an NPDES permit . . . The court need only ascertain that a permit has issued, and then compare the quantities of pollutants permitted by the permit with those listed on the DMRs.")

In re General Motors Corporation, Pontiac Fiero Plant, 7 E.A.D. 465 (EAB 1997), aff'd,168 F.3d 1377, 48 ERC 1257 (D.C. Cir. 1999) (respondent argued that the permit was void *ab initio* because the State of Michigan lacked the authority to issue the permit; EAB ruled that GM failed to exhaust its administrative remedies under State law and may not now raise objection to the permit; whatever Respondent's arguments as to any alleged lack of state authority, such assertions should have been raised to the State entity that issued the permit and not years later in the context of this enforcement proceeding)

In re General Motors Corp., No. CWA-A-O-011-93 (ALJ Hoya June 28, 1996), aff'd, 7 E.A.D. 465 (EAB 1997), aff'd,168 F.3d 1377, 48 ERC 1257 (D.C. Cir. 1999) (in enforcement action for 93 reported violations of permit on DMRs, defense rejected that permit was void ab initio because of mutual mistake by permit holder and the delegated state)

In re Easco Aluminum Corp., CWA-AO-V-13-89 (ALJ Harwood Aug. 16, 1991) (respondent may not defend in enforcement action on grounds that permit limits are wrong; recourse is to challenge permit when issued, slip op. at n. 9, citing Powell Duffryn)

Craig N. Johnston, Don't Go Near the Water: The Ninth Circuit Undermines Water Quality Enforcement, 24 Envt'l L. 1289, 1302-03 (1994) ("Federal enforcement proceedings are not the proper forum for determining the validity or appropriateness of permit conditions as it is well established that only state courts may review the validity of state-issued NPDES permits. Moreover, the time for such challenges is when the permit is issued.")

D. Compliance Schedules

33 U.S.C. § 1362(17) ("The term 'schedule of compliance' means a schedule of remedial measures including an enforceable sequence of actions or operations leading to

compliance with an effluent limitation, other limitation, prohibition, or standard.")

40 C.F.R. § 122.2 ("schedule of compliance" means a "schedule of remedial measures included in a 'permit,' including an enforceable sequence of interim requirements (for example, actions, operations, or milestone events) leading to compliance with the CWA and regulations")

40 C.F.R. § 122.41(l)(5) ("Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule of this permit shall be submitted no later than 14 days following each schedule date.")

40 C.F.R. § 122.47 (Schedules of Compliance)

40 C.F.R. § 125.3 (for existing sources, no compliance schedules for technology-based effluent limits if deadline for implementation of technology is past)

In re City of Ames, Iowa, 6 E.A.D. 498 (EAB 1996) (EPA argument that where city already mostly in compliance with renewed permit, no compliance schedule is allowed under 40 CFR § 122.47, which requires compliance "as soon as possible,"rejected by EAB; remanded for factual determination of whether city is in compliance with newer stricter permit limits)

In re City of Haverhill, Wastewater Division, 5 E.A.D. 211 (EAB 1994) (permit cannot include compliance schedule for water quality limits attributable to state water quality certification)

In re City of Hollywood, Fl., 5 E.A.D. 157, 163 n.8 (EAB 1994) ("A schedule of compliance, suggested by the City in its evidentiary hearing request, cannot be utilized in a permit to defer compliance 'beyond the applicable statutory deadline under the [Clean Water Act].' 40 C.F.R. § 122.47(a). Under the Act, no publicly owned treatment works may receive an extension of the deadline for compliance with secondary treatment standards beyond July 1, 1988. CWA § 301(i), 33 U.S.C. § 1311(i). Whether a schedule of compliance is appropriate as an enforcement matter is a separate question that we leave to the Region.")

In re Star Kist Caribe, Inc., 3 E.A.D. 172, 177 (CJO 1990), aff'd, (EAB 1992, Order Denying Modification Request) (CWA does not allow EPA to authorize unlawful discharges of pollutants by establishing compliance schedules in permits; "EPA may add a schedule of compliance to a permit when EPA is the permit issuer if a State has laid the necessary groundwork in its standards or regulations. In such circumstances, the schedule would be meeting the requirements of the State water quality standards, and therefore no basis would exist for challenging its validity.")

In re Star Kist Caribe, Inc., 2 E.A.D. 758, 762 (CJO 1989) (interpreting 40 CFR 122.47(a)(1), held that EPA does have authority to extend statutory deadlines for compliance with water-quality-based limits)

See also STATE CERTIFICATION: Compliance Schedules

E. Evidentiary Hearings

40 C.F.R. Part 124, Subpart E (Evidentiary Hearing for EPA-issued NPDES Permits and EPA-Terminated RCRA Permits)

Puerto Rico Aqueduct and Sewer Authority v. Browner, 35 F.3d 600, 39 ERC 1269 (1st Cir. 1994) (upheld EPA's denial of request for evidentiary hearing on grounds that the request did not present any genuine issues of material fact)

In re Portland Water District, 7 E.A.D. ___ (EAB 1997) (EAB upholds Regional Administrator's denial of an evidentiary hearing request on grounds that permit limit was attributable to State certification)

In re City of Port St. Joe and Florida Coast Paper Co., 7 E.A.D. 275 (EAB 1997) ("There are three threshold criteria [a request for an evidentiary hearing] must satisfy. First, it must meet the pleading requirements of Section 124.74(b)(1), which include the requirement that 'requests shall state each legal or factual question alleged to be at issue, and their relevance to the permit decision.' If an evidentiary hearing is based solely on an issue of law, the Regional Administrator must deny it; however, a hearing may be held if it is to resolve issues of law and fact that are interconnected . . . Second, the factual issues identified in the request [for a hearing] must be material issues of fact relevant to the issuance of the permit. . . Third, the petitioner ordinarily must have afforded the Regional Administrator a prior opportunity to resolve the issue for which an evidentiary hearing is requested." Slip Op. at 12-14 (citations omitted))

In re Ketchikan Pulp Co., 6 E.A.D. 675, 688 (EAB 1996) (held that KPC not entitled to an evidentiary hearing on TMDL issue because it was not properly raised during the public comment period; "Under 40 C.F.R. Part 124, in order to contest a final permit determination in an evidentiary hearing or to preserve an issue for review by the Board, "all reasonable ascertainable issues" must be raised by the close of the comment period. *See* 40 C.F.R. § 124.13. In addition, 40 C.F.R. § 124.76 provides that '[n]o issues shall be raised by any party that were not submitted to the administrative record . . . as part of the preparation of and comment on a draft permit unless good cause is shown for the failure to submit them.'")

In re Broward County Florida, 6 E.A.D. 535, 547-548 (EAB 1996) (to contest a final permit determination in an evidentiary hearing or to preserve an issue for review by the Board, all reasonably ascertainable issues must be raised by the close of the comment period)

In re Florida Pulp and Paper Ass'n & Buckeye Florida, L.P., 6 E.A.D. 49 (EAB 1995) ("[A]dherence to [the § 124.76] requirement is necessary to ensure that the Region has an opportunity to address potential problems with the draft permit before the permit becomes final . . .")

In re Town of Seabrook, 4 E.A.D. 806 (EAB 1993), aff'd sub nom., Adams v. EPA, 38 F.3d 43 (1st Cir. 1995) (unsupported assertions are not material issues of fact for purposes of granting an evidentiary hearing request)

In re Boise Cascade Corp., 4 E.A.D. 474, 485 (EAB 1993) (where a legal issue is "interlaced with" a factual issue, both issues may be decided at an evidentiary hearing)

In re Mayaguez Regional Sewage Treatment Plant, 4 E.A.D. 772 (EAB 1993), aff'd sub nom, Puerto Rico Aquadcut & Sewer Auth. v. EPA, 35 F.3d 600 (1st Cir. 1994), cert. denied, 513 U.S. 1148 (applicant did not raise a genuine issue of material fact to support the granting of an evidentiary hearing)

See also NPDES PERMITS: Appeals; Public Hearings; Stays

F. Exclusions from NPDES Permit Requirement

40 C.F.R. § 122.3 (activities not requiring NPDES permit)

Concerned Area Residents for the Environment v. Southview Farm, 34 F.3d 114, 120, 39 ERC 1385 (2d Cir. 1994) (agricultural storm water runoff has always been considered nonpoint source pollution)

Lake v. Kiebert, 790 F. Supp. 998, 1012 (D. Id. 1992) (discharge to wetland does not need an NPDES permit)

In re Ketchikan Pulp Co., 7 E.A.D. 605, 637 n. 53 (EAB 1998) (EPA knew how to specifically exclude discharges from permitting requirements of § 402 - see 40 C.F.R. § 122.3; since spills of conventional pollutants from stationary sources are not excluded under 122.3, those discharges are subject to the permit requirements)

In re Sequoyah Fuels Corp., 4 E.A.D. 215, 216 (EAB 1992) (land application of fertilizer as plant nutrient or nutritional chemical is an agricultural activity which is not covered by the NPDES program)

G. General Conditions/Non-Numeric Limits

PUD No. 1 of Jefferson Co. v. Washington State Dept. of Ecology, 511 U.S. 700, 715, 114 S. Ct. 1900, 1911, 128 L. Ed. 2d 716, 38 ERC 1593 (1994) ("As the Solicitor General points out, even 'criteria' are often expressed in broad, narrative terms, such as "there shall be no discharge of toxic pollutants in toxic amounts." . . . . In fact, under the Clean Water Act, only one class of criteria, those governing "toxic pollutants listed pursuant to section 1317(a)(1)," need be rendered in numerical form. See 33 U.S.C. § 1313(c)(2)(B) ; 40 CFR § 131.11(b)(2) (1993).")

Natural Resources Defense Council, Inc. v. EPA, 673 F.2d 400, 403 (D.C. Cir. 1982) (the definition of effluent limitation in § 502(11) refers to any restriction on amount of pollution discharged, thus including all restrictions, not only numeric ones)

EDF v. Costle, 568 F.2d 1369, 1380 (D.C. Cir. 1981) (when it is infeasible for EPA to derive numeric limitations to include as permit conditions, agency may issue permits with conditions designed to reduce the level of effluent discharges to acceptable levels)

United States Steel Corp. v. Train, 556 F.2d 822, 840 (7th Cir. 1977) (narrative, non-numeric water quality based permit condition which prohibited discharges causing receiving waters to exceed temperatures permissible under state water quality standards was valid and enforceable)

Natural Resources Defense Council, Inc. v. EPA, 806 F. Supp. 1263, 1276, 35 ERC 1947 (E.D. Va. 1992) ("[T]he Clean Water Act allows narrative criteria for some uses and numeric criteria for others. See Section 303(c)(2)(B).")

United States v. Louisiana-Pacific Corp., No. C 78-0567, slip op. at 4 (N.D. Cal. Sept. 26, 1990) (the Act precludes defendant from objecting to a narrative water quality based permit condition during an enforceable action, and thus the only question is whether condition was violated)

See also WATER QUALITY STANDARDS: Need to Incorporate into Permit as Effluent Limit

H. Internal Waste Streams

American Iron and Steel Inst. v. EPA, 111 F.3d 979, 996, 44 ERC 1769 (D.C. Cir. 1997) ("The statute is clear: The EPA may regulate the pollutant levels in a waste stream that is discharged directly into the navigable waters of the United States through a "point source"; it is not authorized to regulate the pollutant levels in a facility's internal waste stream.")

Public Service Co. of Colorado v. EPA, 949 F.2d 1063, 34 ERC 1273 (10th Cir. 1991) (permissible for EPA to require the monitoring of internal waste streams where it would be impractical or infeasible to monitor the effluent at the point of discharge to waters of the U.S., citing due deference cases)

Texas Municipal Power Agency v. EPA, 836 F.2d 1482, 1486-90, 27 ERC 1249 (5th Cir. 1988) (internal waste stream regulation falls within EPA's authority under the CWA to monitor and impose limitations on pollutants which eventually will be discharged into the waters of the United States)

Mobil Oil Co. v. EPA, 716 F.2d 1187, 1190, 19 ERC 2043 (7th Cir. 1983) ("The only interest Mobil could possible have in preventing EPA officials from sampling its untreated waste water is that Mobil might want to keep the EPA in the dark as much as possible about what pollutants are present in the water it dumps into the Des Plaines River and about how efficient its treatment processes are at cleaning its waste water of pollutants.")

United States v. Gulf States Steel Inc., 1999 U.S. Dist. LEXIS 8834 (N.D. Ala. 1999) (held permit limits on internal waste streams enforceable and should have been challenged when the permit was issued, not in the action to enforce the permit; defendant is liable because all internal outflow limitations were part of the permit to discharge to Black Creek, which is waters of the U.S., and defendant is required to comply with all terms of the permit)

I. Mandatory Duty to Issue Permit

Dedham Water Co. v. Cumberland Farms Dairy, 805 F.2d 1074 (1st Cir. 1986) (Kitlutsisti superceded by statute)

Garcia v. Cecos Int'l, Inc., 761 F.2d 76, 22 ERC 2018 (1st Cir. 1985) (disapproves of Kitlutsisti)

Cedar Point Oil Co. v. EPA, Civ. No. 3:93-cv-58WS (S.D. Miss. Sept. 30, 1996) (suit by permit applicant for mandamus ordering EPA to issue him a permit while a citizen suit for unpermitted discharge is pending against him rejected for lack of jurisdiction; held that CWA does not impose any duty on EPA to act on a pending NPDES application within any prescribed time period; "The Administrator has discretion either to issue an NPDES permit or to leave the discharger subject to the total proscription of § 1311(a).")

United States v. Tom-Kat Development, Inc., 614 F. Supp. 613, 614 n. 2 (D.C. Alaska 1985) ("In concluding that Tom-Kat's act of applying for the requisite federal permit did not statutorily prevent EPA from instituting this action against Tom-Kat, the court does not mean to imply it countenances EPA's apparent failure to process Tom-Kat's application in an expeditious manner. Had Tom-Kat petitioned the court for mandamus to require EPA to reach a determination on Tom-Kat's permit request, I may well have concluded such an action had merit.")

Kitlutsisti v. Arco Alaska, Inc., 592 F. Supp. 832, 839 (D. Alaska 1984), appeal dismissed without opinion, 772 F.2d 912 (9th Cir.1985) (CWA's requirement that all discharges covered by the statute must have a NPDES permit is "unconditional and absolute;" "[W]hen an action is illegal absent an agency-issued permit, the agency has a mandatory duty to act promptly upon license applications.")

See also DISCHARGE WITHOUT A PERMIT

J. Modifications

40 C.F.R. § 122.62 (Modification or revocation and reissuance of permits)

40 C.F.R. § 122.63 (Minor Modifications)

40 C.F.R. § 122.46(b) ("Except as provided in § 122.6, the term of a permit shall not be extended beyond the maximum duration specified in this section.")

5 U.S.C. § 558(c) (limits modifications to permit that have not expired)

Texas Municipal Power Agency v. EPA, 836 F.2d 1482, 27 ERC 1249 (5th Cir. 1988) ("Congress did not intend petitions for modification to provide a second chance for full review of an NPDES permit *after* the statute of limitations [§ 509] has run from the issue or renewal of the permit." Id. at 1251 (emphasis in original); "The language of both CWA section 402 and 40 C.F.R. § 122.62 make it clear that the EPA is not required to modify any NPDES permit." Id. at 1252)

Stoddard v. Western Carolina Regional Sewer Authority, 784 F.2d 1200, 1208 (4th Cir. 1986) (Sewer Authority not entitled to a retroactive modification of its NPDES permit)

Menzel v. County Utilities Corp., 712 F.2d 91, 19 ERC 2193 (4th Cir. 1983) (permit, once issued, will not be applied retroactively to insulate against past violations of the CWA)

Exxon Corp. v. Train, 554 F.2d 1310, 1315-17, 10 ERC 1209 (5th Cir. 1977) (§ 509(b)(1) gives the court jurisdiction, if timely petitioned, to review directly EPA denial of a requested modification)

Natural Res. Def. Council v. Outboard Marine Corp., 692 F. Supp. 801, 811 (N.D. Ill. 1988) (the court is obliged to enforce all permit restriction that remain in effect, without regard to the possibility that the Illinois Pollution Control Board will retroactively modify the 1983 permit)

Student Pub. Int. Res. Group v. Monsanto Co., 600 F. Supp. 1479, 1483 (D. N.J. 1985) (the pendency of a modification proceeding does not excuse violations of a permit prior to actual modification)

In re Borough of Chambersburg Wastewater Treatment Plant, Docket No. CWA-III-063 (ALJ Lotus, Feb. 4, 1994) (held that letter from delegated state to city requiring it to add a pretreatment program to its NPDES permit constituted a minor permit modification and the pretreatment program was enforceable)

S.Rep. No. 414, 92nd Cong., 2d Ses. 85, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3668, 3751 (discussing § 509 limits on judicial review of EPA action and the limited use of petitions for modification)

K. Prohibitions

40 C.F.R. § 122.4 (conditions under which no NPDES permit may be issued)

Arkansas v. Oklahoma, 503 U.S. 91, 34 ERC 1193 (1992) ("Since 1973, EPA regulations have provided that an NPDES permit shall not be issued 'when the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States.'")

Oklahoma v. EPA, 908 F.2d 595, 31 ERC 1741 (10th Cir. 1990) ("40 C.F.R. § 122.4 (d) expressly provides: 'No permit may be issued: . . . (d) When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States.'")

West Virginia Coal Assn. v. Reilly, 728 F. Supp. 1276 (S.D. Va. 1989) ("Permits may not be issued by a state under conditions that would violate applicable state water quality standards.")

L. Public Hearings

40 C.F.R. § 124.12(a) ("(1)The Director shall hold a public hearing whenever he or she finds, on the basis of requests, a significant degree of public interest in a draft permit(s); (2) The Director may also hold a public hearing at his or her discretion, whenever, for instance, such a hearing might clarify one of more issues involved in the permit decision. . .")

In re City of Fort Worth, 6 E.A.D. 392, 406-407 (EAB 1996) (denial by Region of public hearing request upheld; respondent failed to show that Region "clearly erred or abused its discretion in declining not to hold a public hearing.")

In re Genesse Power Station, 4 E.A.D. 832, 841 (EAB 1993) (no public hearing is required unless the permit issuer determines that there is strong public interest)

In re Avery Lake Property Owners Association, 4 E.A.D. 251, 252 (EAB 1992) ("The decision to hold a public hearing under 40 C.F.R. 124.12(a) is "largely discretionary.")

See also NPDES PERMITS: Evidentiary Hearings

M. Public Notice/Comment

40 C.F.R. § 124.10(a)(1)(ii) ("The Director shall give public notice that the following actions have occurred: . . . A draft permit has been prepared under § 124.12.")

40 C.F.R. § 124.10(b) ("Public Notice of the preparation of a draft permit . . . shall allow at least 30 days for public comment.")

40 C.F.R. § 124.13 (Obligation to raise issues and provide information during the public comment period.)

Amigos Bravos v. Molycorp Inc., 1998 U.S. App. LEXIS 28576 (10th Cir. 1998) ("Anyone who believes that any condition of a draft permit is inappropriate must raise all reasonably ascertainable issues and arguments in support of his position before the end of the comment period.")

Adams v. EPA, 38 F.3d 43, 51 (1st Cir. 1994) (good summary of public notice provisions; the procedural regulations governing the public comment period "are intended to alert the EPA to potential problems with the draft permit and to ensure it has an opportunity to address those problems before the permit becomes final." In promulgating the regulations, EPA "anticipated that most policy and technical issues would be decided as part of the public comment period, which is the most open, accessible forum possible and which comes at a stage where the Agency has the greatest ability to modify a draft permit.")

Shell Oil Co. v. E.P.A., 950 F.2d 741, 747 (D.C. Cir. 1991) ("The relationship between the proposed regulation and the final rule determines the adequacy of the notice. A difference between the two will not invalidate the notice so long as the final rule is a

`logical outgrowth' of the one proposed. If the deviation from the proposal is too sharp, the affected parties will not have had adequate notice and opportunity for comment.")

Manasuta-88, Inc. v. Thomas, 799 F.2d 687, 690 n.6 (11th Cir. 1986) (explanation of public notice provisions)

Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 546-47 (D.C. Cir. 1983) (final rules need only be a "logical outgrowth" of the proposed regulations)

N. State Certification

See STATE CERTIFICATION; WATER QUALITY STANDARDS

O. Stays

40 C.F.R. § 124.16 (Stays of Contested Permit Conditions) (general stay provision for various statutes)

40 C.F.R. § 124.60(c) (specific stay provision for NPDES permits; "If a petition for review of the denial of [an evidentiary hearing request] . . . is timely filed . . . the force and effect of the contested conditions of the final permit shall be stayed.")

Del Ackels v. EPA, 7 F.3d 862, 868, 37 ERC 2118 (9th Cir. 1993) (EPA lacks authority to stay conditions imposed by state cert)

Legal Environmental Assistance Foundation, Inc. v. Board of County Commissioners of Bay County, Florida, Civ. No. 88-50142-RV (Oct. 30, 1989) (the CWA does not provide that permit conditions are stayed by a mere request for an evidentiary hearing; on the contrary, the CWA clearly states that disputed conditions in a permit are stayed if the EPA grants a discharger's formal request for a hearing)

In re: GMC Delco Remy, Anderson, Indiana, 7 E.A.D. 136, 144 n.22 (EAB 1997) (challenge to termination date in permit may render all conditions in the permit stayed because all conditions arguably are tied to the expiration date, but the permit would remain in effect, albeit stayed, if the expiration date is challenged; "There is no suggestion in the cited regulations that the mere staying of permit provisions, or even all of them, renders the permit void and therefore legally nonexistent.")

In re City of Fort Worth, 6 E.A.D. 392, 403 n.10 (EAB 1996) ("Because Arlington has not challenged any condition contained in the permit, there is no reason to believe that any portion of the permit has been stayed pending resolution of this petition for review. See 40 C.F.R. § 124.60(c) (1))

In re City and County of San Francisco, 4 E.A.D. 559, 583 (EAB 1993) ("Under the unique procedures involving NPDES permits, § 124.15(b)(2) provides that an NPDES permit is simply not effective pending a request for an evidentiary hearing. Once the Regional Administrator acts on the hearing request it is possible that certain uncontested conditions may go into effect. However, the regulations contemplate that before any

uncontested conditions become enforceable, the Regional Administrator must clarify which conditions will become effective. ")

In the Matter of: Simpson Paper Company, Louisiana-Pacific Corp., 3 E.A.D. 541, 547 (EAB 1991) (effluent limit should be stayed where monitoring requirement is challenged because the two are inextricably intertwined)

61 Fed. Reg. 65268, 65281 (1996) (interpreting 40 C.F.R. § 124.16(c)(2))

NUCLEAR MATERIALS

40 C.F.R. § 122.2 (definition of "pollutant" exempts those substances "regulated under the Atomic Energy Act of 1954")

Train v. Colorado Public Interest Research Group, 426 U.S. 1, 25 (1976) (held that "the 'pollutants' subject to regulation under the [CWA] do not include source, byproduct, and special nuclear material, and that the EPA Administrator has acted in accordance with his statutory mandate in declining to regulate the discharge of these materials.")

Waste Action Project v. Dawn Mining Co., No. CV-96-00106-AAM (E.D. Wa. Aug. 30, 1996), aff'd, 137 F.3d 1426, 46 ERC 1257 (9th Cir. 1998) (held that discharges from uranium mine tailings piles exempted from definition of "pollutant" under CWA, citing Atomic Energy Act and EPA's regulation 40 C.F.R. 122.2)

See also "POLLUTANT"

OCEAN DISCHARGES (§ 403)

33 U.S.C. § 1343(a) and (c)(1) (an NPDES permit for discharge into a territorial sea or the ocean must incorporate Ocean Discharge Criteria)

40 C.F.R. Part 125 (Ocean Discharge Criteria)

Adams v. EPA, 38 F.3d 43, 47, 25 ELR 20396 (1st Cir. 1994) (EPA can rely on the presumption that by complying with state water quality standards, there will be no unreasonable degradation of the marine environment)

Natural Resources Defense Council, Inc. v. EPA, 863 F.2d 1420, 28 ERC 1609 (9th Cir. 1988) (if there is no way of ascertaining to what extent the discharge may result in the degradation of the environment, including the effect of disposal of pollutants on human health, marine life, aesthetic, recreational, and economic values as well as other considerations, then a permit should be denied)

American Petroleum Institute v. EPA, 787 F.2d 965, 38 ERC 1529 (5th Cir. 1986) (EPA is required by the CWA and its regulations to certify that any ocean discharge allowed by its permit will not cause an unreasonable degradation of the marine environment; there was insufficient

evidence to identify the impacts on environmentally important areas including foraging areas in the near shore zone for fish, birds, and mammals; area was also a critical habitat for "spawning, migration, and/or overwintering of the major subsistence species;" fish found near the shore migrate from fresh water streams to the sea, and thus find the near shore area an essential feeding zone; court found these conditions sufficient to justify denying a permit)

Pacific Legal Foundation v. Quarles, 440 F. Supp. 316, 10 ERC 1369 (D. Cal. 1977), aff'd sub nom., Kilroy v. Quarles, 614 F.2d 225, 14 ERC 1111 (9th Cir. 1980) ("The ocean's waters are in constant circulation, so that any discharge beyond any arbitrary limit, such as 3 or 12 miles, may reach the beaches of the United States. Thus, in considering the discharge effects, the Administrator [of the EPA] must consider the effect that the discharge may have elsewhere on the integrity of the marine systems. [The] Committee wishes to emphasize the need to preserve the ocean in as natural a state as possible at least until we understand its tolerances and characteristics, so that discharges permitted today will not irreversibly modify the oceans for future uses.")

45 Fed. Reg. 65942 (1980) (§ 403 is intended to "prevent unreasonable degradation of the marine environment and to authorize imposition of effluent limitations, including a prohibition of discharge, if necessary, to ensure this goal."

See also OCEAN DUMPING; SECONDARY TREATMENT WAIVERS

OCEAN DUMPING

33 U.S.C. § 1401 et seq. (Marine Protection, Research, and Sanctuaries Act of 1972)

40 C.F.R. Subchapter H (Ocean Dumping)

Clean Ocean Action v. York, 57 F. 3d 328, 40 ERC 1025 (3d Cir. 1995), aff'g, 861 F. Supp. 1203 (D.N.J. 1994) (Corps did not act arb. or cap. by issuing a permit to dump dredge spoils into ocean; plaintiffs failed to show that irreparable injury would result from dumping)

United States v. American Global Line, No. CR-94-0416 (N.D. Cal. Sept. 1, 1994) ($100,000 penalty paid by cruise ship owner for discharging over five tons of debris into the Pacific Ocean)

United States v. Reilly, 827 F. Supp. 1076, 24 ELR 20097 (D. Del. 1993), aff'd, 1994 U.S. App. LEXIS 19256 (3d Cir. 1994) (held that MPRSA's criminal provisions are general intent rather than specific intent crimes; government must prove that Reilly consciously engaged in the acts alleged; it need not prove that Reilly had knowledge of the statutes at issue)

S. Rep. No. 451, 92nd Cong. 2d Sess., reprinted in 1972 U.S.C.C.A.N. 4234, 4249 (in MPRSA, "The term 'knowingly violates' refers to a conscious act or conscious omission of the offender which amounts to a violation of the law, regulation or permit.")

See also OCEAN DISCHARGES

OIL AND GAS

33 U.S.C. §§ 1342(l)(2) (Storm water runoff from oil, gas and mining)

40 C.F.R. Part 435, Subpart D (coastal subcategory effluent limitation guidelines)

Texas Oil & Gas Assoc. v. EPA, 161 F.3d 923 (5th Cir. 1998) (EPA's effluent limit guidelines setting zero discharge limits for produced water and produced sand in Gulf and less strict standards in Cook Inlet upheld)

Citizens for a Better Environment v. Union Oil Co. of Calif., 83 F.3d 1111, 42 ERC 1737 (9th Cir. 1996) (held that conditions under which UNOCAL settled its state court challenge to its NPDES permit did not preclude a citizen suit to enforce the permit; the $780,000 settlement did not constitute assessment and payment of a penalty under a state law comparable to the CWA's administrative penalty provisions)

Sierra Club v. Cedar Point Oil Co., 73 F.3d 546, 41 ERC 1897 (5th Cir. 1996) (produced water held to be a pollutant; argument rejected that only EPA, not the courts, can determine what is a pollutant)

BP Exploration & Oil v. EPA, 66 F.3d 784, 41 ERC 1225 (6th Cir. 1995) (court upheld in total EPA's effluent limitation and new source performance standards for the offshore oil and gas industry; held that EPA made a reasonable decision based on empirical data in determining the appropriate method; "The overriding principle in our review of the final rule is that the agency has broad discretion to weigh all relevant factors during rulemaking. The CWA does not state what weight should be accorded to the relevant factors; rather, the Act gives EPA the discretion to make those determinations.")

Natural Resources Defense Council, Inc. v. EPA, 863 F.2d 1420 (9th Cir. 1988) (EPA decision to not require reinjection held not arb. & cap.; state jurisdiction for 401 certification purposes ends at 3 miles off shore)

Marathon Oil Co. v. EPA, 830 F.2d 1346, 26 ERC 1907 (5th Cir. 1987) (permit requirement that outfalls be submerged not arbitrary or capricious)

American Petroleum Institute v. EPA, 661 F.2d 340, 16 ERC 1690 (5th Cir. 1981) (API challenge to final effluent guidelines for oil and gas extraction point source category)

Citizens for a Better Environment v. Union Oil Co. of California, 861 F. Supp. 889, 904-905, 39 ERC 1393 (N.D. Cal. 1994), aff'd, 83 F.3d 1111, 42 ERC 1737 (9th Cir. 1996) (plaintiff held not preempted by no action assurance issued to defendant by state because state law was not comparable to § 309(g), i.e., it did not include penalties)

Natural Resources Defense Council, Inc. v. EPA, 781 F. Supp. 806, 34 ERC 1471 (D.D.C. 1992) (action to enforce consent decree rendered moot by subsequent proposal to comply by EPA which substantially complied with decree; consent decree set deadlines for agency to propose CWA regulations for offshore oil and gas industry)

64 Fed. Reg. 5487 (1999) (proposed effluent guidelines for synthetic muds)

61 Fed. Reg. 66,085 (1996) (final effluent guidelines for the Coastal Subcategory; set zero discharge limit on produced water and drilling wastes)

60 Fed. Reg. 9,428 (1995) (proposed effluent guidelines for the Coastal Subcategory)

58 Fed. Reg. 6964 (1993) (solicitation of public comments on 3-year compliance schedule for meeting zero discharge limit in Gulf)

57 Fed. Reg. 60,926 (1992) (proposed general permit for oil and gas facilities in coastal Louisiana and Texas; set a zero discharge limit on produced water and drilling wastes for all coastal oil and gas facilities except those located in Cook Inlet, Alaska; also set a zero discharge limit on produced sand for all coastal oil and gas facilities, including those located in Cook Inlet)

44 Fed. Reg. 22,069 (1979) (effluent limit guidelines for coastal subcategory based on BPT)

41 Fed. Reg. 12454 (1993) (Oil and Gas Extraction Point Source Category; Offshore Subcategory Effluent Limitations Guidelines and New Source Performance Standards)

OIL SPILLS (§ 311)

33 U.S.C. § 1321(b) (6) (administrative penalty provisions)

33 U.S.C. § 1321(b) (7) (civil penalty provisions: "Any person who is the owner, operator, or person in charge of any vessel, onshore facility, or offshore facility from which oil or hazardous substance is discharged in violation of paragraph (3), shall be subject to a civil penalty in an amount up to $25,000 per day of violation or an amount up to $1,000 per barrel of oil or unit of reportable quantity of hazardous substances discharged.")

33 U.S.C. § 1321(b) (11) ("Civil penalties shall not be assessed under both this section and section 1319 of this Title for the same discharge.")

40 C.F.R. Part 109 (Criteria for State, Local and Regional Pollution Contingency Plans)

40 C.F.R. Part 110 (Discharge of Oil)

40 C.F.R. Part 112(Oil Pollution Prevention)

40 C.F.R. Part 116 (Designation of Hazardous Substances)

40 C.F.R. Part 117 (Determination of Reportable Quantities of Hazardous Substances)

40 C.F.R. § 122.28(c) (Offshore oil and gas facilities) (EPA shall issue general NPDES permits to cover discharges from offshore oil and gas facilities)

40 C.F.R. Part 138 (Financial Responsibility for Water Pollution)

33 C.F.R. Part 133 (Oil Spill Liability Trust Fund: State Access)

33 C.F.R. Part 136 (Oil Spill Liability Trust Fund: Claims Procedures; Designation of Source; and Advertisement)

United States v. Ward, 448 U.S. 242, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (defendant's report of oil spill compiled in compliance with CWA could be used to establish liability for civil penalties under Act)

Gatlin Oil Co. v. United States, 169 F.3d 207, 48 ERC 1208 (4th Cir. 1999) (recovery from Oil Spill Liability Trust Fund limited to cleanup from Discharge or threat to navigable waters or shoreline)

United States v. Hyundai Merchant Marine Co., 172 F.3d 1187, 48 ERC 1385 (9th Cir. 1999) (held that ship owner liable for Coast Guard $1.7 million in response costs to potential oil spill from beached ship even though no major oil spill occurred; since the beaching "contained the seeds of a major ecological disaster," the court reasoned, "it was only prudent for the government to rush personnel and equipment to the scene and maintain them there until the threat was over.")

Bouchard Transp. Co. v. Updegraff, 147 F.3d 1344, 47 ERC 1353 (11th Cir. 1998) (once state submits itself to jurisdiction of federal court for cost-recovery purposes, it has waived it 11th Amendment immunity from countersuit by ship owners for liability under maritime limitation of liability)

International Assoc. of Independent Tanker Owners v. Washington, 148 F.3d 1053, 46 ERC 1956 (9th Cir. 1998) (two of 16 Washington State oil spill regulations pertaining to oil tanker design and construction held to be preempted by OPA)

Bouchard Transp. Co. v. Florida DEP, 91 F.3d 1445 (11th Cir. 1996) (held that dist. court abused its discretion by failing to address Florida's 11th amendment immunity defense before ordering the state and shipowners to mediate claims arising from a petroleum spill)

Montauk Oil Transportation Corp. v. Tug El Zorro Grande, 54 F.3d 111 (2d Cir. 1995) (held that owner of a barge from which oil spilled is entitled to indemnification from the responsible party for a $3,500 civil penalty assessed under 311(b)(6); § 311(h) provides for indemnification for "liabilities," which include 311(b)(6) civil penalties)

Boca Ciega Hotel v. Bouchard Transp. Co., 51 F.3d 235 (11th Cir. 1995) (before a private lawsuit can be filed under OPA, it is mandatory that all claims for removal costs or damages be presented first to parties responsible for the spill)

Union Petroleum Corp. v. United States, 651 F.2d 734, 744 & n.27, 16 ERC 1339 (Ct. Cl. 1981) (train yard operator not liable for cleanup costs of Coast Guard in response to spill caused by vandals where train yard took reasonable precautions to prevent spill; the term "actual costs incurred" establishes liability for "the full amount of the Coast Guard's costs, even if those costs were unreasonable.")

United States v. Massachusetts Bay Transportation Authority, 614 F.2d 27 (1st Cir. 1980) (for

purposes of § 311, municipalities fall within the definition of "person," and therefore can be "owners or operators" liable for violations of § 311, even though the definition of "person" in § 311 includes corporations and individuals but not municipalities or other government entities; the broader definition of "person" that is contained in § 502 of the Clean Water Act applies to § 311, and the narrower definition in § 311 itself is not intended to be restrictive)

United States v. Chevron Oil Co., 583 F.2d 1357, 12 ERC 1726 (5th Cir. 1978) (penalty action based on sheen test to show discharge of oil in "harmful quantity" struck down on grounds that sheen test exceeded statutory authority)

United States v. Tex Tow, 589 F.2d 1310, 1313, 12 ERC 1593 (7th Cir. 1978) (refusing to read a third-party defense into § 311's civil penalty provisions because they impose absolute liability and the cause of the spill is the polluting enterprise, not the conduct of a third party)

Apex Oil Co. v. United States, 530 F.2d 1291, 1293, 8 ERC 1906 (8th Cir. 1976), cert. denied, 429 U.S. 827 (1976) (oil co. that failed to report spills into Miss. R. violated 311(b)(5) which requires "person in charge" of facility to report such spills, since "person in charge" encompasses corporations as well as individuals; an entity is an operator of a facility where it has the power or capacity to (i) make timely discovery of discharges, (ii) direct the activities of persons who control the mechanisms causing the pollution, and (iii) prevent and abate damage)

United States v. Mobil Oil Corp., 464 F.2d 1124, 1127, 4 ERC 1405 (5th Cir. 1972) (interpreting definition of "owner or operator" in 33 U.S.C. § 1321(a)(6), corporate owner of oil facility is considered "person in charge" within meaning of 33 U.S.C. § 1161(b)(4) for purposes of enjoying immunity from criminal prosecution for self-reported oil discharges to waters of U.S.)

BP Exploration v. U.S. Dep't of Transportation, 44 F. Supp.2d 34 (D.C. 1999) (the Coast Guard administratively assessed a $5,000 penalty for an oil spill. The Respondent argued that the Coast Guard's reliance on its Marine Safety Manual in support of the penalty amount was impermissible because the Manual was an invalid rule or regulation that was not promulgated in accordance with the APA's notice and comment requirements; court found that the Manual was not a rule or regulation, but was merely agency guidance, and therefore did not trigger the APA requirements. The basis of this conclusion was that the Manual did not purport to be binding on the Coast Guard, respondents, or courts, but purported to be merely As a guide for consistent and uniform administration of agency activities.)

Marathon Oil Co. v. EPA, No. 97-CV-267-D (D. Wyo. Aug. 20, 1998) (EPA not limited to enforcement of oil spills under CWA § 311; Agency is entitled to due deference in its interpretation that the CWA allows enforcement under either 309 or 311, but not both)

United States v. Murphy Exploration and Production Co., 939 F. Supp. 489 (E.D. La. 1996) (held that trust fund can recover costs of monitoring a responsible party that is conducting the oil spill removal; costs incurred that are arb. & cap. are not recoverable, rejecting government argument that "all" costs are recoverable)

United States v. V-1 Oil Co., No. CIV96-0454-E-BLW (D. Id. 1996) (under authority of § 311 and RCRA §§ 6973 and 6991d court granted TRO to allow EPA to conduct site assessment on property of underground storage tank owner to determine cause and extent of gasoline

contamination that had infiltrated sewer system and was discharging ultimately from POTW)

Complaint of Ballard Shipping Co., 772 F. Supp. 721 (D. R.I. 1991) (where State of Rhode Island asserted a cause of action for recovery of costs under § 311(f) for its cleanup of a heating oil spill, court held that CWA does not give individual states a cause of action to recover cleanup costs pursuant to § 311; only federal government can sue)

Kyoei Kaiun Kaisha, Ltd. v. M/V Bering Trader, 760 F. Supp. 174 (W.D. Wa. 1991) (where the U.S. initiated a § 311 action to recover the costs of cleanup from an oil spill, and alleged common law theories of negligence, maritime negligence, unseaworthiness, nuisance, and quasi-contract, the court held that the government could recover expenses only under § 311 because it preempts the common law and Refuse Act Claims)

Quaker State Corp. v. U.S. Coast Guard, Civ. A. No. 87-55 ERIE, 1990 Westlaw 272708 (W.D. Pa. 1990) (§ 311(g) third party liability attaches only when the third party is the sole cause of an oil discharge)

Commonwealth of Puerto Rico v. SS Zoe Colocotroni, 456 F. Supp. 1327, 1374 (D. P.R. 1978), aff'd in part, vacated in part, 628 F.2d 652, 15 ERC 1675 (1st Cir. 1980) (recovery under the CWA is measured by the actual costs regardless of their reasonableness), quoting Burgess v. M/V Tamano, 564 F.2d 964, 983 (1st Cir. 1977)

United States v. Beatty Inc., 401 F. Supp. 1040, 1045, 6 ELR 20119 (W.D. Ky. 1975) (government can recover actual costs even if expenses are not reasonable or if fines are "excessive or overkill on the part of the government")

63 Fed. Reg. 9464 (1998) (Notice of Proposed Rulemaking: Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits)

62 Fed. Reg. 63811 (1997) (Notice of Proposed Rulemaking: Oil Pollution Prevention and Response; Non-Transportation Related Onshore and Offshore Facilities)

62 Fed. Reg. 13514 (1997) (Notice of Proposed Rulemaking: Civil Monetary Penalty Inflation Adjustment Rule)

61 Fed. Reg. 69359 (1996) (Notice of Proposed Rulemaking: Civil Monetary Penalty Inflation Adjustment Rule)

61 Fed. Reg. 7419 (1996) (Notice of Proposed Rulemaking: Oil Discharge Program; Editorial Revision of Rules)

59 Fed. Reg. 49005 (1994) (Notice of Proposed Rulemaking: Oil Pollution Prevention; Non-Transportation-Related Onshore Facilities)

59 Fed. Reg. 47383 (1994) (Notice of Proposed Rulemaking: National Oil and Hazardous Substances Pollution Contingency Plan)

59 Fed. Reg. 34069 (1994) (Notice of Proposed Rulemaking: Oil Pollution Prevention; Non-Transportation-Related Onshore Facilities)

58 Fed. Reg. 54702 (1993) (Notice of Proposed Rulemaking: National Oil and Hazardous Substance Pollution Contingency Plan)

58 Fed. Reg. 19030 (1993) (Notice of Proposed Rulemaking: Oil Pollution Prevention; Non-transportation-related Onshore Facilities)

58 Fed. Reg. 8824 (1993) (Notice of Proposed Rulemaking: Oil Pollution Prevention; Non-transportation-related Onshore Facilities)

56 Fed. Reg. 54612 (1991) (Notice of Proposed Rulemaking: Oil Pollution Prevention; Non-transportation-related Onshore and Offshore Facilities)

56 Fed. Reg. 29996 (1991) (Notice of Proposed Rulemaking: Administrative Assessment of Penalties Where Hearing on Record under APA § 554 Is Not Required)

52 Fed. Reg. 10711 (1987) (Notice of Final Rulemaking: Water Programs; Discharge of Oil)

38 Fed. Reg. 34163 (1973) (Notice of Final Rulemaking: Oil Pollution Prevention; Nontransportation Related Onshore and Offshore Facilities

Oil Pollution Act Deskbook, Environmental Law Institute (1991)

Liability, under sec. 311(b)(6) of Federal Water Pollution Control Act (33 U.S.C.S. § 1321(b)(6)), of owner, operator, or person in charge of onshore or offshore facility, or vessel, for discharge of oil or hazardous substance, 55 A.L.R. Fed. 141, secs. 4, 9, 12, 13, 16, 18

See also SPCC

OWNER/OPERATOR LIABILITY

A. Generally

33 U.S.C. § 1319(f) (Administrator may bring an action in district court "for appropriate relief, including, but not limited to, a permanent or temporary injunction, against the owner or operator of such treatment works . . . Such court shall have jurisdiction to restrain such violation and to require the owner or operator of the treatment works and the owner or operator of the source to take such action as may be necessary to come into compliance with this title.")

33 U.S.C. § 1321(a)(6) (definition of "owner or operator" under § 311)

United States v. Bestfoods, 118 S. Ct. 1876, 141 L. Ed. 2d 43, 46 ERC 1673 (interpreting CERCLA, held that parent corporation can be liable for acts of subsidiary - - without piercing the corporate veil - - if the parent directly controls the operation of the

subsidiary, and is therefore an "operator")

San Francisco Baykeeper v. City of Saratoga, 1998 U.S. App. LEXIS 3942 (9th Cir. 1998) (City may be liable for storm water discharges from storm drain owned by CALTRANS, but which was located on City property, if it is found that city was an operator of the drain under 40 C.F.R. 122.26(a)(3)(vi))

Committee to Save Mokelumne River v. East Bay Util., 13 F.3d 305, 309 (9th Cir. 1993) (defendant held to be "operator" of mine despite lack of ownership interest where wholly-owned and financially-dependent subsidiary performed all work at mine)

Apex Oil Co. v. United States, 530 F.2d 1291, 1293, 8 ERC 1906 (8th Cir. 1976), cert. denied, 429 U.S. 827 (1976) (oil co. that failed to report spills into Miss. R. violated 311(b)(5) which requires "person in charge" of facility to report such spills, since "person in charge" encompasses corporations as well as individuals; An entity is an operator of a facility where it has the power or capacity to (i) make timely discovery of discharges, (ii) direct the activities of persons who control the mechanisms causing the pollution, and (iii) prevent and abate damage)

United States v. Mobil Oil Corp., 464 F.2d 1124, 1127, 4 ERC 1405 (5th Cir. 1972) (interpreting definition of "owner or operator" in 33 U.S.C. § 1321(a)(6), corporate owner of oil facility is considered "person in charge" within meaning of 33 U.S.C. § 1161(b)(4) for purposes of enjoying immunity from criminal prosecution for self-reported oil discharges to waters of U.S.)

United States v. Avatar Holdings Inc., No. 93-282-CIV-FTM-21 (D.Fla. 8/20/96) (parent corporation that owned three WWTP's held not liable for violations at the plants; "The evidence as a whole shows that Avatar Holdings' role in the operations of the three Florida Cities' facilities was limited to overall financial review and long-term strategic planning, as Avatar Holdings' officials were concerned with the large costs and budgetary planning. . . The fact that Avatar Holdings officials were informed of environmental compliance issues and discussed the costs of large projects that would eventually eliminate violations does not amount to the type of action or direction for which liability arises under the Clean Water Act.")

Friends of the Sakonnet v. Dutra, 738 F. Supp. 623, 32 ERC 1157, 1161-1164, 21 ELR 20055 (D.N.J. 1990) (homeowners discharged to private wastewater treatment system installed by developers on land subsequently bought by third party; no permit every obtained for discharge from wastewater treatment system; developers held liable for discharges - decision turned on interpretation of point source)

State of Idaho v. Bunker Hill, 635 F. Supp. 665, 672, 24 ERC 1524 (D. ID 1986) (Delaware company held liable for costs of clean up under CERCLA even though site was operated by subsidiary in Idaho because: (1) Del. co. controlled economic and managerial operations of Idaho sub., and (2) Delaware co. owned Idaho sub., and controlled sub.'s disposal activities at waste site)

United States v. Ciampitti, 583 F. Supp. 483 (D.N.J. 1984) (Ciampitti was the designated

agent and representative for the corporate defendant charged with illegally filling wetlands; held that Ciampitti had both control of the filling activities and knowledge of the CWA violations)

United States v. Frezzo Brothers, Inc., 461 F. Supp. 266 (E.D.Pa. 1978), aff'd, 602 F.2d 1123 (3d Cir. 1979) (the ability to control the facility, coupled with knowledge of the violation, is sufficient to impose liability under the CWA)

In re Urban Drainage and Flood Control District and Kemp & Hoffman, Inc., Docket No. CWA-VIII-94-20-PII (ALJ Vanderheyden, February 14, 1995) (EPA sued City, which owned site, Irrigation District that organized unpermitted fill of wetlands on behalf of City, and contractor who actually performed work; dismissed this action against City upon EPA's failure to establish a prima facie case; held that liability will attach under § 301 if the Respondent is the legal cause of the discharge; causation requirement is fulfilled if Respondent had responsibility, control or authority over the discharges; EPA failed to establish that the City was the legal cause of the discharge) Cf. later decision by ALJ Pearlstein)

B. Consultant/Contractor Liability

United States v. Lambert, 1996 U.S. Dist. LEXIS 1343 (S.D.W.Va. Jan. 31, 1996) (owner of property and contractor who performed work liable for illegal dredge and fill; "The CWA imposes liability on the party who actually performed the work and on the party with responsibility for or control over performance of the work.")

United States v. Sargent County Water Resources Dist., 876 F. Supp. 1081, 40 ERC 1710 (D.N.D. 1992) (engineering consultant held not liable for unpermitted work on ditch because of insufficient involvement in alleged violation)

United States v. Van Leuzen, 816 F. Supp. 1171, 1175, 36 ERC 1993 (S.D. Tex. 1993) (contractor held liable for discharging fill into a wetland without a permit although he had been told by the landowner that the Corps permit had been obtained)

United States v. Board of Trustees of Fla. Keys Community College, 531 F. Supp. 267, 274, 18 ERC 1188 (S.D. Fla. 1981) (college and contractor that filled slough without a permit both held liable for unpermitted fill; defense of contractor that it relied in good faith on owner's representation that permits were in place not a defense to unpermitted filling of slough; "[C]ivil liability under the [CWA and Rivers and Harbors Act] is predicated on either (1) performance, or (2) responsibility for or control over performance of the work, in the absence of the necessary federal permits.")

United States v. Weisman, 489 F. Supp. 1331, 17 ERC 1580 (M.D. Fla. 1980) (property owner and consultant held liable under CWA and RHA for work on road project without 404 permit; consultant had applied for permit on behalf of owner, but work went ahead before permit was issued)

In re Urban Drainage and Flood Control District; Kemp & Hoffman, Inc.; and City of Lafayette, Docket No. CWA-VIII-94-20-PII (ALJ Pearlstein June 24, 1998) (held that

contractor who performed work in stream channel for flood control district is strictly liable along with district)

C. Joint and Several Liability

United States v. Lambert, 1996 U.S. Dist. LEXIS 1343 (S.D.W.Va. Jan. 31, 1996) (owner of property and contractor who performed work liable for illegal dredge and fill; "The CWA imposes liability on the party who actually performed the work and on the party with responsibility for or control over performance of the work.")

United States v. Board of Trustees of Fla. Keys Community College, 531 F. Supp. 267, 274, 18 ERC 1188 (S.D. Fla. 1981) (college and contractor that filled slough without a permit both held liable for unpermitted fill; defense of contractor that it relied in good faith on owner's representation that permits were in place not a defense to unpermitted filling of slough; "[C]ivil liability under the [CWA and Rivers and Harbors Act] is predicated on either (1) performance, or (2) responsibility for or control over performance of the work, in the absence of the necessary federal permits.")

In re Corporacion para el Desarrollo Economico y Futuro de la Isla Nena, (ALJ Biro July 15, 1998) ($75,000 awarded jointly and severally against three defendants for CWA violations after one settled for $40,000 and the other two failed to file an answer to the complaint; EPA had only asked for $35,000 against the remaining two in its default motion, giving them credit for the $40,000 settlement)

In Re Friendswood Development Co., USEPA NPDES Permit Op. No. 43 (1976) (EPA as statutory authority to provide in NPDES permit that industrial users of waste water treatment plant be jointly and severally responsible with plant for compliance with provisions of permit issued for treatment plant)

D. Lessor/Lessee Liability

40 C.F.R. § 122.21(b) ("When a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit.")

In re Donald J. Aardema and Joe Pacheco, Docket No. 1091-08-06-309(g) (Order Granting Partial Summary Determination, June 24, 1992, J. Hamill) (if a lessee is in possession and control of real property from which pollutants are discharged in violation of the CWA, then an owner who did not participate in the activity giving rise to the discharge is not liable for the CWA violation merely by reason of ownership of the land)

E. Lender Liability

Rhode Island v. Q.L.C.R.I., 32 ERC 1661 (D.N.J. 1990) (court denied motion to dismiss where credit union, which is mortgagee of property where CWA violations are occurring, was held to have influence and control over actors principally responsible for violations because the credit union knew of the possible pollution problem at the site and could have conditioned the mortgage on the fixing of the problem)

See also "PERSON"

PENALTIES (§ 309)

A. Generally

33 U.S.C. § 1311(b) ("The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. . .")

33 U.S.C. § 1311(g) ("Whenever on the basis of any information available -

(A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or has violated any permit condition or limitation implementing any of such section in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by a State, or

(B) the Secretary of the Army . . . . finds that any person has violated any permit condition or limitation in a permit issued under section 1344 of this title by the Secretary,

the Administrator or Secretary , as the case my be, my, after consultation with the state in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.")

Tull v. United States, 481 U.S. 412, 422-23, 107 S. Ct. 1831, 1838, 95 L. Ed. 2d 365 (1987) ("The legislative history of the Act reveals that Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties." 123 Cong. Rec. 39191 (1977) (Sen. Muskie citing EPA memorandum outlining enforcement policy); a court can require retribution for wrongful conduct based on the seriousness of the violations, the number of prior violations, and the lack of good faith efforts to comply with the relevant requirements; purpose of civil penalties under the Act is threefold: retribution, deterrence and restitution)

Sierra Club v. Simkins Industries, Inc., 847 F.2d 1109, 1113 (4th Cir. 1988), cert. denied, 491 U.S. 904 (1989) (imposing civil penalties on one polluter "can be an important deterrence against future violations.")

United States v. Gulf Park Water Co., 972 F. Supp. 1056, 46 ERC 1877 (S.D. Miss. 1997) ("Enforcement of the CWA is designed to be simple, speedy and straightforward.")

United States v. Harrison Warehouse Services Co., Inc., No. 1:90CV82 (N.D. W.V. 1995) slip op. at 22 (CAA; "The primary purpose of the penalty is to deter future violations. Accordingly, the Court should impose a fine substantial enough to hurt both [defendants] but not so great as to obliterate them.")

Hawaii's Thousand Friends v. Honolulu, 821 F. Supp. 1368, 1394, 37 ERC 1398 (D.

Haw. 1993) (penalty must be high enough to ensure that the discharger cannot absorb penalty as cost of doing business)

Atlantic States Legal Foundation, Inc. v. Universal Tool & Stamping Co., Inc., 786 F. Supp. 743, 753, 35 ERC 1308, 1316 (N.D. Ind. 1992) ("To further the objective of the Act, the amount of the civil penalty must be high enough such that the penalty does not merely become a cost of doing business. If not, it becomes more profitable to pay the penalty rather than incur the costs of compliance.")

United States v. A.A. Mactal Construction, 1992 U.S. Dist. LEXIS 21790 (D.Kan. 1992) (CAA case; "deterrence is effective only to the extent that the risk of incurring significant civil penalties for noncompliance is real and substantial.")

United States v. CPS Chemical Co., Inc., 779 F. Supp. 437, 442 (E.D. Ark. 1991) (enforcement of the CWA is designed to be simple, speedy and straightforward)

Public Interest Research Group v. Powell Duffryn Terminals, Inc., 720 F. Supp. 1158, 1166 (D.N.J. 1989), aff'd in part, rev'd in part, 913 F.2d 64 (3d Cir. 1990) ("Civil penalties seek to deter pollution by discouraging future violations. To serve this function, the amount of the civil penalty must be high enough to insure that polluters cannot simply absorb the penalty as a cost of doing business. Otherwise, a rational profit maximizing company will choose to pay the penalty rather than incur compliance costs. Additionally, the probability that a penalty will be imposed must be high enough so that polluters will not choose to accept the risk that non-compliance with [sic] go unpunished." (citations omitted))

Student Public Interest Research Group v. Hercules, Inc. 29 E RC 1417 (D.N.J. 1989) (civil penalties seek to deter pollution by discouraging future violations)

United States v. Ohio Edison, 725 F. Supp. 928, 934 (N.D. Ohio 1989) (even assuming the defendant is without fault in this matter, the statute does not require fault to support a penalty; once it has been determined that the terms of a permit have been violated, § 309(d) provides substantial discretion to the Court in determining the amount of penalties)

Student Public Interest Research Group of NJ, Inc. v. AT&T Bell Laboratories, 617 F. Supp. 1190, 1201 (D.N.J. 1985) (civil penalties seek to deter pollution by discouraging future violations; "There is little doubt that Congress intended deterrence as a purpose of sanctions under the FWPCA.")

Chesapeake Bay Foundation v. Gwaltney of Smithfield, 611 F. Supp. 1542, 1557 (E.D. Va. 1985), aff'd 791 F.2d 304 (4th Cir. 1986), vacated and remanded on other grounds, 100 S. Ct. 376 (1987), on remand, 844 F.2d 170 (4th Cir. 1988) (civil penalties seek to deter pollution by discouraging future violations)

Chesapeake Bay Foundation v. Bethlehem Steel, 608 F. Supp. 440, 452 (D. Md. 1985) (enforcement of the CWA is designed to be simple, speedy and straightforward)

Sierra Club v. Hanna Furnace, 23 ERC 1910, 1911-12 (W.D.N.Y. 1985) (unless faced with the fear of being penalized, "the potential polluter verging upon bankruptcy or shutdown for any reason would be tempted to disregard restrictive effluent controls, lured perhaps by an added incentive to maximize profits or reduce losses of an ailing business.")

United States v. CF Industries, Inc., 542 F. Supp. 952 (D.Minn. 1982) ("[T]he public policies embodied in the CWA are stronger and more important than those embodied in the [admiralty-related] Limitation Act" and "if the government's claim for a civil penalty must be brought in the limitation action, it will have no deterrent effect.")

United States v. Velsicol Chemical Corp., 12 ERC 1417, 1421 (W.D. Tenn. 1978) (civil penalties seek to deter pollution by discouraging future violations)

EPA, "Civil Penalty Assessment for Clean Water Act Wastewater Discharge Violations: A Review of the Law" (1992)

David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd when Enforcement Authority Is Shared by the United States, the States and Their Citizens?*, 54 Md. L. Rev. 1552, 1577 (1995)

Thompson, *Citizen Suits and Civil Penalties Under the Clean Water Act*, 85 Michigan Law Review 1656, 1665 n. 51 (1987) ("Congress would not have included the civil penalty authorization at all if it were not to have some effect as a deterrence mechanism.")

Environmental Law - Assessment of Penalties for Violations of Compliance Prescribed by a National Pollutant Discharge Elimination System Permit, 12 Cap. Univ. L. Rev. 335 (1982)

Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 Colum. L. Rev. 1435, 1456 (1979)

Comment, *The Use of Civil Penalties in Enforcing the Clean Water Act Amendments of 1977*, 12 Univ. of San. Fran. L. Rev. 437, 451-52 (1978)

B. Appeals/Scope of Review

33 U.S.C. § 1319(g)(8) ("Any person against whom a civil penalty is assessed . . . may obtain review of such assessment - (A) in the case of assessment of a class I civil penalty, in the United Stated District Court for the District of Columbia or in the district in which the violation is alleged to have occurred, or (B) in the case of assessment of a class II civil penalty, in United States court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business, by filing a notice of appeal in such court within the 30-day period beginning on the date the civil penalty order is issued and by simultaneously sending a copy of such notice by certified mail to the Administrator . . . and the Attorney General. . . Such court shall not set aside or remand such order unless there is not substantial evidence in the record, taken as a

whole, to support the finding of a violation or unless the Administrator's . . . assessment of a penalty constitutes an abuse of discretion . . .")

Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 185, 93 S. Ct. 1455, 1458, 36 L. Ed. 2d 142 (1973) ("[T]he relation of the remedy to policy is peculiarly a matter of administrative competence.")

B.J. Carney Industries, Inc. v. EPA, ___ F.3d ___, 1999 U.S. App. LEXIS 23005 (9th Cir. 1999) (appeal of ALJ decision dismissed as untimely; held that appeal must be filed within 30 days of date of "issuance" of penalty order, not within 30 days of "finality" of penalty order as Carney had argued; strong dissenting opinion)

United States v. Smithfield Foods, Inc., ___ F.3d ___, 1999 U.S. App. LEXIS 22092 (4th Cir. 1999) ("Because of the difficulty of determining an appropriate penalty in a complex case such as this one, we give deference to the 'highly discretionary calculations that take into account multiple factors [that] are necessary in order to set civil penalties under the Clean Water Act.' . . . [T]he Supreme Court has emphasized that under the CWA, the highly discretionary calculations necessary to assess civil penalties are particularly within the purview of trial judges, see Tull, 481 U.S. at 426-27, and we have continually given these determinations wide deference, reviewing them only for abuse of discretion.")

General Motors v. EPA,168 F.3d 1377, 48 ERC 1257 (D.C. Cir. 1999) ("We review the EPA's findings of violations of a permit under the Clean Water Act for lack of 'substantial evidence in the record, taken as a whole,' and the assessment of an administrative penalty for 'abuse of discretion'")

Sasser v. EPA, 990 F.2d 127, 130 (4th Cir. 1993) (the amount of the penalty is reviewed under the abuse of discretion standard)

Hoffman Homes, Inc. v. EPA, 999 F.2d 256, 261 (7th Cir. 1993) (liability issues are reviewed under the substantial evidence standard)

All Regions Chemical Labs, Inc. v. EPA, 932 F.2d 73, 75 (1st Cir. 1991) (court must give deference to agency penalty determinations)

Kaulkin v. Bergland, 626 F.2d 181, 184 (1st Cir. 1980) ("Generally, administrative remedies or sanction are subject to a very limited judicial review.")

Buxton v. United States, 961 F. Supp. 6 (D.D.C. 1997) (District court upholds administrative penalty, finding the filling of wetlands and the failure to restore the wetlands in timely manner to be a serious violation; court found that the RA committed no clear error of judgment, and, therefore, the penalty must be upheld; The abuse of discretion standard under § 309(g)(8) should be read consistently with the interpretation of the same standard in the Administrative Procedure Act, 5 U.S.C. §706. Accordingly, the Court should "consider whether the decision was based on a consideration of all the relevant factors and whether there has been a clear error of judgment." This standard is "narrow," and courts may not insert their judgments for those of the agencies. Absent a

clear error of judgment, EPA's penalty must be upheld)

C. Calculation of Penalty/Statutory Penalty Factors

1. Generally

33 U.S.C. § 1319(d) (". . .In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.")

33 U.S.C. § 1319(g)(3) ("In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. . .")

42 U.S.C. § 300h-2(c)(4)(B) (SDWA: "In assessing any civil penalty under this subsection, the Administrator shall take into account appropriate factors, including (i) the seriousness of the violation; (ii) the economic benefit (if any) resulting from the violation; (iii) any history of such violations; (iv) any good-faith efforts to comply with the applicable requirements; (v) the economic impact of the penalty on the violator; and (vi) such other matters as justice may require.")

40 C.F.R. Part 19 (Adjustment of Civil Monetary Penalties for Inflation)

40 C.F.R. § 22.27(b) ("[T]he Presiding Officer shall determine the dollar amount of the recommended penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act.")

2. Daily Max & Monthly Avg: Double Counting

United States v. Smithfield Foods, Inc., ___ F.3d ___, 1999 U.S. App. LEXIS 22092 (4th Cir. 1999) ("Far from double counting, the district court's decision to treat each violation of the 1992 Permit as a separate infraction for purposes of penalty calculation makes sense. This structure gives courts considerable flexibility to tailor penalties to the unique facts of each case. As noted by the district court, a permittee who violates a single effluent limit one time is less culpable than one who violates the limits of several different pollutants in one day. Such a structure is reasonable considering the first violator causes less overall harm to the environment. In the same vein, a permittee who violates a monthly average limit is less culpable and causes less harm than a permittee who

violates daily maximum and monthly average limits in the same month." (citations omitted))

Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 78-79 (3d Cir. 1990) (counting single reported exceedance for a pollutant as a violation of both the average concentration limit and the maximum concentration limit for the pollutant did not amount to double counting of permit violations; good discussion of application of statutory penalty factors)

United States v. Smithfield Foods, Inc., 972 F. Supp. 338 (E.D. Va. 1997), affirmed in part, reversed in part, ___ F.3d ___, 1999 U.S. App. LEXIS 22092 (4th Cir. 1999) ("[I]f multiple violations of the Permit occur on the same day, defendants are liable for a separate day for each violation of the Permit, including the daily maximum, monthly average concentration, and monthly average loading limits for each pollutant. This determination is consistent with Section 309(d) of the Act, which specifically provides for a "civil penalty not to exceed $25,000 per *day for each violation*" (emphasis added) rather than a statutory maximum of $25,000 *per day*. The different pollutants, and their daily maximum, monthly average concentration, and monthly average loading limits, are included in the Permit for different reasons. Each limit is a separate, distinct requirement in the Permit which can be violated. Accordingly, where multiple violations of defendants' Permit occur on one day, the maximum penalty on that day may exceed $25,000.")

Hawaii's Thousand Friends v. City and County of Honolulu, 821 F. Supp. 1368, 37 ERC 1398 (D. Hawaii 1993) (counting simultaneous 7-day and 30-day average violations constitutes impermissible duplicative penalties)

In re Amvac Chemical Corp, (III-16, I.F.R, Doc. No. IX-98C, Final Decision 1976) (separate civil penalties may be assessed only if (1) each violation results from an independent act or failure to act and (2) is substantially distinguishable from any other charge; otherwise there is double jeopardy)

3. Economic Benefit

33 U.S.C. § 1319(d) and (g) ("In determining the amount of the civil penalty the court shall consider . . . the economic benefit (if any) resulting from the violation . . .")

United States v. Smithfield Foods, Inc., ___ F.3d ___, 1999 U.S. App. LEXIS 22092 (4th Cir. 1999) ("the precise economic benefit a polluter has gained by violating its effluent limits may be difficult to prove, so '[r]easonable approximations of economic benefit will suffice.'"; "The cost-avoided method is not in conflict with the CWA or basic economic principles. On the contrary, it represents a logical method by which a violator in Smithfield's position can be disgorged of any profits it attained through its non-compliance. Finding no fault with the district court's choice to apply the cost-avoided method in this case, we reject Smithfield's claim that its application was in error."; upheld use of WACC

rate over "risk-free" rate; refused to credit expenditures made to come into partial compliance)

Sierra Club v. Cedar Point Oil Co., 73 F.3d 546 (5th Cir. 1996) (process of weighing the statutory factors in calculating civil penalties under the CWA is "highly discretionary" with the trial court and that a court need only make a "reasonable approximation" of economic benefit when calculating a penalty under the CWA)

Sierra Club, Lone Start Chapter v. Cedar Point Oil Co., Inc., 73 F.3d 546, 574 (5th Cir. 1996) (upholding trial court's decision to calculate the economic benefit "by reference to the money [the violator] saved by not" complying)

Atlantic States Legal Foundation v. Tyson Foods, 897 F.2d 1128, 1141-42 (11th Cir. 1990) (reasonable approximation of economic benefit will suffice; "There was one simple and straightforward way for Tyson to avoid paying civil penalties for violations of the Clean Water Act: After purchasing the plant, Tyson could have ceased operations until it was able to discharge pollutants without violating the requirements of its NPDES permit. Tyson chose not to do this and it must now bear the consequences of that decision.")

Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 80 (3d Cir. 1990) (determination of economic benefit does not require elaborate evidentiary showing; reasonable approximations will suffice)

United States v. ConAgra, 1997 U.S. Dist. LEXIS 21401 (D. Id. 997) (proof of economic benefit is limited by 5-year SOL)

S.E.C. v. Jakubowski, 1997 WL 598108 (N.D. Ill. Sept. 19, 1997) (the primary purpose of disgorgement as a remedy for violation of the securities laws is to deprive violators of their ill-gotten gains, thereby effectuating the deterrence objectives of those laws)

United States v. Smithfield Foods, Inc., 972 F. Supp. 338, 349 (E.D. Va. 1997), affirmed in part, reversed in part, ___ F.3d ___, 1999 U.S. App. LEXIS 22092 (4th Cir. 1999) ("Courts use economic benefit analysis to level the playing field and prevent violators from gaining an unfair competitive advantage. The analysis provides an approximation of the amount of money a company has gained over its competitors by failing to comply with the law. Since it is difficult to prove the precise economic benefit to a polluter, a reasonable approximation of economic benefit is sufficient. . . . [T]he court finds the avoided and/or delayed cost of compliance, and the weighted average cost of capital (WACC) as a discount/interest rate in the economic benefit calculation, to be both the best and the appropriate method to determine how much money defendants made on the funds they did not spend for compliance.")

S.E.C. v. Moran, 944 F. Supp. 286 (S.D.N.Y. 1996) (disgorgement is designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating

the securities laws, citing S.E.C. v. First City Fin. Corp. Ltd., 890 F.2d 1215, 1230 (D.C. Cir. 1989))

S.E.C. v. Bilzerian, 814 F. Supp. 116 (D.D.C. 1993) (a reasonable approximation of defendant's illicit profits from defendant's untimely and inaccurate schedule 13D filing was $33,140,787.07 plus interest), aff'd, 29 F.3d 689 (D.C. Cir. 1994)

United States v. Municipal Authority of Union Township and Dean Dairy Products Co., 929 F. Supp. 800, 433 ERC 1377 (M.D. Pa. 1996), aff'd, 150 F.3d 259, 46 ERC 1977 (3d Cir. 1998) (held that revenue earned by not reducing flow to come into compliance with pretreatment limits constituted economic benefit, in this case $2,015,000; "it is in the nature of [economic benefit calculation] that its quantification will be imprecise. . . .It would eviscerate the Act to allow violators to escape civil penalties on the ground that such penalties cannot be calculated with precision.")

United States v. Sheyenne Tooling & Mfg. Co., 952 F. Supp. 1420 (D.N.D. 1996) (court considered 10 year period in calculating economic benefit, but held that " the principal requiring that persons at fault must be held to a 'level playing field' means that the defendant must be held to the conditions of his field, not that of a larger or more wealthy players . . . the defendant's playing field was a small playing field in a sparsely-settled community.")

Public Interest Research Group of N.J., Inc. v. Magnesium Elektron, Inc., 40 ERC 1917, 1929 (D.N.J. 1995) ("The penalty must at least reflect the proven economic benefit . . . That is the starting point. Then the other § 309(g) factors are used to increase the amount which reflects the economic benefit, except that economic impact of the penalty in extraordinary circumstances may serve to reduce the amount found to reflect the economic benefit to the violator of non-compliance. If the penalty arrived at by calculation of the economic benefit exceeds the statutory maximum penalty, the penalty will be reduced to the statutory maximum.")

Friends of the Earth v. Laidlaw Envt'l Serv's, 890 F. Supp. 470, 517, 40 ERC 2063 (D.S.C. 1995), vacated, 149 F.3d 303, 46 ERC 2025 (4th Cir. 1998) (failure of state to recover economic benefit deemed evidence of failure to diligently prosecute -- prior penalty paid to state therefore not a 309(g)(6) bar to citizens suit; good discussion of economic benefit including discount rates)

Friends of the Earth, Inc. v. Laidlaw Envt'l Serv's (TOC), Inc., 956 F. Supp. 588 (D.S.C. 1995), rev'd on other grounds, 149 F.3d 303, 46 ERC 2025 (4th Cir. 1998) (court assessed penalty of $405,800 despite proof at trial of economic benefit in excess of $1 million; judge reduced penalty reasoning that defendant's attorneys fees together with the penalty awarded, provides an adequate deterrent)

Gersh & Danielson v. United States, Civ. No. 94-C-1575 (D. Colo. 1994) (acknowledges EPA's broad authority under § 308 to obtain information re economic benefit)

Hawaii's Thousand Friends v. City and County of Honolulu, 821 F. Supp. 1368, 37 ERC 1398 (D. Haw. 1993) (City enjoyed economic benefit beginning from the date of noncompliance)

United States v. City of Beaumont, 786 F. Supp. 634, 35 ERC 1106 (E.D. Tex. 1992) (city ordered to pay $400,000 for failure to implement pretreatment program; penalty amount is appropriate where city saved over $300,000 by failing to implement according to schedule)

United States v. A.A. Mactal Construction, 1992 U.S. Dist. LEXIS 21790 (D.Kan. 1992) (CAA case; "deterrence is effective only to the extent that the risk of incurring significant civil penalties for noncompliance is real and substantial. . . [T]he recovery of economic benefit essential and that economic benefit should serve as the floor below which the maximum civil penalty should not be mitigated.")

Natural Resources Defense Council v. Texaco Refining and Marketing, Inc., 800 F. Supp. 1, 17, 35 ERC 2095 (D. Del. 1992), aff'd in part, rev'd in part on other grounds, 2 F.3d 493 (3d Cir. 1993) (on basis that NPDES permit requires permittee to "take affirmative steps to ascertain and mitigate any adverse impacts of its nonconforming discharges," court held that defendant avoided $900,000 in receiving water monitoring costs)

Atlantic States Legal Foundation, Inc. v. Universal Tool & Stamping Co., Inc., 786 F. Supp. 743, 749 (N.D. Ind. 1992) (court rejected plaintiff's estimation of economic benefit and used average return on equity of 16.1 % to calculate the time value of spending avoided; "[U]nless the [defendant] is fined an amount at least as great as the economic gain in not complying with the regulations, the statute serves little deterrent value.")

United States v. Roll Coater, Inc., 21 ELR 21073 (S.D.Ind. March 22, 1991) ("unless the company is fined an amount at least as great as the economic gain in not complying with the regulations, the statute serves little deterrent value.")

Public Interest Research Group v. Powell Duffryn Terminals, Inc., 720 F. Supp. 1158, 30 ERC 1201, 1204 (D.N.J. 1989), aff'd in part, rev'd in part, 913 F.2d 64, 31 ERC 1905 (3d Cir. 1990), cert. denied, 498 U.S. 1109 (1991) (economic benefit found to be in excess of statutory maximum penalty; "Needless to say, those numbers compel this Court to gravitate towards the higher end of the penalty range, if not the maximum.")

Student Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc., 19 ELR 20903, 29 ERC 1417 (D.N.J. 1989) (it is in the nature of [economic benefit calculation] that its quantification will be imprecise; nevertheless, the court must endeavor to reach a "rational estimate of [the violator's] economic benefit, resolving uncertainties in favor of a higher estimate.")

Student Public Interest Research Group of N.J. v. Monsanto, 29 ERC 1078, 1090

(D.N.J. 1988) ("To simply equalized the economic benefit with the penalty would serve ill the possibility of discouraging other and future violations. Some additional penalty should be imposed as a sanction.")

United States. v. Mac's Muffler Shop, Inc., 25 ERC 1369 (N.D. Ga. Nov. 4, 1986) (the economic benefit estimate "must encompass every benefit that defendants received from violation of the law."; penalty imposed based on wrongful profits earned by violations of CAA)

Student Public Interest Research Group of New Jersey, Inc. v. A.T.&T. Bell Laboratories, 617 F. Supp. 1190, 1200-1202 (D.N.J. 1985) (reasonable approximation of economic benefit will suffice)

Student Public Interest Research Group of New Jersey, Inc. v. American Cyanamid Co., 23 ERC 2044, 2049 (D.N.J. 1985) (the recapture of the economic benefit of noncompliance is essential to provide "economic equity" to those members of the regulated community who have spent the money to remain in compliance)

Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd., 611 F. Supp. 1542, 1558 (E.D. Va. 1985), aff'd, 791 F.2d 304 (4th Cir. 1986), cert. granted, 479 U.S. 1029 (1987), vacated on other grounds, 484 U.S. 49 (1987) (There are at least three distinct types of economic benefit: "First, by delaying the expenditure of funds on compliance, a violator obtains the use of the money for other purposes in the meantime. Second, a violator may also avoid some costs altogether -- for example, the costs of maintaining and operating the pollution control system until it is implemented. Third, a violator may, in addition, obtain a competitive advantage as a result of its violation -- for example, it may be able to offer goods at a lower price, thereby possibly increasing its sales and profits.")

Tull v. United States, 615 F. Supp. 610 (E.D. Va. 1983), aff'd, 769 F.2d 182 (4th Cir. 1985), cert. granted, 476 U.S. 1139 (1986), rev'd and remanded on other grounds, 481 U.S. 412, 423 (1987) (basing the penalty on its economic impact may deter future violations)

United States v. Reserve Mining Co., 412 F. Supp. 705, 709 (D. Minn. 1976), aff'd on penalties and remanded on injunctive relief, 543 F.2d 1210 (8th Cir. 1976) ("[I]n this business venture, the record shows it returned very substantial profits to its corporate owner-parents, Republic and Armco. [citation omitted]. It is reasonable to conclude that some of those profits are attributable to operations made less costly by discharging tailings in Lake Superior rather than on land, as is done by its competitors.")

Ohio ex rel. Brown v. Dayton Malleable, Inc., 1 Ohio St. 3d 151, 438 N.E.2d 120 (Sup. Ct. 1982) (reasonable approximation of economic benefit will suffice)

In re B&R Oil Co., Inc., ___ E.A.D. ___ (EAB 1998) (RCRA case: EAB rejected Respondent's argument that the economic benefit component should have been

offset by the payments made to the state fund; to allow such an offset would "subvert a primary purpose of the Penalty Policy, which is to remove the competitive advantage that violators gain through noncompliance"; the cost of upgrading and replacing tanks were also not allowed as setoffs to economic benefit)

In re B.J. Carney Industries, Inc., 7 E.A.D. 171 (EAB 1997), appeal dismissed, ___ F.3d ___, 1999 U.S. App. LEXIS 23005 (9th Cir. 1999) (the "recapture of a violator's economic benefit of noncompliance is the cornerstone of the Agency's civil penalty program;" based on record, EAB held that 16% discount rate used by EPA was not unreasonably high)

In re A.Y. McDonald Industries, Inc., 2 E.A.D. 402, 423 (CJO 1987) ("the economic benefit component serves to remove any incentive to violate the [law] by requiring the violator to pay the expenses avoided or deferred through noncompliance.")

In re Alaska's Fishing Unlimited Lodges, Docket No. 10-97-0062 OPA (RJO Anderson Feb. 22, 1999) (held that no penalty should be assessed against tank owner who violated SPCC regulations on grounds that none of the local competitors complied either, so no economic benefit accrued, and EPA should not have filed a penalty action when it was attempting to encourage Respondent to comply with the law)

In re Urban Drainage and Flood Control District, Docket No. CWA-VIII-94-20-PII (ALJ Pearlstein June 25, 1998) ("Civil penalties should, at a minimum, recoup any economic benefit the violator has accrued as a result of the violation.")

In re B.J. Carney Industries, Inc., Docket No. 1090-09-13-309(g) (ALJ Kuhlmann 1998), appeal dismissed, ___ F.3d ___, 1999 U.S. App. LEXIS 23005 (9th Cir. 1999) (on remand from EAB $125,000 awarded based on economic benefit)

In re B.J. Carney Industries, Inc., Docket No. 1090-09-13-309(g) (ALJ Head 1996), aff'd in part, rev'd in part, 7 E.A.D. 171 (EAB 1997), appeal dismissed, ___ F.3d ___ , 1999 U.S. App. LEXIS 23005 (9th Cir. 1999) (economic benefit calculations may not begin prior to statute of limitations; discount rate of 16% argued by government was unreasonably high)

60 Fed. Reg. 66706, 66707 (1995) (recovering economic benefit of noncompliance provides an incentive for regulated entities to comply on time; EPA's ability to recoup a violator's economic benefit "protects responsible companies from being undercut by their noncomplying competitors, thereby preserving a level playing field.")

60 Fed. Reg. 16875, 16876 (1995) (economic benefit of noncompliance component of the penalty helps "ensure a level playing field by ensuring that

violators do not obtain an economic advantage over their competitors who made the necessary investment in environmental compliance."

60 Fed. Reg. 66706, 66707 (1995) ("Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations") (gravity portion of penalty can be reduced or waive for self-disclosure, but economic benefit must be recovered)

S. Rep. No. 50, 99th Cong., 1st Sess. 25 (1985) ("The amendment would also expressly require the courts to consider a number of factors, including, in particular, the economic benefit gained as a result of the violation. Violators should not be able to obtain an economic benefit vis-a-vis their competitors due to their noncompliance with environmental laws. The determination of economic benefit or other factors will not require an elaborate or burdensome evidentiary showing. Reasonable approximations of economic benefit will suffice.")

EPA, "Interim Clean Water Act Settlement Penalty Policy" at 4 (Mar. 1, 1995) ("The objective of the economic benefit calculation is to place violators in the same financial position as they would have been if they had complied on time.")

EPA, "Policy on Civil Penalties, EPA General Enforcement Policy #GM-21" (Feb. 16, 1984), p. 3 (violator should pay a penalty that recovers economic benefit)

EPA, "Penalty Policy for Civil Settlement Negotiations" (Feb. 11, 1986) (economic benefit must be recovered)

Wise, Kolbe & Maniatis, *EPA's BEN Model: A Change for the Better?*, Toxics Law Reporter (February 24, 1993)

Fuhrman, *Penalty Assessment at the Environmental Protection Agency: A View From the Outside*, Environment Reporter (October 18, 1991)

Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 Colum. L. Rev. 1435, 1466-68 (1979) ("Mere removal of economic benefit will usually be insufficient by itself to secure compliance with regulatory standards.")

4. Economic Impact (Ability to Pay)

United States v. Municipal Authority of Union Township and Dean Dairy Products Co., 150 F.3d 259, 46 ERC 1977 (3d Cir. 1998) ("Dean Dairy contends it was legal error for the district court to consider the financial condition of Dean Foods because the parent corporation was not a party to the action, it did not violate the Clean Water Act, and there was insufficient evidence to pierce the corporate veil. We reject its contention. . . [I]t is important to remember that it was not Dean Foods, but only Dean Dairy, the violator, who was penalized. The

reference to Dean Foods' financial statement merely assured that the penalty would not be set at a level above Dean Dairy's ability to pay. If the subsidiary does not retain its revenues, as the evidence showed in this case, then its parent's financial resources are highly relevant.")

United States v. Municipal Authority of Union Township and Dean Dairy Products Co., 929 F. Supp. 800, 43 ERC 1377, 1381 (M.D. Pa. 1996), aff'd, 150 F.3d 259, 46 ERC 1977 (3d Cir. 1998) (wealth of corporate parent corporation considered in determining ability to pay; "It would constitute a serious injustice to allow Dean Foods to profit from Fairmont's violations of the Act, which occurred while Dean Foods retained control over Fairmont's wastewater problem and failed to take timely remedial action, and at the same [sic] allow Dean Foods to escape liability for the violations. Judicial sanction of such an arrangement would surely encourage violation of the Clean Water Act.")

United States v. Harrison Warehouse Services Co., Inc., No. 1:90CV82 (N.D. W.V. 1995) at 23-24 (CAA; reduction from statutory max based on inability of highly-leveraged business empire to pay; however, "the Court is not precluded from finding that the defendants can pay some penalty simply because doing so might require Wilfong to sell or otherwise encumber a personal or business interest.")

Hawaii's Thousand Friends v. City and County of Honolulu, 821 F. Supp. 1368, 37 ERC 1398 (D. Haw. 1993) ("The impact of a penalty on the city will be a slight increase in the monthly rates paid by users of the sewer system. Therefore, economic impact is not a mitigating factor.")

Atlantic States Legal Foundation, Inc. v. Universal Tool & Stamping Co., Inc., 786 F. Supp. 743, 753 (N.D. Ind. 1992) (OK to look to assets and finances of the violator's parent in evaluating the economic impact of the penalty on the violator)

United States v. City of San Diego, 21 ELR 21,223, 21,225 (S.D. Cal. 1991) ("Contrary to the position advocated by the City, the court finds that plaintiffs' analysis of economic benefit is valid as to municipalities. While it is difficult to quantify precisely the savings realized by the City as a result of its intransigence, plaintiffs have demonstrated by a preponderance of the evidence that the City has saved in excess of $300 million dollars [sic] overs approximately the last thirty years by failing to invest in capital improvements. Residents living here in those years earned "dividend" in the form of lower sewer rates. A direct parallel to corporate operations is apparent.")

United States v. Roll Coater, Inc., 21 ELR 21073 (S.D. Ind. 1991) at *22 (no reduction in penalty based on ability to pay because defendant introduced no evidence to support the defense)

United States v. Confederate Acres Sanitary Sewer and Drainage System, Inc., 767 F. Supp. 834, 840 (W.D. Ky. 1990) (the court recognized that a civil penalty

would work a severe hardship on the defendant, and limited the civil penalty to the recapture of economic benefits because the company was going out of business and no further deterrence was required)

Public Interest Research Group v. Powell Duffryn Terminals, Inc., 720 F. Supp. 1158, 1166 (D.N.J. 1989), aff'd in part, rev'd in part, 913 F.2d 64, 31 ERC 1905 (3d Cir. 1990), cert. denied, 498 U.S. 1109 (1991) (court considered EPA's penalty policy (which it held was not binding on the court), which places the burden of proving inability to pay on the defendant; "Defendant has failed to demonstrate that assessing a severe penalty would jeopardize defendant's continued operation. . . Defendant claims that it is in a relatively poor economic position. The Court is not persuaded that this is the case." OK to look to assets and finances of the violator's parent in evaluating the economic impact of the penalty on the violator)

Public Interest Research Group of N.J. v. CP Chemicals, Inc., 26 ERC 2017, 2022 (1987) ("Congress anticipated that the [environmental] regulations `would cause economic hardship and plant closings' because they would impose in a `substantial number of point sources' within each industrial category additional costs which `must be borne or the point source eliminated.'")

Chesapeake Bay Foundation v. Gwaltney, 611 F. Supp. 1542, 1562 (E.D. Va. 1985), aff'd, 791 F.2d 304 (4th Cir. 1986), vacated and remanded on other grounds, 484 U.S. 49, 108 S. Ct. 376, 98 L. Ed. 2d 306 (1987) (the Court was "unpersuaded that any penalty warranted by Gwaltney's violations would jeopardize Gwaltney's continued operation)

United States v. Eureka Pipeline Co., 401 F. Supp. 934 (N.D. W.V. 1975) (civil penalties should be tailored to the ability of the defendant to pay)

In re James C. Lin and Lin Cubing, Inc., 5 E.A.D. 595 (EAB 1994) (once respondent asserts that it cannot afford to pay the penalty, the burden of persuasion shifts to EPA as part of its prima facie case)

In re New Waterbury, Ltd., 5 E.A.D. 529, 538-539 (1994) ("[A]lthough the Region bears the burden of proof as to the appropriateness of the penalty it does not bear a separate burden on each of the TSCA § 16 factors. More specifically, the burden of proof goes to the appropriateness of the penalty tanking *all* factors into account. Thus, for the Region to make a prima facie case on the appropriateness of its recommended penalty, the Region must come forward with evidence to show that it, in fact, considered each factor identified in [TSCA] Section 16 and that its recommended penalty is supported by its analysis of those factors. The depth of consideration will vary in each case, but so long as each factor is touched upon and the penalty is supported by the analysis a prima facie case can be made. Once this is accomplished, the burden of going forward shifts to the respondent. . . In view of the foregoing, New Waterbury's contention that the Region must specifically and separately prove that a respondent has the funds necessary to pay a proposed penalty before a penalty can be assessed is

erroneous and must be rejected."; ability to pay is merely one of the factors to consider in assessing a penalty and should not require a zero penalty on its own)

In re Dr. Marshall C. Sasser, 3 E.A.D. 703, 708 (CJO 1991) (burden is on respondent to prove inability to pay)

In re Helena Chemical Co., 3 E.A.D. 26, 35-39 (CJO 1989) (FIFRA case; inability to pay is an affirmative defense; burden of proof is on respondent)

In re Central Paint and Body Shop, Inc., 2 E.A.D. 309 (CJO 1987) (RCRA case; inability to pay is an affirmative defense; burden of proof is on respondent)

Diver, *The Use of Civil Penalties in Enforcing the Clean Water Act Amendments of 1977*, 12 Univ. San. Fran. L. Rev. 437, 460-62 (1978)

5. Good Faith Efforts to Comply (Culpability)

United States v. Smithfield Foods, Inc., ___ F.3d ___, 1999 U.S. App. LEXIS 22092 (4th Cir. 1999) ("Section 309(d) of the CWA requires a district court to consider 'any good-faith efforts to comply with the applicable requirements' as a mitigating factor in the penalty calculation. 33 U.S.C.A.§ 1319(d). In practice, a court evaluates the evidence to determine whether the permittee took any actions to reduce the number of violations or attempted to lessen the impact of their discharges on the environment.")

Hawaii's Thousand Friends v. City and County of Honolulu, 821 F. Supp. 1368, 37 ERC 1398 (D. Hawaii 1993) (city's good faith reliance on DOH interim standards must be a significant factor in assessing a penalty for the secondary treatment violations)

Atlantic States Legal Foundation, Inc. v. Universal Tool & Stamping Co., Inc., 786 F. Supp. 743 (N.D. Ind. 1992) (despite finding that defendant could have been more expeditious in installing pollution control equipment, court found no calculated effort to avoid compliance; the courts may consider the defendant's efforts to comply with the law, the difficulties of compliance and the reasons for the defendant's lack of compliance in assessing a penalty)

United States v. Roll Coater, Inc., 21 ELR 21073 (S.D. Ind. 1991) (the courts may consider the defendant's efforts to comply with the law, the difficulties of compliance and the reasons for the defendant's lack of compliance in assessing a penalty)

United States v. Key West Towers, Inc., 720 F. Supp. 963, 965-966 (S.D. Fla. 1989) (no good faith effort to comply found were defendant violated earlier administrative orders to stop filling wetlands)

United States v. Velsicol Chemical Corp., 12 ERC 1417, 1421 (W.D. Tenn. 1978) (a showing of willfulness or negligence is not necessary to impose a civil

penalty)

Chesapeake Bay Foundation v. Gwaltney of Smithfield, 611 F. Supp. 1542, 1564 (E.D. Va. 1985), aff'd, 791 F.2d 304 (4th Cir. 1986), vacated and remanded on other grounds, 100 S. Ct. 376 (1987), on remand, 844 F.2d 170 (4th Cir. 1988) (the courts may consider the defendant's efforts to comply with the law, the difficulties of compliance and the reasons for the defendant's lack of compliance in assessing a penalty)

United States v. Municipal Authority of Union Township and Dean Dairy Products Co., Civil No. 1:CV-94-0621 (M.D. Pa. July 10, 1996) at 19 ("Fairmont's lengthy delay in meaningfully confronting its IU permit violations, and its unwillingness to reduce production volume until its wastewater problem was under control, do not speak highly of its good faith in this matter.")

In re Rofor Plating Co., Inc., Docket No. CWA-2-I-91-1112, 1993 TSCA LEXIS 257 (ALJ Head, September 16, 1993) (high culpability found where Respondent failed to provide DMRs and it would have been relatively easy for Resp. to comply)

6. History of Violations

United States v. Smithfield Foods, Inc., 972 F. Supp. 338 (E.D. Va. 1997), affirmed in part, reversed in part, ___ F.3d ___, 1999 U.S. App. LEXIS 22092 (4th Cir. 1999) ("In determining the 'history of such violations,' courts considered the duration of defendants' current violations, whether defendants have committed similar violations in the past, and the duration and nature of all of the violations, including whether the violations are perpetual or sporadic.")

United States v. ConAgra, 1997 U.S. Dist. LEXIS 21401 (D. Id. 1997) (only adjudicated violations can be used as prior history prior to 5-year SOL)

Public Interest Research Group of New Jersey v. Hercules Inc., 830 F. Supp. 1525, 1549, 36 ERC 1833 (D.N.J. 1993), aff'd in part, rev'd in part, 50 F.3d 1239, 40 ERC 1385 (3d Cir. 1995) (evidence of violations at another facility relevant and admissible in a CWA penalty hearing because evidence is relevant to the defendant's good faith and history of violations)

Hawaii's Thousand Friends v. City and County of Honolulu, 821 F. Supp. 1368, 37 ERC 1398 (D. Hawaii 1993) (history of violation inapplicable since there was inconclusive evidence regarding other bypass incidents)

Atlantic States Legal Foundation, Inc. v. Universal Tool & Stamping Co., Inc., 786 F. Supp. 743 (N.D. Ind. 1992) (since violations stretched back to 1975, court did not reduce penalty based on this factor (starting from stat. max.))

United States v. City of San Diego, No. CIV 88-1101-B, 1991 WL 163747 (S.D. Cal. Apr. 28, 1991)

United States v. Roll Coater, Inc., 21 ELR 21073 (S.D. Ind. 1991) (ongoing violations not part of history of violations, which must be previous unrelated violations)

Student Public Interest Research Group of N.J. v. Hercules, Inc., 29 ERC 1417 (D.N.J. 1989) (past unpunished violations considered as part of "history of violations" factor used in penalty assessments)

Public Interest Research Group v. Powell Duffryn Terminals, Inc., 720 F. Supp. 1158, 1163, 30 ERC 1201, 1204 (D.N.J. 1989), aff'd in part, rev'd in part, 913 F.2d 64, 31 ERC 1905 (3d Cir. 1990), cert. denied, 498 U.S. 1109 (1991) ("The Court finds that defendant's 386 violations spanned an 11 year period from 1977 to 1988. Defendant has violated its permit in each of those 11 years.")

Student Public Interest Research Group of N.J., Inc. v. Monsanto Co., 29 ERC 1078, 1091 (D.N.J. 1988) (where the defendant has been sued before, or where it has had prior notice of the problems giving rise to the case and failed to take action, the courts will generally refuse to mitigate the penalty)

In re Ketchikan Pulp Co., Docket No. CWA-1089-12-22-309(g) (ALJ Head Nov. 22, 1995), aff'd, 7 E.A.D. 605 (EAB 1998) (ALJ considered violations by respondent at same facility in all media when considering prior history. Id. at 41)

7. Monthly Average Violations

Natural Resources Defense Council, Inc. v. Texaco Ref. & Mktg, Inc., 2 F.3d 493, 507, 37 ERC 1508 (3d Cir. 1993) ("Since the daily average limit is computed by averaging effluent levels only for days on which the facility operated, it seems only logical and fair to assess penalties for a violation of this limit based on the number of days the facility was in operation.")

EPA v. City of Green Forest, Arkansas, 921 F.2d 1394, 1407, 32 ERC 1508 (8th Cir. 1990), cert. denied, 112 S. Ct. 414 (1991) (where a NPDES permit provides an effluent limitation measured in terms of an average over a number of days, such as a monthly average, a violation of the average results in a violation for each day of the period)

Atlantic States Legal Foundation v. Tyson Foods, 897 F.2d 1128, 1139-40, 31 ERC 1201 (11th Cir. 1990) (monthly average violation counts as 30 violations; court cannot impose penalties for violations of daily max and monthly average for same pollutant)

Chesapeake Bay Foundation v. Gwaltney, 791 F.2d 304, 314, 24 ERC 1417 (4th Cir. 1986), vacated and remanded on other grounds, 484 U.S. 49, 108 S. Ct. 376, 98 L. Ed. 2d 306 (1987) (for purposes of penalty calculation, a monthly average violation equals the number of days in the month; CWA "speak[s] in terms of

penalties per day of violation, rather than penalties per violation. . . . This language strongly suggests that where a violation is defined in terms of a time period longer than a day, the maximum penalty assessable for that violation should be defined in terms of the number of days in that time period.")

United States v. Aluminum Co. of American, 824 F. Supp. 640, 649 n.15 (E.D. Tex. 1993) ("The term 'daily average' is often referred to as a 'monthly average.' The terms may be used interchangeably.")

Atlantic States Legal Foundation, Inc. v. Universal Tool & Stamping Co., Inc., 786 F. Supp. 743 (N.D. Ind. 1992) (monthly average violations equals 30)

United States v. Roll Coater, Inc., 21 ELR 21073 (S.D. Ind. 1991) (citing Tyson, held that in calculating the statutory maximum, each monthly violation constitutes a violation for each day of that month)

United States v. Amoco Oil Co., 580 F. Supp. 1042, 1045 (W.D. Miss. 1984) ("[W]here effluent limitations are set on some basis other than a daily limit -- that is, for example, where they are set as . . . a monthly maximum or monthly average limit, etc. - - a 'violation' necessarily encompasses all the days involved in the time period covered by the limitation.")

United States v. Phelps Dodge Industries, Inc., 589 F. Supp. 1340, 1367 (S.D.N.Y. 1984) (violation of monthly average results in a violation for each day of the period)

United States v. Swingline, Inc., 371 F. Supp. 37, 47 (E.D.N.Y. 1974) (violation of monthly average results in a violation for each day of the period)

In re Easco Aluminum Corp., CWA-AO-V-13-89 (ALJ Harwood Aug. 16, 1991) (monthly average counts as thirty violations, citing Tyson Foods; "Counting a violation of a monthly average as a single violation does not adequately take account of the nature of the violation and its potential gravity.")

8. Other Matters as Justice Requires

Tull v. United States, 481 U.S. 412, 426-27, 95 L. Ed. 2d 365, 107 S. Ct. 1831 (1987) ("Congress [made the] assignment of the determination of the amount of the civil penalties to trial judges. . . . Since Congress itself may fix the civil penalty, it may delegate that determination to trial judges. In this case, highly discretionary calculations that take into account multiple factors are necessary in Order to set civil penalties under the Clean Water Act.")

United States v. Marine Shale Processors, 81 F.3d 1329, 42 ERC 1481 (5th Cir. 1996) (court must recalculate $3,000,000 fine because it failed to support its conclusion that operator increased volume of thermal pollution discharges in Order to maximize profit)

Sierra Club v. Cedar Point Oil Co., 73 F.3d 546 (5th Cir. 1996) (process of weighing the statutory factors in calculating civil penalties under the CWA is "highly discretionary" with the trial court)

Sierra Club v. Simkins Industries, Inc., 847 F.2d 1109, 1113, 27 ERC 1881 (4th Cir. 1988), cert. denied, 491 U.S. 904 (1989) ($977,000 penalty upheld)

San Francisco Baykeeper v. Tidewater Sand & Gravel Co., 46 ERC 1780, 1789 (N.D. Ca. 1997) (court declined to hold that each day of violation of a storm water general permit as a separate violation of the CWA; "The violations at issue in this motion concern failures to meet regulatory requirements by specific deadlines. They do not concern discrete discharges by [defendant].")

Public Interest Research Group of N.J. v. Hercules, Inc., 970 F. Supp. 363, 364 (D.N.J. 1997) ("In assessing a penalty under the Clean Water Act, a district court has a great amount of discretion.")

United States v. Sheyenne Tooling & Mfg. Co., 952 F. Supp. 1420, 1422-23 (D.N.D. 1996) ("It must be understood, however, that despite the directional aid and guidance that the six enumerated factors in § 1319(d) provide, the calculation of a final penalty may often be imprecise and approximate at best. Indeed, the accuracy of the final calculations, and the figure of penalty that they produce, is as dependant, or even more so, upon the provision of complete and accurate evidence, as introduced, developed, and explained at trial, as it is upon a good evaluation of this information by the court.")

United States v. Harrison Warehouse Services Co., No. 1:90CV82, Slip op. at 18 (D. W. Va., Mar. 6, 1995) (CAA case holding that failure to give notice is a continuing violation; defendant liable for 25 days of violation were 10 day prior notice required and construction lasted 15 days)

United States v. Trident Seafoods Corp., No. C92-10250, Slip. op. at 5-6 (W.D. Wash., Dec. 13, 1993) (CAA case rejecting the notion that noncompliance with the notice requirement should be treated as a single violation of a single day)

Atlantic States Legal Foundation, Inc. v. Universal Tool & Stamping Co., Inc., 786 F. Supp. 743 (N.D. Ind. 1992) (court rejected plaintiff's estimation of economic benefit; substantially reduced penalty for lack of significant environmental harm; recognized civil penalties as deterrent; assessed $450,000 based on stat. max. of $25.8 million)

In re Catalina Yachts, Inc., 8 E.A.D. ___(EAB 1999) (EPCRA case; held that use of the "other matters" factor inappropriate where penalty had already been adjusted downward for good faith efforts to comply; rejected application of "other matters" factor to SEP in this case)

In re B.J. Carney Industries, Inc., 7 E.A.D. 171 (EAB 1997), appeal dismissed, ___ F.3d ___ , 1999 U.S. App. LEXIS 23005 (9th Cir. 1999) ("Adjustment under

the 'justice' factor may be warranted only if the evidence of those good deeds is 'clear and unequivocal, and the circumstances must be such that a reasonable person would easily agree that not giving some form of credit would be a manifest injustice.'" Slip op. at 81 n. 82)

In re Spang & Co., 6 E.A.D. 226 (EAB 1995) ("[U]se of the justice factor should be far from routine, since application of the other adjustment factors normally produces a penalty that is fair and just.")

In re Puerto Rico Urban Renewal & Housing Corp., Docket No. CWA-II-89-249 (ALJ Nissen June 29, 1993) ("other matters as justice may require" counseled reduction in penalty where owner of sanitary collection system held strictly liable for unpermitted discharges of untreated wastewater to river notwithstanding that the discharges resulted from illegal connections to system by third parties)

In re Rofor Plating Co., Inc., Docket No. CWA-2-I-91-1112, 1993 TSCA LEXIS 257 (ALJ Head, September 16, 1993) (application of 309(g)(3) factors to administrative case)

In re Easco Aluminum Corporation, Docket No. CWA-AO-V-13-89, 1992 TSCA LEXIS 349 (ALJ Harwood, December 8, 1992) (good discussion of penalty appropriate for DMR and reporting violations - reduced from $125,000 requested to $45,000)

S. Rep. No. 92-414, 2nd Cong., 1st Sess. 65 (1971) ("The threat of sanction must be real . . . abatement orders [and] penalty provisions . . . should accomplish the objective of compliance.")

9. Seriousness of Violation

Chevron U.S.A. v. Yost, 919 F.2d 27 (5th Cir. 1990) (violation of oil sheen regulations that declare all oil sheens to be environmentally harmfully cannot be rebutted by specific evidence regarding actual harm)

Public Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 31 ERC 1905 (3d Cir. 1990), cert. denied, 498 U.S. 1109 (1991) (a "particularized showing of the harm" is not required and proof of the overall risk of the pollutants is sufficient)

Natural Resources Defense Council, Inc. v. Texaco Refining and Marketing Inc., No. 88-263 (D. Del. Sept. 1, 1998) (held that refinery owner must conduct environmental sampling to determine the impact of past and future discharges to the river in excess of the limits in the refinery's NPDES permit)

Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc., 956 F. Supp. 588, 602 (D.S.C. 1997), rev'd on other grounds, 149 F.3d 303, 46 ERC 2025 (4th Cir. 1998) ("presence or absence of environmental harm is relevant" to the penalty

assessment)

United States v. Smithfield Foods, Inc., 972 F. Supp. 338 (E.D. Va. 1997), affirmed in part, reversed in part, ___ F.3d ___, 1999 U.S. App. LEXIS 22092 (4th Cir. 1999) (may justifiably impose a significant penalty if it finds there is a risk or potential risk of environmental harm, even absent proof of actual deleterious effect)

United States v. Gulf Park Water Co., 1997 U.S. Dist. LEXIS 12802 (S.D. Miss. 1997) (in assessing $1.5 million penalty, held that potential harm to the environment enough to justify substantial penalty; actual harm need not be shown)

United States v. Municipal Authority of Union Township and Dean Dairy Products Co., 929 F. Supp. 800, 43 ERC 1377, 1382-83 (M.D. Pa. 1996) ("It must be emphasized, however, that because actual harm to the environment is by nature difficult and sometimes impossible to demonstrate, it need not be proven to establish that substantial penalties are appropriate in a Clean Water Act case.")

United States v. Avatar Holdings, Inc., 1996 WL 479533, at *6 (M.D. Fla. 1996) (the seriousness of the violations is determined by considering "the number, duration and degree of the violations as well as the actual or potential harm to human health and the environment," "[a] substantial reduction in the maximum statutory penalty is warranted where the violations caused minimal environmental damage")

Public Interest Research Group of N. J., Inc. v. Magnesium Electron, Inc., 40 ERC 1917, 1995 WL 461252, *17 (D.N.J. March 9, 1995) (environmental harm need not be proven to collect penalty under the CWA)

United States v. Harrison Warehouse Services Co., Inc., No. 1:90CV82 (N.D. W.V. 1995) at 24 (CAA; "The release of asbestos fibers into the environment necessarily puts the entire community at risk of contracting diseases which can be fatal. Therefore, there can be no doubt that the instant violations are serious as a matter of law.")

Hawaii's Thousand Friends v. City and County of Honolulu, 821 F. Supp. 1368, 37 ERC 1398 (D. Hawaii 1993) (lack of measurable material harm was a mitigating factor)

Natural Resources Defense Council, Inc. v. Texaco Refining & Marketing, Inc., 800 F. Supp. 1, 21 (D. Del. 1992) (court may justifiably impose a significant penalty if it finds there is a risk or potential risk of environmental harm, even absent proof of actual deleterious effect)

Atlantic States Legal Foundation, Inc. v. Universal Tool & Stamping Co., Inc., 786 F. Supp. 743, 747 (N.D. Ind. 1992) (3-year study of receiving waters showed

no measurable environmental harm; the complete absence of environmental damage may be considered by the Court in mitigating a civil penalty)

Natural Resources Defense Council, Inc. v. Texaco, 800 F. Supp. 1, 35 ERC 2095, 2114 (D. Del. 1992), aff'd in part and reverse in part, 2 F.3d 493, 37 ERC 1305 (3d Cir. 1993) (plaintiff put on proof of theoretical environmental harm; "We therefore reject Texaco's contention that no penalty is appropriate because the plaintiffs have failed to prove actual adverse impact. Congress has stated that the objective of the [CWA] is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. . . So as long as the plaintiffs have proved that there is at least a potentially destructive impact on the waterway, penalties are not inappropriate. . . [I]f we required specific proof that particular violating discharges caused discrete, identifiable harms, we would encourage a permittee to ignore the requirements of its permit `with impunity so long as it discharge into already polluted waters.'")

United States v. Roll Coater, Inc., 21 ELR 21073 (S.D. Ind. 1991) (held that lack of proven environmental damage a mitigating factor, rejecting government's argument that court should accept, without evidence, that all violations involving toxic pollutants are serious; distinguishes Powell Duffryn on grounds that it was not a pretreatment case)

United States v. Roll Coater, Inc., 21 ELR 21073, 21075 (S.D. Ind. 1991) (lack of environmental damage is a mitigating factor)

All Regions Chemical Labs, Inc. v. EPA, 932 F.2d 73, 76 (1st Cir. 1991) (TSCA failure-to-report case, where court held that ALJ was correct to hold that EPA has the power to assess penalties in terms of what might have happened rather than what did happen)

International Union, UAW v. Amerace Corp, Inc., 740 F. Supp. 1072, 1081, 32 ERC 1790, 21 ELR 20097 (D.N.J. 1990) (discharges of prohibited substances to the POTW are presumed to pass through in unacceptable amounts; Because categorical standards and local limits established by the POTW incorporate a causation element (i.e., a determination has been made that concentrations or loadings exceeding certain numerical limits will interfere with or pass through the POTW), both types of limitations are enforceable without direct evidence that a particular discharge caused pass through or interference)

Public Interest Research Group v. Powell Duffryn Terminals, Inc., 720 F. Supp. 1158, 1163 (D.N.J. 1989), aff'd in part, rev'd in part, 913 F.2d 64, 31 ERC 1905 (3d Cir. 1990), cert. denied, 498 U.S. 1109 (1991) ("The Court finds that the 386 violations were very serious in nature. A significant number of the violations exceeded the permit limitations by large amounts. Significantly, some of the defendant's effluent was toxic to marine organisms because defendant's violations involved toxic pollutants and pollutants with potential to cause environmental harm to the waters into which they were discharged. Moreover, the Court attaches significance to the large number of violations at issue.")

Student Public Interest Research Group of N.J., Inc. v. Hercules, Inc., 29 ERC 1417, 1421 (D.N.J. 1989) (courts recognize that it is usually impossible to determine the precise effect of a violation on ambient water quality, and accordingly they do not permit protracted litigation over the issue in civil penalty proceedings)

Public Interest Research Group V. C.P. Chemicals, 26 ERC 2017, 2021 (D.N.J. 1987) ("if the Court were to adopt defendant's view, . . . any permittee could ignore the requirements of its permit with impunity so long as it discharged into already heavily polluted waters. Clearly, any argument that toxic discharges fail to make the receiving waters measurably worse frustrates the Act's intent to improve the quality of our nation's waters.")

Mumford Cove Assoc. v. Groton, 640 F. Supp. 392 (D. Conn. 1986) ("enforcement of the Clean Water Act does not depend upon establishing a direct causal link between violations of NPDES permit and pollution.")

United States v. Velsicol Chemical Corp., 12 ERC 1417, 1421 (W.D. Tenn. 1978) (Civil penalties are "not tied to damages actually suffered . . . .")

In re Labarge, Inc., Docket No. CWA-VII-91-W-0078 at 7 (ALJ Greene Feb. 5, 1996) ("[E]vidence of measurable environmental harm in connection with a violation is not required in order to support the assessment of a substantial penalty under the Act.")

10. Top-Down/Bottom-Up

United States v. Smithfield Foods, Inc., ___ F.3d ___, 1999 U.S. App. LEXIS 22092 (4th Cir. 1999) (rejecting defendant's argument that CWA does not allow trebling of the penalty, appeals court affirmed trial court's use of bottom-up method, beginning with economic benefit as lowest possible penalty; "When calculating Smithfield's penalty, the district court took into account all six of the statutorily mandated factors and sufficiently detailed it findings as to whether the evidence in each area had a mitigating or aggravating impact on the total penalty. . . . We find that the court's analysis was complete and in line with what is required under the statute. . . But even if the court had simply trebled the economic benefit to determine the appropriate penalty, that was within its discretion, as long as it was below the statutory maximum of $174.55 million.")

Sierra Club v. Cedar Point Oil Co., 73 F.3d 546, 41 ERC 1897 (5th Cir. 1996), cert. denied, 519 U.S. 811 (1997) (held that trial court's use of top-down approach of Tyson Foods appropriate)

Atlantic States Legal Foundation v. Tyson Foods, 897 F.2d 1128, 1137-40, 31 ERC 1201 (11th Cir. 1990) (monthly average violation counts as 30 violations; the statutory maximum penalty is the point of departure in assessing a penalty under the CWA; court cannot impose penalties for violations of daily max and monthly average for same pollutant)

United States v. Gulf Park Water Co., 972 F. Supp. 1056, 46 ERC 1877 (S.D. Miss. 1997) (in assessing $1.5 million penalty adopted Tyson approach of top-down penalty calculation)

United States v. Smithfield Foods, Inc., 972 F. Supp. 338, 45 ERC 1387 (E.D. Va. 1997), affirmed in part, reversed in part, ___ F.3d ___, 1999 U.S. App. LEXIS 22092 (4th Cir. 1999) ("As the statute does not require either the 'top-down' or the 'bottom-up' method, the court exercises its discretion and elects to use the 'bottom-up' method when calculating the appropriate penalty for defendants' violations of their Permit;" court began with econ. benefit ($4.2 million) and adjusted upward to account for other factors to arrive at $12.6 million)

United States v. Municipal Authority of Union Township and Dean Dairy Products Co., Civil No. 1:CV-94-0621 (M.D. Pa. July 10, 1996) (rejects top-down approach in favor of starting with economic benefit and working up)

Public Interest Research Group of New Jersey, Inc. v. Magnesium Electron, Inc., 40 ERC 1917 (D.N.J. March 9, 1995) (economic benefit is the starting point and the other § 309(d) factors are used to increase it)

Hawaii's Thousand Friends v. City and County of Honolulu, 821 F. Supp. 1368, 37 ERC 1398 (D. Hawaii 1993) (start with statutory max and work down)

United States v. Roll Coater, Inc., 21 ELR 21073 (S.D. Ind. 1991) (start with statutory max and work down; cites Tyson Foods)

Student Public Interest Research Group of N.J. v. Monsanto, 29 ERC 1078, 1091 (D.N.J. 1988) (court refused to first set the penalty at statutory max and then place the burden on the defendant to establish facts justifying a reduction)

Public Interest Research Group of New Jersey, Inc. v. Monsanto Co., 18 ELR 20999 (D.N.J. 1988) (rejects top-down approach)

In re B.J. Carney Industries, Inc., Docket No. 1090-09-13-309(g) (ALJ Head 1996), aff'd in part, rev'd in part, 7 E.A.D. 171 (EAB 1997), appeal dismissed, ___ F.3d ___ , 1999 U.S. App. LEXIS 23005 (9th Cir. 1999) (rejected Tyson Foods; ALJ ruled that penalty should be calculated from bottom up)

In re Mahoning Valley Sanitary Dist., 1996 CWA LEXIS 7 (ALJ Head 1996) (rejecting top-down approach to calculation of penalty)

In re Ketchikan Pulp Co., Docket No. CWA-1089-12-22-309(g) (ALJ Head Nov. 22, 1995), aff'd, 7 E.A.D. 605 (EAB 1998) (rejecting Tyson Foods as not applicable to administrative cases, ALJ calculated penalty from bottom up applying penalty factors)

D. Collateral Estoppel

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5, 99 S. Ct. 645, 649 n.5, 58 L. Ed. 2d 552 (1979) (Under collateral estoppel principles, once an issue is actually litigated and necessarily determined, that determination is conclusive in subsequent suits based on a different cause of action but involving a party or privy to the prior litigation.)

Brown v. Felsen, 442 U.S. 127, 139, n.10, 99 S. Ct. 2205, 2213, n.10, 60 L. Ed. 2d 767 (1979) (In the absence of countervailing statutory policy, collateral estoppel bars relitigation of factual questions or mixed questions of law and fact.)

United States v. ITT Rayonier, Inc., 627 F.2d 996 (9th Cir. 1980) (EPA collaterally estopped to enforce for violations of CWA by pulp mill where mill had already litigated liability in state court against Washington State Department of Ecology for same violations)

United States v. City of Erie, Pa., No. 94-281 (W.D. Pa. July 21, 1995) (motion to dismiss denied in case against city for failure to enforce pretreatment violations; court rejected collateral estoppel argument, among others)

In re Marine Shale Processors, Inc., 5 E.A.D. 751 (EAB 1995) (collateral estoppel argument rejected where permit applicant argued that tentative finding of jury in enforcement case was binding on Region in permitting matter; good analysis of elements of collateral estoppel)

E. Enforcement Discretion

Heckler v. Chaney, 470 U.S. 821, 831, 105 S. Ct. 1649, 1656, 84 L. Ed. 2d 714 (1985) ("[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." Agency non-enforcement decisions should generally not be subject to judicial review because such decisions involve the balancing of various factors, including "whether a violation has occurred, . . . whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.")

Greene v. Reilly, 956 F.2d 593 (6th Cir. 1992) (district court held that CWA does not impose a mandatory duty on EPA to take enforcement action under § 309 when the Agency learns of a violation of § 301; court did not reach this question, ruling on grounds that plaintiff failed to give 60 days notice)

Coker v. Sullivan, 902 F.2d 84, 88 (D.C. Cir. 1990) (Unless Congress has provided meaningful standards for defining limits of agency's discretion to enforce statutory provisions entrusted to agency supervision, the APA does not permit courts to interfere. "This court should not steer the Department's resources and shape its priorities when we lack knowledge of the matters competing for the Department's attention.")

Natural Resources Defense Council, Inc. v. Thomas, 885 F.2d 1067, 1073 (2d Cir. 1989) (mandatory duty exists only when EPA fails to perform a duty due by a date certain)

Harmon Cove Condominium Ass'n v. Marsh, 815 F.2d 949, 952-53 (3d Cir. 1987) (Corps's responsibilities in enforcing CWA requirements are discretionary)

Dubois v. Thomas, 820 F.2d 943, 946-47 (8th Cir. 1987) (the Administrator of the EPA has discretion to enforce violations of the Clean Water Act)

Mountain States Legal Foundation v. Costle, 630 F.2d 754, 766 (10th Cir. 1980), cert. denied, 450 U.S. 1050 (1981) (citizen suit can only challenge specific, nondiscretionary statutory requirements)

Sierra Club v. Train, 557 F.2d 485, 491, 10 ERC 1433 (5th Cir. 1977) (§ 309(a)(3) and (b) duties are discretionary)

Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1375 (D.C. Cir. 1977) ("The use of the word `may' in § 402 means only that the Administrator has discretion either to issue a permit or to leave the discharger subject to the total proscription of § 301. This is the natural reading, and the one that retains the fundamental logic of the statute.")

State Water Control Board v. Train, 559 F.2d 921, 927 (4th Cir. 1977) (EPA has power to exercise enforcement discretion and not bring penalty action when municipality is making good faith effort to comply)

Cross Timbers Concerned Citizens v. Saginaw and Johnson, 991 F. Supp. 563 (N.D. Tex. 1997) (citizen suit against EPA for alleged failure to force Texas to enforce CAFO regulations dismissed on grounds that enforcement is not a non-discretionary duty)

F. EPA Guidance

EPA, "Supplemental Guidance on Section 309(g)(6)(A) of the Clean Water Act" (March 5, 1993)

EPA, "New Administrative Penalty Procedures" (October 29, 1991)

EPA, "Guidance on Division of CWA Administrative Penalties with State and Local Governments" (September 27, 1991)

EPA, "Final Rules of Practice Governing Administrative Assessment of Class II Civil Penalties under the Clean Water Act," (June 12, 1990), published at 55 Fed. Reg. 23838 (1990)

EPA, "Use of Administrative Penalty Orders (APO's) in FY 89" (March 13, 1990)

EPA, "Final Clean Water Act Section 404 Civil Administrative Penalty Settlement Guidance" (December 14, 1990)

EPA, "Guidance on Class I Clean Water Act Administrative Penalty Procedures" (July 27, 1987), noted at 52 Fed. Reg. 30730 (1987)

EPA, "Relationship of Section 309(a) Compliance Order to Section 309(g) Administrative Penalty Proceedings" (1987)

EPA, "Guidance on Choosing Among Clean Water Act Administrative, Civil and Criminal Enforcement Remedies" (August 28, 1987)

EPA, "Guidance on State Action Preemption Civil Penalty Actions under the Federal Clean Water Act" (August 28, 1987)

EPA, "Guidance on 'Claim Splitting' in Enforcement Actions under the Clean Water Act" (August 28, 1987)

EPA, "Guidance on Retroactive Application of New Penalty Authorities under the Clean Water Act" (August 28, 1987)

EPA, "Addendum to the Clean Water Act Civil Penalty Policy for Administrative Penalties" (August 28, 1987)

EPA, "Guidance on Notice to Public and Commentors in Clean Water Act Class II Administrative Penalty Proceedings" (August 28, 1987)

EPA, "Guidance Regarding Regional and Headquarters Coordination on Proposed and Final Administrative Penalty Orders on Consent under New Enforcement Authorities of the Water Quality Act of 1987" (August 28, 1987)

G. EPA Not Limited to One Remedy

United States v. Roll Coater, Inc., 1991 U.S. Dist LEXIS 8790 (S.D. Ind. 1991) (EPA is not limited to one remedy and may seek both penalties for past violations and prevention of future violations)

United States v. Earth Sciences, Inc., 599 F.2d 368, 375-76 (10th Cir. 1979) (rejecting argument that EPA is limited to only one remedy)

H. Equitable Estoppel

33 U.S.C. § 1342(i) ("Nothing in this section [pertaining to NPDES permits] shall be construed to limit the authority of the [EPA] Administrator to take [enforcement] action. . .")

OPM v. Richmond, 496 U.S. 414, 110 L. Ed. 2d 387 (1990) ("Since [Heckler], federal courts have continued to accept estoppel claims under a variety of rationales and analyses. In sum, courts of appeals have taken our statements as an invitation to search for an appropriate case in which to apply estoppel against the Government, yet we have reversed every finding of estoppel that we have reviewed. Indeed, no less than three of

our most recent decisions in this area have been summary reversals of decisions upholding estoppel claims. . . .Summary reversal of courts of appeals are unusual under any circumstances. The extraordinary number of such dispositions in this single area of the law provides a good indication that our approach to these cases has provided inadequate guidance for the federal courts and served only to invite and prolong needless litigation." 110 L. Ed. 2d at 398.)

Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 60 (1984). ("[w]hen the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." The court, however, "hesitant," despite "substantial" arguments to the contrary, to hold that "there are no cases in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government." 467 U.S. at 60-61. See also Rehnquist concurring opinion ("I think that the Court's treatment of [the question of estoppel against the government]. . . gives an impression of hospitality towards claims of estoppel against the Government which our decided cases simply do not warrant." Id. at 68.)

Immigration and Naturalization Serv. v. Miranda, 459 U.S. 14, 16-17 (1982) (per curiam) (affirmative defense of estoppel may only be asserted upon a showing that the complainant is "guilty of intentional conduct while knowing the Respondent should be misled into detrimental reliance.")

Scott Paper Co. v. Marcalus Mfg. Co., Inc., 326 U.S. 249, 257 (1945) (estoppel cannot serve as the "means of successfully avoiding the requirements of legislation enacted for the protection of a public interest.")

United States v. Boccanfusco, 882 F.2d 666, 671-72, 30 ERC 1292 (2d Cir. 1989) (government not estopped to enforce CWA for violation arising out of construction of seawall despite owner's contention that government representative made a misstatement as to government's jurisdiction over the seawall and that the government failed to timely process owner's application)

United States v. Tull, 764 F.2d 182, 24 ERC 1495 (4th Cir. 1985), rev'd on other grounds and remanded, 481 U.S. 42, 25 ERC 1857 (1987) (no estoppel where Corps. allegedly misled defendant into believing he did not need a 404 permit to fill wetlands)

United States v. Ven-Fuel, Inc., 758 F.2d 741, 761 (1st Cir. 1985) ("The possibility of harm to a private party inherent in denying equitable estoppel its wonted reach is often (if not always) grossly outweighed by the pressing public interest in the enforcement of congressionally mandated public policy. . . [N]either carelessness, nor a reluctance to be of assistance are tantamount to affirmative misbehavior." (citations omitted))

Deltona Corp. v. Alexander, 682 F.2d 888, 892, 18 ERC 1009 (11th Cir. 1982) ("the actions of the government to implement the [Clean Water] Act are unquestionably an exercise of the government's sovereign power to protect the public interest")

United States v. City of Toledo, 38 ERC 1955 (W.D. Ohio 1994) (city failed to show that EPA engaged in affirmative misconduct that would prevent agency from bringing enforcement action against City for unpermitted discharges from sewer system)

United States v. Bethlehem Steel Corp., 829 F. Supp. 1023, 1035, 37 ERC 1925 (N.D. Ind. 1993) (no affirmative misconduct found in RCRA case involving decade-long delay by EPA in acting on delisting petition)

United States v. Citizens Utilities Co. of Illinois, 1993 U.S. Dist. LEXIS 10340, at *17. (N.D. Ill. 1993) (no estoppel in CWA case where there was no evidence found of affirmative misconduct by EPA)

United States v. Winward Properties, Inc., Civil No. 1:91-CV-348-RLV (N.D. Ga. Mar. 31, 1993) (EPA's motion to strike granted on estoppel defense grounds that Defendant had failed to show affirmative misconduct and "[b]ecause the act of granting a § 404 permit is `unquestionably an exercise of the government's sovereign power to protect the public interest.'")

Slagle v. United States, 809 F. Supp. 704, 710, 23 ELR 20615 (D. Minn. 1992) (estoppel defense rejected in wetlands case for lack of affirmative misconduct by Corps and no reasonable reliance by defendant)

United States v. Rybachek, No. F86-059 (D. Ak. July 20, 1992) (no estoppel to enforce for violation of NPDES permit where EPA inspector allegedly told miners that DMRs, which formed basis of liability, would not be used as basis for enforcement because no affirmative misconduct shown)

United States v. CPS Chemical Co., 779 F. Supp. 437, 452-453 (E.D. Ark. 1991) (court rejected estoppel defense stating that "[i]n the absence of affirmative misconduct, the government may not be estopped by misrepresentation given by its agents." "As a general rule,`those who deal with the government are expected to know the law and may not rely on the conduct of government agents to the contrary.'" (quoting Heckler) "[N]oncompliance with an effluent limitation is a violation of the law, and CPA could not reasonably have relied on statements to the contrary.")

United States v. Eastern of N.J., Inc., 770 F. Supp. 964, 983-987, 34 ERC 1114 (D.N.J. 1991) (no estoppel in RCRA case where defendant failed to show alleged misrepresentations by EPA were affirmative misconduct; "Eastern contends the Government engaged in affirmative misconduct when it failed both to apprise Eastern of the regulations promulgated under RCRA and to assist Eastern in complying with the regulations. . . The Government, however, does not have a duty to apprise the public of regulations which are readily available to the public." 34 ERC at 1131)

United States v. Roll Coater, Inc., 1991 U.S. Dist. LEXIS 8790 (S.D. Ind. 1991) (government may be estopped from asserting claims against a party that it has wronged; in this case, however, estoppel only goes to amount of penalty rather than liability because CWA is a strict liability statute)

United States v. Pennzoil Exploration and Production Co., (W.D. Pa. Apr. 18, 1991) (motion to strike affirmative defense of estoppel granted on grounds that it is not available against the United States acting in its sovereign capacity)

United States v. Quaker State Corp., Civ. No. 88-306-Erie (W.D. Pa. Apr. 2, 1991) (liability under § 309 of the CWA is strict; therefore, defenses going to intent, good faith, estoppel or the like are irrelevant to the question of liability)

United States v. Crown Cork de Puerto Rico, Inc., (D. Puerto Rico Jan. 31, 1991) (EPA's delay in issuing NPDES permit does not constitute the basis for estopping the government from enforcing against a discharger for CWA violations that occur during the period of delay)

United States v. FMB-First Mich. Bank, 1990 U.S. Dist. LEXIS 8114 (W.D. Mich. 1990) (estoppel defense stricken on motion for summary judgment in RCRA enforcement action; "In this case, the government is seeking enforcement of health and safety regulations. This role is well recognized as one of the characteristic' sovereign activities traditionally not subject to estoppel.")

United States v. Chevron, 757 F. Supp. 512, 515-516, 32 ERC 467 (E.D.Pa. 1990) (EPA not estopped to enforce despite four-year delay in instituting action and despite alleged representations by EPA staff that defendant was in compliance)

United States v. Menominee, Mich., 727 F. Supp. 1110, 1121-22, 20 ELR 20509 (W.D. Mich. 1989) (EPA's failure to enforce known NPDES permit violation while defendant sought state and federal approval for new permit authorizing discharges was not grounds for estoppel in subsequent enforcement action; "No right exists to pollute our nation's waters. The burden is on the polluter to comply with the CWA, not on USEPA to ensure compliance.")

United States v. Vanguard Corp., 701 F. Supp. 390, 392 (E.D.N.Y. 1988) (government's participation in negotiations over proposed consent decree allowing defendant 18 months to come into compliance with Clean Air Act did not estop government to seek civil penalties for violations where no agreement was ever reached)

United States v. Arkwright, Inc., 690 F. Supp. 1133, 1143, 27 ERC 2258 (D.N.H. 1988) (where defendant entered into consent agreement with state, defendant applied to EPA for incorporation of the consent decree into a SIP (a state implementation plan) and EPA took more than a year to reject proposed SIP amendment, EPA was not estopped to seek civil penalties for violation of existing SIP; "If EPA cannot penalize companies which violate approved air quality standards, then the general populace will suffer from unhealthy air pollution levels.")

In re B.J. Carney Industries, Inc., 7 E.A.D. 171 (EAB 1997), appeal dismissed, ___ F.3d ___, 1999 U.S. App. LEXIS 23005 (9th Cir. 1999) (EAB rejected Respondent's equitable estoppel argument and held that Respondent failed to make the requisite showing that the Region's conduct amounted to affirmative misconduct; also fatal to an equitable estoppel claim was the fact that, rather than suffering the requisite detriment,

Respondent actually benefitted from the EPA's conduct by operating for five years without making the expenditures necessary to comply with the law)

In re Britton Construction, Docket No. CWA-III-096 (ALJ Pearlstein 1997), aff'd, 8 E.A.D. ___ (EAB 1999) (due to the lack of affirmative misrepresentation by government as well as the Respondent's lack of detrimental reliance, Respondents' claim of estoppel as a bar to liability was rejected; however, ALJ used the "such other factors as justice may require" statutory factor to reduce the penalty dramatically)

In re Borden Chemicals & Plastics Co., Docket No. [CERCLA] EPCRA-003-1992 (ALJ Vanderheyden 1/18/93) (estoppel defense rejected where defendant could not show reasonable reliance to its detriment, and where ALJ found no affirmative misconduct: "neither carelessness nor a reluctance to be of assistance constitute affirmative misconduct." Id. at 17.)

In re Willis Pyrolizer Co., RCRA-83-H-002 (ALJ Jones 1983) ("When an agency of the United States government is performing a regulatory function pursuant to an act and regulations designed to protect or enforce a public interest or right, it may not be estopped.")

Annotation, *Modern Status of Applicability of Doctrine of Estoppel Against the Federal Government and Its Agencies*, 27 A.L.R. Fed. 702 (1998)

I. Mandatory Assessment

Leslie Salt Co. v. United States, 55 F.3d 1388 (9th Cir. 1995) cert. denied sub nom, Cargill, Inc. v. United States, 516 U.S. 955 (1995) (were a violation of the CWA is found, assessment of a penalty is mandatory, however, court retains discretion to assess only a nominal penalty)

United States v. Winchester Municipal Utilities, 944 F.2d 301, 306 (6th Cir. 1991) (assessment of a penalty is mandatory once liability is established)

Atlantic States Legal Foundation v. Tyson Foods, 897 F.2d 1128, 1142 (11th Cir. 1990) (language of 309(d) makes clear that once a violation has been established, some penalty is required)

Chesapeake Bay Foundation v. Gwaltney of Smithfield, 890 F.2d 690, 697 (4th Cir. 1989) (§ 309(d)'s statement that a violator "shall" be subject to civil penalties meant that "the court is virtually obligated to assess penalties.")

Stoddard v. Western Carolina Regional Sewer Authority, 784 F.2d 1200, 1208 (4th Cir. 1986) (reversing the district court for failing to assess a penalty for proven violations of the Act)

Georgia v. City of East Ridge, Tenn., 1996 U.S. Dist. LEXIS 18862 (N.D. Ga. Nov. 20, 1996) (held that sewer overflow via manhole violates CWA and that penalty must be imposed once CWA liability is established)

United States v. Roll Coater, Inc., 21 ELR 21073 (S.D. Ind. 1991) (when the CWA is violated, a penalty is mandated)

Conservation Law Foundation of New England, Inc. v. City of Fall River, (D. Mass. June 13, 1991) (CWA mandates the imposition of civil penalties against one who has violated the terms of an NPDES permit)

Conservation Law Foundation of New England, Inc. v. City of Fall River, Civ. No. 87-3067-N (D. Mass. June 13, 1991) (CWA mandates the imposition of civil penalties against one who has violated the terms of an NPDES permit)

J. Mootness

United States v.Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203, 89 S. Ct. 361, 364, 21 L. Ed. 2d 344 (1968) ("Mere voluntary cessation of allegedly illegal conduct does not moot a case.")

Atlantic States Legal Foundation v. Tyson Foods, 897 F.2d 1089, 1094 (1st Cir. 1986) (even where a claim for injunctive relief is mooted by discontinuance of the challenged conduct, claims for civil penalties survive)

Powtuxet Cove Marina v. Ciba-Geigy Corp., 807 F.2d 1089, 1094 (1st Cir. 1986), cert. denied, 484 U.S. 975, 108 S. Ct. 484, 98 L. Ed. 2d 483 (1987) (compliance does not moot penalty action)

Public Interest Research Group v. Elf Atochem, 817 F. Supp. 1164, 1171, 36 ERC 1855 (D.N.J. 1993) (penalty action not rendered moot by compliance of defendant with act after action filed; "This position makes sense from a policy standpoint, since the opposite position would encourage polluters to wait until they get sued to take corrective action in compliance with the Act.")

See also CITIZENS SUITS: Mootness

K. Penalties Assessed by Courts

Sierra Club v. Cedar Oil Co., 73 F.3d 546 (5th Cir. 1996) ($186,070 awarded for unpermitted produced water discharges into Galveston Bay based on economic benefit)

United States v. City of Green Forest, 921 F.2d. 1394 (8th Cir. 1990) (combined appeals of EPA enforcement action and citizen's suit from judgments against City for failure of city to pretreatment and IU violations as to Tyson Foods; court assessed penalty of $43,000 against Tyson-Work v. Tyson Foods, Inc., 720 F. Supp. 132 (W.D. Ark. 1989); found that Tyson's purchased the plant with the knowledge that it had CWA compliance problems, Tyson steadily increased production at the plant, and Tyson was the principal loader to the POTW; penalty affirmed)

Public Interest Research Group v. Powell Duffryn Terminals, Inc., 913 F.2d 64 (3d Cir. 1990) (District Court's reduction of the penalty by $1 million was not justified by the

District Court's findings)

Student Public Interest Research Group v. P.D. Oil and Chemical, 913 F.2d 64 (3d Cir. 1989) (statutory max. ($4,085,000) for 386 effluent violations)

United States v. Buckner, No. 96-CR-9-S (D. Colo. Dec. 18, 1998) ($20,000 criminal penalty plus five year probation for two men convicted of conspiracy to violate CWA at Summetville Mine in Colorado)

United States v. Smithfield Foods, Inc., 927 F. Supp. 338, 45 ERC 1387 (E.D. Va. 1997), affirmed in part, reversed in part, ___ F.3d ___, 1999 U.S. App. LEXIS 22092 (4th Cir. 1999) ($12,500,000 for 6,982 total days of violations (DMR and reporting violations); economic benefit held to be $4,253,070)

United States v. Gulf Park Water Co., 927 F. Supp. 1056, 46 ERC 1877 (S.D. Miss. 1997) (in assessing $1.5 million penalty, held that potential harm to the environment enough to justify substantial penalty; actual harm need not be shown)

United States v.Avatar Holdings Inc., No. 93-282-CIV-FTM-21 (D.Fla. Aug. 20, 1996) ($309,710 for various CWA violations at three WWTPs – $5,610 at Barefoot Bay for BPD, TRC, and chronic toxicity; $14,675 at Carrollwood for phosphorus, carbonaceous BPD, nitrogen, TRC, TSS and fecal; $289,425 at Waterway Estates for permit exceedances and unpermitted discharges)

United States v.Municipal Authority of Union Township and Dean Dairy Products Co., Civil No. 1:CV-94-0621 (M.D. Pa. July 10, 1996), aff'd, 150 F.3d 259 , 46 ERC 1977 (3d Cir. 1998) (held that revenue earned by not reducing flow to come into compliance with pretreatment limits constituted economic benefit, in this case $2,015,000; court then doubled the economic benefit to arrive at the penalty)

Weber v. Trinity Meadows Raceway, Inc., 42 ERC 2063 (N.D.Tex. 1996) ($230,000 for unpermitted discharges of animal wastes)

United States v. Sheyenne Tooling, 952 F. Supp. 11420 (D.N.D. 1996), aff'd, 1998 U.S. App. LEXIS 20855 (per curiam) ($60,150 for violations of categorical standards for metal finishers; $10,000 for "failure to obey regulations" + $4,600 for economic benefit over 10 yrs + $500 for continuing to electroplate for 1 week after receiving compliance order + $1.00/day for each day of violation; judge found that "the principle of requiring that persons at fault must be held to a 'level playing field' means that the defendant must be held to the conditions of his field, not that of a larger or more wealthy players . . . the defendant's playing field was a small playing field in a sparsely-settled community.")

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 956 F. Supp. 588 (D.S.C. 1995), rev'd on other grounds, 149 F.3d 303, 46 ERC 2025 (4th Cir. 1998) (court assessed penalty of $405,800 despite proof at trial of economic benefit in excess of $1 million; judge reduced penalty reasoning that defendant's attorneys fees together with the penalty awarded, provides an adequate deterrent)

United States v. Perdue-Davidson Oil Co., (E.D. Ky. 1994) ($3,867,590 ($4 million stat. max.) awarded in multimedia case (CWA, SDWA (UIC), EPCRA) arising out of discharges from POTW treating oil wastes from oil production facility that severely contaminated ground water)

Hawaii's Thousand Friends v. City and County of Honolulu, 821 F. Supp. 1368, 37 ERC 1398 (D. Hawaii 1993) ($718,000 ($156,000 for 52 days of bypass, $312,000 for 52 reporting violations and $250,000 for secondary treatment violations) and $1 million to the Manla Bay Study Commission for additional monitoring of the effects of sewage discharges on public health and the marine environment; Court found: 1) lack of measurable material harm was a mitigating factor as to seriousness of violations; 2) city had negligible economic benefit; 3) history of violations factor not applicable for mitigation; 4) city relied on state and EPA standards, and thus the city's good faith reliance served as a partial mitigating factor; 5) a penalty will cause only a minor increase in the amount paid by sewer customers)

United States v. Van Leuzen, 816 F. Supp. 1171, 36 ERC 1992 (S.D. Tex. 1993) (§ 309 requires that a court impose some fine on each defendant and that the duty to restore intentionally filled wetlands is mandatory, absent equities; court ordered defendant to restore the entire wetland, including the area under the house, within 8 years, or a trustee would be appointed to remove the house and restore the wetland; based on ability to pay, $900 penalty assessed)

Atlantic States Legal Foundation v. Universal Tool & Stamping Co., 786 F. Supp. 743 (N.D. Ind. 1992) ($450,000 violations of NPDES permit prior to installing new equipment; Court found: 1) 1,977 violations; 2) statutory maximum is $25,830,000, 3) court started with the statutory maximum and applied "six mitigating factors" to reduce the penalty; 4) sheer number of violations caused minimal environmental damage constitute a significant mitigating factor; 5) battle of the experts over economic benefit resulted in court's use of equity rate of return; 6) economic benefit equaled $85,000; 7) history of violations established from those at issue and the fact that defendant had been in noncompliance since 1975; 8) defendant showed that it had been proceeding in good faith to come into compliance with the permit; 9) No economic impact on the violator; 10) court considered the ability of the company (an employer of "400") to continue in business had a net income of $1,351,506 from 1986-1989)

Natural Resources Defense Council v. Texaco Refining and Marketing, Inc., 800 F. Supp. 1, 17, 35 ERC 2095 (D. Del. 1992), aff'd in part, rev'd in part on other grounds, 2 F.3d 493 (3d Cir. 1993) ($1,680,000 awarded in citizen's suit against private entity for NPDES violations. Court found: 1) 3360 violations; 2) violations included flow, pH, oil and grease, BOD, TOC, phenols, sulfides, bioassay; 3) court calculated the penalty beginning at the statutory maximum and then analyzes "qualitative factors" to come to a final penalty; 4) violations were serious-level of exceedance, poor internal procedures at Texaco, threatened harm to river ecosystem; 5) court divided the difference in economic benefit expert's opinion in half, finding economic benefit to be $900,000, 6) Texaco had a declining history of violation which served to mitigate history of violations factor; 7) Texaco demonstrated good faith efforts to comply; 8) Texaco did not demonstrate that a large penalty would have an adverse impact on the company.

Public Interest Research Group v. Magnesium Elecktron, Inc., 32 ELR 20362 (D.N.J. 1992) ($2,625,000 awarded (statutory max.) in citizen suit: 1) discharge violations were regarded as non-serious due to lack of environmental impact; non-discharge violations were deemed serious; 2) figure of $5,330,000 will be used to calculate economic benefit; 3)Penalty must at least reflect economic benefit; 4) if economic benefit exceeds statutory maximum, then the penalty is the statutory maximum; 5) court referred to the EPA penalty policy to apply a dollar amount to the seriousness of the violations; 6) court looked to economic benefit obtained by defendant inured to its parent since defendant is a wholly owned subsidiary; 7) parent's ability to pay should be examined, not sub.'s; 8) parent could pay a penalty of $10 million)

United States v. Beaumont, 786 F. Supp. 634, 35 ERC 1106 (E.D. Tex 1992) ($400,000 awarded in enforcement action for failure to implement pretreatment program. Court found: 1) statutory maximum is $8,000,000; 2) economic benefit was $316,000; 3) City ran in operating debt of $4 million per year; 4) City's investment loss of $20 million was not why pretreatment program was not implemented; 5) city had 800 violations; 6) environmental harm caused by toxic pollutant may have occurred in the Hillebrandt Bayou; 7) city is now in compliance)

United States v. Roll Coater, Inc., 21 ELR 21073 (S.D. Ind. 1991) ($2,093,750 awarded for violations of pre-treatment standards; Court found: 1) Start at statutory maximum and reduce the penalty by statutory factors; 2) Statutory maximum equaled $52,945,000; 3) Violations were-248 chromium, 248 zinc, 908 zinc, 31 cyanide, 91 cyanide; 4)Seriousness "considerable-1,000% exceedances, but no environmental harm traceable to Defendant; 5) Court adjusted date of first violation to June, 1986 from December 1, 1985; 6) Court found EPA was sending mixed signals; 7) Roll Coater had a history of violations, 8) the state recognized and excused noncompliance; 9) Roll Coater acted in good faith; 10) Roll Coater made no evidentiary showing that a large civil define would adversely affect it, 11) Roll Coater could not have compiled prior to October 1987, because it took 18 months to construct a treatment facility; 12) the revised statutory maximum is $16,750,000; 13) lack of environmental damage reduced penalty by 50%; 14) good faith reduced penalty by another 75%)

United States v. City of San Diego, 33 ERC 1256, 21 ELR 21223 (S.D. Cal. 1991) ($3 million awarded for effluent violations, despite economic benefit of $300 million because city showed good faith; $500,000 paid to Treasury, $2.5 mill devoted to water conservation program; court found: 1) statutory maximum = $229 million; 2) City has been in violation of CWA from 1972 to 1991; 3) City had violations which constituted violations of substantial seriousness, 4) no damage cause by failure to enforce pretreatment; 5) effluent violations caused significant injury to the marine environment but were not of "epidemic proportions"; 6) city had $300 million economic benefit; 7) history of violations established by those set forth in the case, 8) City demonstrated good faith in trying to correct the problem; 9) city did not claim poverty; 10) taxpayers would have to pay the penalty-and that they would be the only victim of the penalty 11) EPA and State sent conflicting messages to the City; 12) penalty calculation started at statutory maximum and then the applications of the six factors brought it down)

United States v. Confederate Acres, 767 F. Supp. 834 (W.D. Ky. 1990) ($17,000

awarded in enforcement action against a privately owned sewage treatment works; court found: 1) 4,000 violations over 12 years are serious; 2) 17,00 economic benefit; 3)injunction that court intends to put in place will put them out of business so there is no need for a deterrence factor in the penalty; 4) defendant has high indebtedness 5) defendant has demonstrated that a severe economic penalty is beyond defendant's ability to pay)

Public Interest Research Group v. Powell Duffryn Terminals, 720 F. Supp. 1158 (D.N.J. 1989), aff'd in part, rev'd in part, 913 F.2d 64, 31 ERC 1905 (3d Cir. 1989) ($3,205,000 awarded in citizen's suit against private entity for violations of NPDES permit; court found: 1) 386 violations-363 committed when statutory maximum was $10,000/day, 23 were $25,000/day; 2) violations were 8-TOC, 63-pH, 66-TSS, 1-bioassay, oil and grease 48-1, hexavalent chromium-2, methylene chloride-9, phenol-1, BOD-80, COD-81; 3) 286 violations exceeded permit limit by 100%; 4) 195 violations exceeded permit by 200%; 4) 127 violations exceeded permit by 400%; 5) 86 violations exceeded the permit by 1,000%; 6) violations were very serious-exceedances were large, and were toxic to marine organisms, and the sheer number of violations were significant; 7) economic benefit was difficult to quantify, however, court thought it was a lot; 8) defendant's 386 violations over 11 years established a history of violations; 9) Powell Duffryn's purchased all the stock of the company when it was subject to an enforcement action for water pollution; 10) defendant did not act in good faith, however, EPA, and NJ DEP approved of defendant's actions; 11) no economic impact - court looked to parent, and parent's parent; 12) economic benefit is in excess of statutory maximum; 13) court deducted $1 million because of DEP/EPA malfeasance)

Student Public Interest Research Group v. Hercules, Inc., 29 ERC 1417 (D.N.J. 1989) ($1,680,000 statutory max for failure to install wastewater treatment equipment from 1978 to 1986)

Work v. Tyson Foods, 720 F. Supp. 132 (W.D. Ark. 1989) ($43,000 (10% of statutory max) for discharging wastewater to POTW that caused POTW to violate its NPDES permit)

Sierra Club v. Simkins Industries, Inc., 617 F. Supp. 1120, 23 ERC 1018 (D. Md. 1985), aff'd, 847 F.2d 1109, 27 ERC 1881 (4th Cir. 1988), cert. denied, 491 U.S. 904 (1989) ($977,000 statutory maximum imposed for failure to file DMRs for 977 days)

Student Public Interest Research Group v. Monsanto, 29 ERC 1078, 1092 (D.N.J. 1988) ($380,000 for delayed installation of treatment facility that did not work properly even when installed)

Chesapeake Bay Foundation v. Gwaltney of Smithfield, 611 F. Supp. 1542, 1557 (E.D. Va. 1985), aff'd 791 F.2d 304 (4th Cir. 1986), vacated and remanded on other grounds, 100 S. Ct. 376 (1987), on remand, 844 F.2d 170 (4th Cir. 1988) ($289,822 against pork processor for violations of permit resulting from problems with biological treatment and chlorination systems)

Raymond Profitt v. Lower Bucks County Joint Municipal Authority, Civil Action 86-

7220 (E.D. Pa. May 12, 1988) ($0 penalty assessed; citizen's suit against municipal POTW. 596 violations, BOD, TSS, Percentage Removal of Oxygen Demand, Percentage Removal of Suspended Solids and Oxygen Demand. Court found: 1) violations serious; 2) POTW suffered economic detriment; 3) POTW had a history of violations (the 596); 4) POTW demonstrated much good faith in that it had commenced construction to improve the POTW/bring POTW into compliance; 5) POTW had not been willfully noncompliant; 6) the taxpayers would pay the penalty; 7) POTW is not a commercial entity)

United States v. Atlantic Richfield Co., Civ. No. CA3-85-1621H (N.D. Tex. 1985) ($350,000 for 22 violations at 10 offshore oil and gas production platforms)

Ohio ex rel. Brown v. K & S Circuits, Civ. No. 79-950, C.P. (Montgomery Co., Ohio, Sept. 5, 1983) ($800,000 based on penalty policy)

State ex rel. Brown v. Dayton Malleable, Inc., 13 ERC 2189 (C.P., Montgomery Co., 1979) ($493,500 against manuf. of iron castings for violations of permit resulting from failure to construct adequate wastewater treatment facilities)

United States v.Velsicol Chemical Corp., 12 ERC 1417 (W.D. Tenn. 1978) ($30,000 for permit violations)

United States v. Bd. of Trustees of Fla. Keys Comm. College, 531 F. Supp. 267, 274, 18 ERC 1188 (S.D. Fla. 1981) (wetland site covered with riprap ordered restored and $15,000 fine imposed; penalty reduced because not intentional violation and public entity involved)

29 Envir. Rptr. 2375, 2376 (April 2, 1999) ($18,582,253 in civil judicial penalties by EPA under the CWA in 1998)

L. Penalties Assessed in Administrative Cases

In re Dr. Marshall C. Sasser, 3 E.A.D. 703 (CJO 1991), aff'd, Sasser v. EPA, 990 F.2d 127 (4th Cir. 1993) ($125,000 for illegal fill of wetlands)

In re Pepperell Associates, No. CWA-2-I-97-1088 (ALJ Gunning Feb. 26, 1999) ($24,876 assessed for heating oil spill that violated OPA and SPCC regulations; the spill originated from an UST that leaked in a basement and entered navigable waters via the drain system; some oil also entered the POTW)

In re Condor Land Co., No. CWA-404-95-106 (ALJ Pearlstein Dec. 8, 1998) ($32,160 (full amount proposed) assessed for unpermitted fill of wetlands when respondent used bulldozers and plows to clear land; held that land in question was jurisdictional wetlands, "redepositing" of dredge material constitutes a "discharge," and farm exemption does not apply)

In re Slinger Drainage, Inc., Docket No. 5-CWA-97-022 (ALJ Kuhlmann Sept. 14, 1998), affirmed, 8 E.A.D. ___ (EAB 1999) ($90,000 (full amount of proposed penalty)

assessed for unpermitted fill of wetlands while installing tile drains)

In re Corporacion para el Desarrollo Economico y Futuro de la Isla Nena, (ALJ Biro July 15, 1998) ($75,000 awarded jointly and severally against three defendants for CWA violations after one settled for $40,000 and the other two failed to file an answer to the complaint; EPA had only asked for $35,000 against the remaining two in its default motion, giving them credit for the $40,000 settlement)

In re Urban Drainage and Flood Control Dist., and Kemp & Hoffman, Inc., Docket No. CWA-VIII-94-PII (ALJ Pearlstein June 24, 1998) ($80,000 assessed for unpermitted stream channel alteration in violation of 404; Region requested $125,000; penalty reduced penalty for lack of environmental impact; penalty was split: $75,000 against District and $5,000 against Kemp)

In re B.J. Carney Industries, Inc., Docket No. 1090-09-13-309(g) (ALJ Kuhlmann 1998), appeal dismissed, ___ F.3d ___, 1999 U.S. App. LEXIS 23005 (9th Cir. 1999) (on remand from EAB $125,000 awarded based on economic benefit)

In re Paul L. Smith, 1998 EPA RJO LEXIS 9 (RJO Hankinson 1998) ($12,000 assessed for unpermitted clearing of 0.43 acres of wetlands for new road)

In re Britton Construction, Docket No. CWA-III-096 (ALJ Pearlstein May 21, 1997), aff'd, 8 E.A.D. ___ (EAB 1999) ($2,000 award ($125,000 proposed) for illegal dredge and fill of wetland; ALJ Pearlstein found that the statutory factors of CWA § 309(g)(3) warranted a "drastic reduction" from the $125,000 civil penalty proposed by the Region to $2000. Among the factors discussed were Respondents' reasonably prompt completion of the successful mitigation plan and the small, nonpristine ("trash-strewn") wetland at issue; buttressed by the lack of economic benefit and ability to pay the proposed penalty and "other matters.")

In re Labarge, Inc., Docket No. CWA-VII-91-W-0078 (ALJ Greene Feb. 5, 1996) ($125,000 for pretreatment violations by circuit board manufactured; exceeded DM 18 for copper times, six of which exceeded standard by more than 100% and 3 more than 1000%; violated MA for copper 11 times, with six more than 100% over limit; no actual environmental harm shown; culpability high; economic benefit not considered)

In re General Motors Corp., Docket No. CWA-A-O-011-93 (ALJ Hoya Oct. 31, 1996), aff'd, 7 E.A.D. 465 (EAB 1997), aff'd, 168 F.3d 1377, 48 ERC 1257 (D.C. Cir. 1999) ($62,500 for discharge of storm water in excess of permit limits; size and number of violations and toxicity of pollutants justified the max. penalty of $125,000, but fine was reduced by half because the violations stemmed from good-faith efforts to comply with CWA when other storm water discharges were unregulated)

In re B.J. Carney Industries, Inc., Docket No. 1090-09-13-309(g) (ALJ Head 1996), aff'd in part, rev'd in part and remanded, 7 E.A.D. 171 (1997), appeal dismissed, ___ F.3d ___, 1999 U.S. App. LEXIS 23005 (9th Cir. 1999) ($9,000 for 18 violations of pretreatment standards (PCP discharges to POTW); $1,000 per violation assessed, then reduced by 50% for "other matters as justice so requires")

In re Mahoning Valley Sanitary Dist., Docket No. CWA-AO-08-90 (ALJ Head May 14, 1996) ($24,000 awarded ($125,000 requested in complaint) for unpermitted lime discharges from municipal water treatment system; 24 days of violation @ $750/day; 10% added for prior history (10 years prior sued for same discharge) and 10% added for culpability); respondent's ability to pay argument rejected)

In re Donna Heptner East Penn Trucking Co., 1996 EPA RJO LEXIS 4 (RJO McCabe 1996) ($19,000 assessed against four respondents for filling total of less than one acre of wetlands at 3 sites)

In re Ketchikan Pulp Co., Docket No. CWA-1089-12-22-309(g) (ALJ Head Nov. 22, 1995), aff'd, 7 E.A.D. 605 (EAB 1997) ($23,000 awarded for three illegal discharges: $10,000 each for 2 and $3,000 for one; environmental harm and prior history played large parts in the analysis)

In re Rofor Plating Co., Inc., Docket No. CWA-2-I-91-1112, 1993 TSCA LEXIS 257 (ALJ Head, September 16, 1993) ($30,000 for reporting violations - full amount requested by EPA)

In re Easco Aluminum Corporation, 1992 TSCA LEXIS 349 (ALJ Harwood 1992) ($45,000 for 476 DMR (TSS, pH and o&g) and 1078 reporting violations - reduced from $125,000 requested; ALJ considered equitable arguments regarding when the permit limits went into effect (muddled record on the effective date of the permit) and good faith efforts of respondent to comply prior to violations)

29 Envir. Rptr. 2375, 2376 (April 2, 1999) ($4,822,104 in administrative penalties assessed by EPA under the CWA in 1998)

M. Penalty Policy

40 C.F.R. § 22.27(b) ("[T]he Presiding Officer shall determine the dollar amount of the recommended penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act.")

In re Great Lakes Division of National Steel Corp, 5 E.A.D. 355, 374 (EAB 1994) ("The Agency has issued penalty policies to create a framework whereby the decisionmaker can apply his discretion to the statutorily-prescribed penalty factors, thus facilitating the uniform application of these factors. . . . As we stated in the Genicom decision, a penalty policy 'reasonably implements the statutory criteria, with a range of penalties to reflect differing circumstances.' . . . Therefore, a presiding officer may properly refer to such a policy as a means of explaining how he arrived at his penalty determination. . . . Agency regulations require that a presiding officer consider any penalty policy issued under the Act, although they do not mandate that he adhere to it.")

In re Gallagher & Henry, Docket No. CWA-A-012-93 (ALJ Pearlstein Nov. 29, 1995) (in motion to compel by respondent, held that Agency was not required to disclose the document setting forth its internal CWA penalty settlement calculation)

In re B.J. Carney Industries, Inc., Docket No. [CWA] Docket No. 1090-09-13-309(g) (ALJ Head Jan. 28, 1993) (in denying motion to compel production of CWA penalty policy calculation, ALJ stated: "Materials prepared for settlement purposes are not admissible at hearing and their production does not advance the hearing process.")

In re Clark Refining & Marketing Corp, Docket No. CAA-05-93 (ALJ Vanderheyden Mar. 9, 1995) (rejected respondent's argument that the penalty policies should not be applied because they were not subject to the rulemaking procedures of the APA §553; held that the policies serve as guidelines only and do not rise to the level of binding regulations)

D. Preemption

33 U.S.C. § 1319(g)(6)(A) ("Action taken by the Administrator . . . under this subsection shall not affect or limit the Administrator's . . . authority to enforce any provision of this chapter; except that any violation . . . (i) with respect to which the Administrator . . . has commenced and is diligently prosecuting an action under this subsection, (ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, . . . shall not be the subject of a civil penalty under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.")

Citizens for a Better Environment v. Union Oil Co. of Calif., 83 F.3d 1111, 42 ERC 1737 (9th Cir. 1996) (held that conditions under which UNOCAL settled its state court challenge to its NPDES permit did not preclude a citizen suit to enforce the permit; the $780,000 settlement did not constitute assessment and payment of a penalty under a state law comparable to the CWA's administrative penalty provisions)

Atlantic States Legal Foundation v. Pan American Tanning Corp., 993 F.2d 1017, 36 ERC 1960 (2d Cir. 1993) (penalty action by municipality in pretreatment case did not preempt citizen suit under § 505; "In general, the Act accords the enforcement actions of local agencies less deference than it does those of state and federal agencies.")

United States v. Smithfield Foods, Inc., 972 F. Supp. 338 (E.D. Va. 1997), affirmed in part, reversed in part, ___ F.3d ___, 1999 U.S. App. LEXIS 22092 (4th Cir. 1999) (no 309(g)(6)(A) preemption where state issued special orders re compliance, but the orders were not incorporated into the permit in any way and the enforcement scheme used by the state was not sufficiently comparable to § 309)

Culbertson v. Coats American Inc., 42 ERC 1162 (N.D. Ga. 1996) (no preemption in citizens suit for violations of copper and zinc limits and state water quality color standard where state action was limited to compliance order)

Molokai Chamber of Commerce v. Kukui, Inc., 891 F. Supp. 1389 (D. Haw. 1995), aff'd, 58 F.3d 35 (2nd Cir.1995) (notice from state that failure to comply may result in penalty action held not to constitute commencement of an action)

Friends of Santa Fe v. LAC Minerals, Inc., 892 F. Supp. 1333 (D.N.M. 1995) (argument

that state-issued permit at mine for overburden management rejected on grounds that § 309(g)(6)(A)(ii) bar applies only when administrative penalty has been collected)

Friends of the Earth v. Laidlaw Ent'l Serv's, 890 F. Supp. 470 (D.S.C. 1995) (failure of state to recover economic benefit deemed evidence of failure to diligently prosecute -- prior penalty paid to state therefore not a 309(g)(6) bar to citizens suit)

Citizens for a Better Environment v. Union Oil Co. of California, 861 F. Supp. 889, 904-907 (N.D. Cal. 1994), aff'd, 83 F.3d 1111 (9th Cir. 1996) (plaintiff held not preempted by no action assurance issued to defendant by state because state law was not comparable to § 309(g), i.e., it didn't include penalties; "The Court can easily imagine that Congress, realizing that state enforcement agencies can be susceptible to regulatory 'capture' by the industries they regulate, might have feared that state agencies might consent to inappropriately lax compliance agreements.")

Natural Resources Defense Council, Inc. v. Fina Oil & Chemical Co., Civ. No. 1:92CVO217 (E.D. Tex. Sept. 29, 1992) (citizens group held not preempted under § 309(g)(6) where only prior agency action was the filing of a compliance order by EPA and no administrative penalty had been assessed)

Arkansas Wildlife Federation v. Bekaert Corp., 791 F. Supp. 769, 771-775 (W.D. Ark. 1992) (citizen suit not barred by administrative action that did not involve a penalty)

Natural Resources Defense Council, Inc. v. Fina Oil & Chemical Co., No. 1:92CV0217 (E.D. Tex. Sept. 29, 1992) (no preemption of citizen's suit where EPA had issued compliance order prior to initiation of lawsuit)

North and South Rivers Watershed Association v. Town of Scituate, 755 F. Supp. 484 (D.Mass. 1991), aff'd, 949 F.2d 552 (1st Cir. 1991) (discussion of 309(g)(6) bar and "comparable state law" and "diligent prosecution")

Wash PIRG v. Pendleton Woolen Mills, 1991 U.S. Dist. LEXIS 19383 (W.D. Wash, Dec. 13, 1991) (motion to dismiss citizens' suit granted on grounds that defendant was already subject to EPA compliance order, citing Scituate with approval); rev'd, 11 F.3d 883, 37 ERC 1806 (9th Cir. 1993) (held that § 309(a) enforcement order did not preempt § 505 citizen's suit)

New York Coastal Fisherman's Assoc. v. New York Sanitation Dep't, 752 F. Supp. 162 (S.D.N.Y. 1991) (held that citizen's suit brought under the CWA could continue because the state of N.Y. was not diligently prosecuting N.Y.C. to clean up a landfill that emitted leachate into Eastchester Bay)

Public Interest Research Group v. GAF, 770 F. Supp. 943 (D.N.J. 1991) (citizen's suit held not preempted under 309(g)(6) by previous payment of penalty to state; state action found to be "not comparable"; good analysis of statutory language)

In re Labarge, Inc., Docket No. CWA-VII-91-W-0078 (ALJ Greene Mar. 26, 1997) (§ 309(d) does not bar assessment of civil penalties pursuant to § 309(g)(1))

S. Rep. No. 99-50 at 28, reprinted in 2A *Legislative History of the Water Quality Act of 1987* at 1449 ("This limitation applies only to an action for civil penalties . . . for the same violations which are the subject of an administrative civil penalties proceeding. [T]his limitation would not apply to . . an action seeking relief other than civil penalties (e.g., an injunction or declaratory judgment)[.]"

H.R. Conf. Rep. No. 99-1004 at 135, Legislative History at 822.

EPA, "Guidance on State Action Preempting Civil Penalty Actions Under the Federal Clean Water Act"

EPA, "Supplemental Guidance on Section 309(g)(6)(A) of the Clean Water Act (March 5, 1993)

David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd when Enforcement Authority Is Shared by the United States, the States and Their Citizens?*, 54 Md. L. Rev. 1552, 1577 (1995)

"Overview of the Water Quality Act of 1987" (BNA) at 56-57. (discussion of reasons for amending CWA to add § 309(g)(6))

See also CITIZENS' SUITS

E. Retroactivity

Sasser v. EPA, 990 F.2d 127, 129, 36 ERC 1421 (4th Cir. 1993) (challenge to jurisdiction of EPA administrative proceeding on grounds that violation began prior to `87 amendments rejected; "Since Dr. Sasser's violations continued long after the enactment of the 1987 amendment, the Administrator acted within the jurisdiction that Congress conferred on him in 33 U.S.C. § 1319(g), and this court has jurisdiction to review the Administrator's assessment.")

In re Universal Circuits, Inc., EPA Docket No. CWA-IV-88-001 (ALJ Vanderheyden Aug. 22, 1988) (administrative remedies under the 1987 Clean Water Act amendments apply retroactively to acts that occurred prior to the date of the amendments as long as the penalty sought does not exceed the sum that would have been available under the old statute)

PERMIT AS A SHIELD (§ 402(k))

33 U.S.C. § 1342(k) ("Compliance 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. . . .")

40 C.F.R. § 122.5(a) (compliance with NPDES permit constitutes compliance with the CWA; note exceptions to this rule)

40 C.F.R. § 122.13 (1980)

40 C.F.R. § 125.22(a) (1972)

40 C.F.R. § 122.42 (reporting requirements for non-routine discharges)

DuPont v. Train, 430 U.S. 112, 138 n. 28, 51 L. Ed. 2d 204, 223 n. 28, 97 S. Ct. 965, 980 n.28 (1977) ("The purpose of [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.")

EPA v. Calif. ex rel. State Water Resources Control Bd., 426 U.S. 200, 223 (1976) ("For enforcement purposes § 402(k) deems a permit holder who is in compliance with the terms of its permit to be in compliance with sections 301, 3021, 306, 307, and 403, except any standard imposed under section 307 for a toxic pollutant injurious to human health. Thus, the principle means of enforcing the pollution control and abatement provisions of the Amendments is to enforce compliance with a permit.")

Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 12 F.3d 353 (2d Cir. 1994), cert. denied, 115 S. Ct. 62, 130 L. Ed. 2d 19 (1994) (held that discharge of pollutants not listed in NPDES permit is not unlawful; "Viewing the regulatory scheme as a whole, however, it is clear that the permit is intended to identify and limit the most harmful pollutants while leaving the control of the vast number of other pollutatns to disclosure requirements. Once within the NPDES or SPDES scheme, therefore, polluters may discharge pollutants not specifically listed in their permits so long as they comply with the appropriate reporting requirements and abide by any new limitations when imposed on such pollutants.")

Ohio v. U.S. D.O.E., 904 F.2d 1058, 1061 (6th Cir. 1990) ("Once a state water pollution law is approved, compliance with the state law is compliance with the CWA.")

Public Interest Research Group of N.J. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 68, 31 ERC 1905 (3d Cir. 1990), cert. denied, 498 U.S. 1109 (1991) ("A person who complies with the permit parameters is deemed to comply with the Act.")

Sierra Club v. Shell Oil Co., 817 F.2d 1169, 1173, 25 ERC 2061 (5th Cir. 1987), cert. denied, 484 U.S. 985 (1987) ("If a discharger is in compliance with the effluent limitations contained in its NPDES permit, it is deemed to be in compliance with the CWA.")

Atlantic States Legal Foundation v. Eastman Kodak Co., 1992 U.S. Dist. LEXIS 20358 (W.D.N.Y. 1992) ("[W]hen an alleged polluter is subject to a pollution discharge permit issued pursuant to the [CWA], a citizen suit under the Act against the polluter may only address discharges of pollutants expressly regulated by such permit.")

United States v. Tennessee Gas Pipeline Co., 1991 U.S. Dist. LEXIS 21698 (W.D. La. 1991) (in denying motion to dismiss based on permit as a shield, court held that fact that defendant did not apply for PCP discharges makes defense inapplicable to charge of discharging PCBs without a permit; "TGPL has not demonstrated that the language section 402(k) ("in compliance with the permit") was intended to protect permittees who discharge pollutants not declared on the permit; neither has TGPL shown that it properly applied for the permit." Id. at 5)

McClellen Ecological Seepage Situation (MESS) v. Weinberger, 707 F. Supp. 1182 (E.D. Cal. 1988) (discharge of volatile organic compounds not specifically addressed in the permit, not prohibited where permit holder complied with applicable disclosure requirements)

Student Public Interest Research Group of N.J. v. Fritzche, Dodge & Olcott, Inc., 759 F.2d 1131, 1133, 22 ERC 1721 (3d Cir. 1985) ("Under section 402(k) of the Act, if a discharger is in compliance with its NPDES permit, it is generally deemed to be in compliance with the Act.")

United States v. Tom-Kat Development, Inc., 614 F. Supp. 613 (D. Ak. 1985) ("Any discharge except pursuant to a permit is illegal." Id. at 614; "Plain reading of § 402 . . . reveals a congressional intent to create a limited liability shield for alleged violators of the Act who properly applied for the required NPDES permit. . ." Id. at 616)

People v. General Motors Corp., No. B093432 (Cal. Ct. App. Apr. 4,, 1996) (permittee did not violate state-issued NPDES permit by discharging a pollutant not specifically listed in the permit, because it promptly reported the discharge to the permitting authority)

In re Ketchikan Pulp Co., Docket No. CWA-1089-12-22-309(g) (ALJ Head Nov. 22, 1995), aff'd, 7 E.A.D. 605 (EAB 1998) (held that cooking acid and flocculent discharges to be unpermitted discharges because they were not addressed in the permit and were not identified in the permit application; "[T]he conclusion that seems most reasonable is that an analysis of the NPDES permit and permit application is critical in determining whether the shield defense applies. If the discharge can reasonably be considered as part of the operation for which the permit application was made, then grant of the permit would shield the discharges [not specifically set out in the permit] from being illegal." Id. at 23)

In re Star-Kist Caribe, Inc., 2 E.A.D. 758, 761 (CJO 1989) ("During the term of the permit, compliance with the permit and effluent limitations in its constitutes compliance with § 301.")

1 *A Legislative History of the Water Pollution Control Act of 1972* (Environmental Policy Div., Congressional Research Serv. ed., 1973) at 274 ("Section 402(k) states that until December 31, 1974, a discharge shall not be in violation of law if a permit has been applied for, and the applicant has furnished all information reasonably required or requested.")

H.R. 11896, 92d Cong., 2d Sess. § 402(l) (1972); S. 2770, 92 cong., 2d Sess § 402(l) (1972)

EPA Clean Water Act Compliance/Enforcement Guidance Manual (1985), Chapter 11, § 3, pp. 11-13 ("To obtain the shield, permittees must provide all information on their discharge requested by EPA during the permit application process.")

2 William H. Rodgers, Jr., Environmental Law, Air & Water § 4.30 at 441 (1986) ("The more interesting question is the extent to which approximate information in an application can buy an immunity in the permit. The answer seems to be that the immunity extends to the extent of the application disclosure and no further. Section 402(a) of the Act authorizes EPA to issue "a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding" the generic prohibition against all discharges in section 301(a). There is nothing in Section 402(a) to suggest that pollutants not named, or those undiscovered or unknown, are approved by the mere issuance of a permit. Nor is it plausible that the absolutist prohibition on discharges carried over

from the Refuse Act is limited to effluent that can be discovered by prevailing analytical techniques. An Act that stacks the deck so deliberately against continuing discharge would be unlikely to sanction a category of inadvertently approved discharges. It is thus a reasonably safe bet that the discharge of any pollutant not specifically permitted is unlawful.")

"Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits" (July 11, 1994)

"PERSON" (§ 502(5))

33 U.S.C. § 1352(5) ("person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.")

33 U.S.C. § 1319(c)(6) ("For the purpose of this subsection, the term "person" means, in addition to the definition contained in section 1362(5) of this tittle, any responsible corporate officer.")

33 U.S.C. § 1322(a)(8) ("'person' means an individual, partnership, firm, corporation, association, or agency of the United States, but does not include an individual on board a public vessel")

City of Milwaukee v. Illinois, 451 U.S. 304, 339, 15 ERC 1908 (1981) ("The Act specificially defines 'person' to include States, and thus embraces respondents Illinois and Michigan.")

EPA v. California, 426 U.S. 200, 222 n.37, 8 ERC 2098 (1976) ("Section 301(a) simply makes it 'unlawful' for 'any person' not to have the required permit. That federal agencies, departments, and instrumentalities are not 'persons' within the meaning of § 301(a) and the Amendments . . . does not mean either that federal dischargers are not required to secure NPDES permits, or that their obligation to secure an NPDES permit derives from a different provision of the Amendments. A federal discharger without a permit is no less out of compliance with § 402 than a nonfederal discharger; the federal discharge is however not 'unlawful.'")

United States v. Curtis, 988 F.2d 946, 36 ERC 2064 (9th Cir. 1993) (Air Force employee convicted of discharging jet fuel into creek; court rejected argument that since CWA did not specifically define "person" to include federal employees, as other statutes do, Congress did not intend to subject federal employees acting within the scope of their employment to criminal prosecution)

United States v. Brittain, 931 F.2d 1413, 1418-19, 32 ERC 2084 (10th Cir. 1991), cert. denied, 111 S. Ct. 1307 (1991) (public utilities director, who was convicted for falsifying DMRs submitted to EPA by the utility, held to be a "person" under the act, even though the city was the permit holder)

Mass. v. Veterens Admin., 541 F.2d 119, 121 n.1, 9 ERC 1507 (1st Cir. 1976) ("Under § 502(5) of the [CWA], a state is a 'person' within the meaning of § 505(g) . . . which defines a 'citizen' as a 'person . . . having an interest which is or may be adversely affected.'")

United States v. Smithfield Foods, 965 F. Supp. 769, 781, 44 ERC 1792 (D. Va. 1997), affirmed

in part, reversed in part, ___ F.3d ___, 1999 U.S. App. LEXIS 22092 (4th Cir. 1999) ("Under 502(5) . . . a corporation is considered a 'person' within the meaning of the Act.")

United States v. Gulf Park Water Co., 972 F. Supp. 1056, 1063 (S.D. Miss. 1997) (defendant found to be alter ego of discharging corporation; § 309 also provides for individual liability in appropriate cases; "This section states that 'any person' violating specific provisions of the Act may be subject to an enforcement action. The statutory definition of 'person' specifically includes 'individuals.' . . . Individuals can be liable for violations of the Act where they participated in or were responsible for the violations, even when the individuals purport to act through a corporate entity."; the court examined the following factors to determine whether the subsidiary functioned as the alter ego of its parent and, thus, liability should be imposed on the parent company: 1) was there common stock ownership; 2) were there common directors or officers; 3) did the companies share common business departments; 4) did the companies file consolidated financial statements and tax returns; 5) whether the parent financed the subsidiary; 6) whether the parent caused the incorporation of the subsidiary; 7) if the subsidiary operated with grossly inadequate capital; 8) whether the parent paid the salaries and other expenses of the subsidiary; 9) whether the subsidiary's sole source of business was the parent company; 10) whether the parent used subsidiary's property as its own; and 11) whether the subsidiary did not observe basic corporate formalities)

See also OWNER/OPERATOR LIABILITY

"POINT SOURCE" (§ 502(14))

33 U.S.C. § 1362(14) ("The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm water discharges and return flows from irrigated agriculture.")

40 C.F.R. § 122.2 ("Point source means any discernible, confined, and discrete conveyance, including but not limit to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff.")

40 C.F.R. § 122.23(a) ("Concentrated animal feeding operations are point sources subject to the NPDES permit program.")

Oregon Natural Desert Ass'n v. Dombeck, 151 F.3d 945, 46 ERC 1993 (9th Cir. 1998) (held that 401 cert. applies only to point sources and not nonpoint sources as plaintiffs had argued in their challenge of grazing permit issued by Forest Service)

Newton County Wildlife Assoc. v. Rogers, 141 F.3d 803 (8th Cir. 1998) ("EPA regulations do not include the logging and road building activities cited by the Wildlife Association in the narrow list of silvicultural activities that are point sources requiring NPDES permits.")

United States v. West Indies Transport Co., 127 F.3d 299, 45 ERC 1417 (3d Cir. 1997) (barge that broke up during a hurricane and its wreckage purposefully sunk considered a point source discharge)

Concerned Area Residents for the Environment v. Southview Farm, 34 F.3d 114, 39 ERC 1385 (2d Cir. 1994), cert. denied, 514 U.S. 1082 (1995) (held that the runnoff from the fields to which manure from 700 cattle was applied was not nonpoint source runoff)

Committee to Save Mokelumne River v. East Bay Municipal Utility Dist., 13 F.3d 305, 308-309, 38 ERC 1001 (9th Cir. 1993), cert. denied, 513 U.S. 873 (1994) (spillway and valve of dam that channels acid mine runoff from abandoned mine site considered to be point source)

United States v. Plaza Health Labs, Inc. and Geronimo Villegas, 3 F.2d 3d 643, 37 ERC 1265 (2d Cir. 1993), cert. denied, 512 U.S. 1245 (1994) (man who threw vials of blood into river was not a point source within meaning of statute and therefore was not criminally liable for unlawful discharges to waters of U.S.; "Human beings are not among the enumerated items that may be a point source." "The words used to define the term and the examples given . . . evoke images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to navigable waterways.")

United States v. Law, 979 F.2d 977, 23 ELR 20466 (4th Cir. 1992) (water treatment system is not waters of U.S., but is a point source)

Carr v. Alta Verde Industries, Inc., 931 F.2d 1055, 33 ERC 1361, 1363 (5th Cir. 1991) (the CWA defines "point source" to include "concentrated animal feeding operations)

Dague v. City of Burlington, 935 F.2d 1343, 33 ERC 1559 (2d Cir. 1991), rev'd in part on other grounds, 505 U.S. 557 , 34 ERC 1857 (1992) (culvert containing landfill leachate is a point source; "The touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste, with the quantity and quality of the discharge regulated. The concept of a point source was designed to further this scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States.")

Natural Resources Defense Council, Inc. v. EPA, 915 F.2d 1314, 1316, 31 ERC 2089 (9th Cir. 1990) ("The Act focused on point soruce polluters presumably because they could be identified and regulated more easily than nonpoint source polluters.")

National Wildlife Fed. v. Consumers Power Co., 862 F.2d 580, 583, 28 ERC 1572 (6th Cir. 1988) (in case involving discharge of dead fish entrained in dam turbine water, court held that "discharge" as used in the definition of "point source" required a facility must "add" pollutants to navigable waters)

Oregon Natural Resources Council v. U.S. Forest Service, 834 F.2d 842, 844 (9th Cir. 1987) (construction of logging road and bridge not point source discharges subject to regulation)

United States v. M.C.C. of Florida, 772 F.2d 1501, 23 ERC 1318 (11th Cir. 1985), vacated on other grounds, 481 U.S. 1034 (1987), readopted in relevant part on remand, 848 F.2d 1133 (11th

Cir. 1988) (tugs used in construction project that discharged vegetation and sediment held to be point sources because the CWA specifically includes "vessels" within the meaning of the term "point source")

Trustees for Alaska v. EPA, 749 F.2d 549, 21 ERC 2222 (9th Cir. 1984) (placer mines held to be point sources; "point and non-point sources are not distinguished by the kind of pollutant they create or by the activity causing the pollution, but rather by wether the pollution reaches the water through a confined, discrete conveyance.")

Avoyelles Sportman's League, Inc. v. Marsh, 715 F.2d 897, 923, 19 ERC 1841 (5th Cir. 1983) (bulldozers and backhoes constitute point sources within the meaning of the CWA)

Sierra Club v. Abston Construction Co., Inc., 620 F.2d 41, 45, 14 ERC 1984 (5th Cir. 1980) (sump pits into which miners channeled contaminated runoff and which sometimes overflowed into U.S. waters were point sources; "Gravity flow, resulting in a discharge of a pollutant into a navigable water, may be a point source discharge if miner at least initially collected or channeled the water and other materials.")

Consolidation Coal Co. v. Costle, 604 F.2d 239, 250, 13 ERC 1289 (4th Cir. 1979), rev'd on other grounds sub nom, EPA v. National Crushed Stone Association, 449 U.S. 64, 100 S. Ct. 1011, 62 L. Ed. 2d 750, 15 ERC 1209 (1980) (challenge to regulations on mining wastewater that is "pumped, siphoned or drained from coal storage" rejected on grounds that definition of point source "excludes unchanneled and uncollected surface waters."

United States v. Earth Sciences, Inc., 599 F.2d 368, 373, 13 ERC 1417 (10th Cir. 1979) (every identifiable point that emits pollution is a point source which must be authorized by a NPDES permit issued by EPA; "it contravenes the intent of [the CWA] and the structure of the statute to exempt from regulation any activity that emits pollution from an identifiable point.")

Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1382, 10 ERC 2025 (D.C. Cir. 1977) ("the power to define point and nonpoint sources is vested [initially] in EPA")

Appalachian Power Co. v. Train, 545 F.2d 1351, 1373, 9 ERC 1033 (4th Cir. 1976) (EPA may regulate channeled runoff, but not unchanneled runoff)

United States v. Rockview Farms, Inc., No. CRF 98-5331 OWW (E.D. Ca. Apr. 26, 1999) (dairy farm ordered to pay criminal fine of $250,000 for discharging 1.7 million gallons of wastewater from waste pond into the desert for 2 days, from where it ran overland for 8 miles to the Amargosa River)

Stone v. Naperville Park Dist., 38 F. Supp.2d 651, 49 ERC 1019 (N.D. Ill. 1999) (operation of a trap-shooting facility where lead shot and clay targets are discharged into water without an NPDES permit violates CWA)

Mamo v. Galiher, 1998 U.S. Dist. LEXIS 18924 (D. Haw. 1998) (construction of farming access roads does not require a storm water permit because it is a nonpoint source activity)

San Francisco Baykeeper v. Tidewater Sand & Gravel Co., 46 ERC 1780, 1784 (N.D. Ca. 1997)

(storm water discharges from settling ponds via a drainage pipe at sand & gravel yard held to be point source discharges; prior to construction of ponds, water simply ran off yard - this was also held to constitute a point source discharge)

Friends of the Coast Fork v. Co. of Lane, OR, Civ. No. 95-6105-TC (D. OR. Jan. 31, 1997) (municipal landfill and associated lagoons are points sources for purposes of CWA)

Oregon Natural Desert Ass'n v. Thomas, No. 94-522-HA (D. Or. 1996) (in challenge to grazing permits issued by Forest Service, court held that § 401 applies to all federally permitted activities that may result in a discharge, including discharges from nonpoint sources; court concluded that definition of point source in § 502 was not limited to discrete conveyances)

United Anglers v. East Bay Municipal Utility, No. C-95-2671 SI (N.D. Cal. Oct. 24, 1996) (court rejected defendant's argument that there had been no addition of pollutants because defendant collected, piped, and redeposited contaminated groundwater; held that "defendants cannot escape liability by arguing that pollution was not added because they merely transported historical pollution at the site, and channeled it elsewhere.")

RSR Corp. v. Browner, 924 F. Supp. 504, 42 ERC 2146 (S.D.N.Y. 1996) (court rejected plaintiffs argument that the treatment of the facility's wastewater at the POTW prior to being discharged into "navigable waters" precluded a "point source," holding that a facility that discharges into a POTW is a "point source."

Beartooth Alliance v. Crown Butte Mines, 904 F. Supp. 1168, 28 ELR 20639 (D. Mont. 1995) (historic discharges from adits and pits that were exacerbated by recent exploration work held to be point source discharges, not storm water)

Friends of Santa Fe v. LAC Minerals, Inc., 892 F. Supp. 1333, 26 ELR 20135 (D.N.M. 1995) (seeps and springs at the mine site containing acid mine drainage held to be non-point source pollution)

Long Island Soundkeeper Fund v. New York Athletic Club, 42 ERC 1421, (S.D.N.Y. 1995) (held that shot gun pellets and clay pigeons hurled into the water from a trap shooting facility are a point source discharge)

Washington Wilderness Coalition v. Hecla Mining Co., 870 F. Supp. 983, 988, 40 ERC 1134 (E.D. Wash. 1994) (held that a tailing pond is a point source; the "touchstone for finding a point source is the ability to identify a discrete facility from which pollutants have escaped.")

Friends of the Sakonnet v. Dutra, 738 F. Supp. 623, 32 ERC 1157, 1161-1164 21 ELR 20055 (D.N.J. 1990) (homeowners discharged to private WWT system installed by developers on land subsequently bought by third party; no permit every obtained for discharge from WWT system; developers held liable for discharges - decision turned on interpretation of point source)

Fishel v. Westinghouse Electric Corp., 640 F. Supp. 442, 23 ERC 1329, 1636 (M.D. Pa. 1986) (a hazardous waste site is a point source where it contained a lagoon from which there were discharges of unchanneled and uncollected surface water into a stream)

United States v. Tom-Kat Development, Inc., 614 F. Supp. 613, 614 (D.C. Alaska 1985) (every identifiable point that emits pollution is a point source which must be authorized by a NPDES permit issued by EPA)

O'Leary v. Moyer's Landfill, Inc., 523 F. Supp. 642, 20 ERC 1318 (E.D. Pa. 1981) (liquid leachate from a landfill which entered a nearby creek by natural phenomena such as rainfall and gravity, once channeled or collected, constitutes discharge by a point source; intent of operator irrelevant)

United States v. Oxford Royal Mushroom Products, Inc., 487 F. Supp. 852, 14 ERC 1321 (E.D. Pa. 1980) (waste water sprayed onto the surface of an irrigation field, which then entered a nearby stream through a break in the berm of a canal was a discharge from a point source)

United States v. Weisman, 489 F. Supp. 1331, 1343, 17 ERC 1580 (M.D. Fla. 1980) (manure spreading truck and bull dozer held to be point sources)

Barcelo v. Brown, 478 F. Supp. 646, 13 ERC 2105 (D.P.R. 1979), rev'd on other grounds, 643 F.2d 835 (1st Cir. 1981), rev'd sub nom., Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) (dropping of bombs into ocean and shooting at marine targets by navy considered a point source discharge; "It would be a strained construction of unambiguous language for the Court to interpret that the release or firing of ordnance from aircraft into the navigable waters of Vieques is not . . . any addition of any pollutant . . . from any point source. . . particularly in view of the broad rather than narrow interpretation given to this type of statue.")

United States v. Holland, 373 F. Supp. 665, 668, 6 ERC 1388 (M.D. Fla. 1974) (bulldozers are point sources)

In re Paul L. Smith, 1998 EPA RJO LEXIS 9 (RJO Hankinson 1998) (bulldozers are point sources)

54 Fed. Reg. 254 (1989) (NPDES permit regulations, revised definition of "point source.")

Annotation, *What Constitutes a "Point Source" of Pollution Subject to Control by Provisions of Water Pollution Control Act, as amended,* 52 ALR Fed 885, supp. sec. 3

2 William H. Rodgers, Jr., Environmental Law: Air and Water 4.10 at 150 (1986) ("The statutory 'discernable, confined and discrete conveyance' . . . can be understood as singling out those candidates suitable for control-at-the-source.")

See also "POLLUTANT;" "DISCHARGE OF POLLUTANTS;" GROUNDWATER, DISCHARGES TO; NONPOINT SOURCES; DAMS; CONCENTRATED ANIMAL FEEDING OPERATIONS

"POLLUTANT" (§ 502(6))

33 U.S.C. § 1362(6) ("'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials,

heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) `sewage' from vessels' within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.")

33 U.S.C. § 1362(12) ("discharge of pollutants")

33 U.S.C. § 1362(19) ("pollution")

40 C.F.R. § 401.11(f) ("pollutant")

40 C.F.R. § 401.11(h) ("discharge of pollutants")

40 C.F.R. § 401.11(g) ("pollution")

United States v. Standard Oil Co., 384 U.S. 224, 229-30, 86 S. Ct. 1427, 16 L. Ed. 2d 492, 1 ERC 1033 (1966) (oil is a pollutant; the commercial value of a product does not change its status as waste when dumped into the water)

Train v. Colorado Public Interest Research Group, 426 U.S. 1, 25, 8 ERC 2057 (1976) (held that "the `pollutants' subject to regulation under the [CWA] do not include source, byproduct, and special nuclear material, and that the EPA Administrator has acted in accordance with his statutory mandate in declining to regulate the discharge of these materials.")

United States v. Edison, 108 F.3d 1336, 44 ERC 1550 (11th Cir. 1997), cert. denied, 118 S. Ct. 248 (1997) (held that although definition of "pollutants" is broad, it is not unduly vague, since it is based on the definiton an ordinary person should have been able to understand that petroleum-based, sludge-like substance was a pollutant within the meaning of the Act)

Sierra Club v. Cedar Point Oil Co., 73 F.3d 546, 41 ERC 1897 (5th Cir. 1996), cert. denied, 519 U.S. 811 (1996) (produced water held to be a pollutant; argument rejected that only EPA, not the courts, can determine what is a pollutant)

Committee to Save Mokelumne River v. East Bay Util., 13 F.3d 305, 309, 38 ERC 1001 (9th Cir. 1993), cert. denied, 513 U.S. 873 (1994) (acid mine drainage is sufficient to satisfy the definition of "pollutant" under the CWA; reliance on historical pollution to evade current liability misapprehends the focus of the CWA; the CWA does not impose liability only where a net increase in the level of pollution from a point source discharge is present. Rather, the CWAs categorically prohibits any discharge of a pollutant from a point source without a permit)

Connecticut Coastal Fisherman's Ass'n v. Remington Arms, 989 F.2d 1305, 1313, 36 ERC 1251 (2d Cir. 1993) ("The [Clean Water] Act's definition of `pollutant' does not distinguish between lead and steel shot; both are pollutants.")

National Wildlife Fed. v. Consumers Power Co., 862 F.2d 580, 583, 28 ERC 1572 (6th Cir. 1988) (court held that fish entrained in discharge from hydroelectric dam turbines were "pollutants" within meaning of Act because they constituted "biological material")

Reynolds Metal Co. v. EPA, 760 F.2d 549, 551 n.3, 22 ERC 1794 (4th Cir. 1985) ("The pollutants sought to be removed from the nation's waterways are divided into three types: (1) `conventional pollutants' . . . (2) `toxic pollutants' which are subject to regulations if they are contained in the list of 65 `priority' toxic pollutants listed in . . . 40 C.F.R. § 401.5; and (3) `non-conventional pollutants' . . .")

Minnehaha Creek Watershed District v. Hoffman, 597 F.2d 617, 627, 13 ERC 1009 (8th Cir. 1979) (the act provides no justification for the determination "that whether the discharge of a particular substance listed in 502(6) constitutes the discharge of a `pollutant' . . . depends upon the purpose for which the discharge is made.")

United Satets v. Hamel, 551 F.2d 107, 9 ERC 1932 (6th Cir. 1977) (gasoline is a pollutant even though not specifically listed in the statutory definition)

Piney Run Preservation Ass'n v. Carroll County, Md., 50 F. Supp.2d 443 (D. Md. 1999) (county's sewage treatment plant violated the FWPCA by discharging heat into a stream located near environmental group members' homes; held that heat is a pollutant under § 502(6))

Waste Action Project v. Dawn Mining Co., No. CV-96-00106-AAM (E.D. Wa. Aug. 30, 1996), aff'd, 137 F.3d 1426, 46 ERC 1257 (9th Cir. 1998) (held that discharges from uranium mine tailings piles exempted from definition of "pollutant" under CWA, citing Atomic Energy Act and EPA's regulation 40 CFR 122.2)

Beartooth Alliance v. Crown Butte Mines, 904 F. Supp. 1168, 26 ELR 20639 (D. Mont. 1995) (acid mine drainage held to be a pollutant)

Concerned Area Residents for the Environment v. Southview Farm and Richard Popp, 834 F. Supp. 1410, 36 ERC 2005 (W.D.N.Y. 1993), rev'd on other grounds, 34 F.3d 114, 39 ERC 1385 (2d Cir. 1994), cert. denied, 115 S. Ct. 1793 (1995) (argument rejected that manure is not a pollutant because it was not "discarded" but is instead used as a fertilizer)

United States v. Alcan Aluminum Corp., 755 F. Supp. 531, 538, 32 ERC 1826 (N.D.N.Y. 1991), modified, 990 F.2d 711, 36 ERC 1321 (1993) (CERCLA liability for clean held where "'copper and compounds,' 'lead and compounds,' and 'zinc and compounds,' are expressly so included in the 'list of toxic pollutants designated pursuant to section 307(a)(1) of the Act.'")

Hudson River Fisherman's Ass'n v. City of New York, 751 F. Supp. 1088, 1101, 32 ERC 1862 (S.D.N.Y. 1990), aff'd without op., 940 F.2d 649 (2d Cir. 1991) ("pollutant" interpreted to cover chlorine to fulfill Congress' purpose in enacting the CWA of eventually achieving zero pollution; "It is indisputable that a pollutant is a pollutant no matter how useful it may earlier have been.")

Dague v. City of Burlington, 732 F. Supp. 458, 469-70 30 ERC 1815 (D.Vt. 1989), aff'd, 935 F.2d 1343, 33 ERC 1559 (2nd Cir. 1991), rev'd on other grounds, 505 U.S. 557, 34 ERC 1857 (1992) (held that chemical wastes leaching from a landfill were "pollutants" under § 502(6)

because water samples "indicate[d] the presence of various chemical wastes specifically listed as toxic pollutants under 40 C.F.R. § 401.15.")

In re J&L Specialty Products Corp., 5 E.A.D. 31, 1994 NPDES LEXIS 1 (EAB 1994) (held that copper and nickel, two pollutants discharged by respondent, were on a list "derived from the 65 classes of compounds identified as `toxic' under CWA § 307(a)(1) . . . and therefore are `toxic pollutants.'")

In re General Motors Corp., No. CWA-A-O-011-93 (ALJ Hoya June 28, 1996), aff'd, CWA Appeal No. 96-5, 7 E.A.D. 465 (1997), aff'd,168 F.3d 1377, 48 ERC 1257 (D.C. Cir. 1999) (copper, lead and zinc held to be pollutants under CWA)

In re Chevron U.S.A., Inc., Docket No. IX-FY88-54, at 4 (May 3, 1990) (oil is a pollutant even though not specifically named as such)

S. Rep. No. 92-414, 92nd Cong. 1st Sess. 76 (1971), 2 Legis. History at 1494 ("[B]efore any material can be added to the navigable waters, authorization must first be granted by the Administrator, or a state.")

2 William H. Rodgers, Jr., *Environmental Law: Air and Water* (1986) at 144 ("This laundry list of 'bads' endorses an understanding of a pollutant as a 'resource out of place.' The congressional purpose was to identify expansively and anticipate all the physical 'stuff' that could end up in the wrong place to the detriment of water quality. . . . Despite the absence of an indisputable catch-all (e.g., 'any other waste whatever'), there is little doubt that the recitation of categories in the definition of "pollutant" is designed to be suggestive not exclusive. In the 1972 amendments, Congress meant to carry on the tradition of the Refuse Act, and that tradition was to construe the word "refuse" as condemning each and every variation of damage-inducing wastes that changing technologies could invent. This interpretation is endorsed by United States v. Hamel, [551 F.2d 107 (6th Cir. 1977),] which condemns a discharge of gasoline as within a generic understanding of 'pollutant,' rather than stretch the less inclusive 'biological materials' to cover organically-based petroleum compounds. That the definition of 'pollutant' is meant to leave out very little is confirmed by the statutory definition of 'pollution,' which means nothing less than the "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19).]")

See also PRIMA FACIE CASE, DISCHARGE OF POLLUTANTS, NUCLEAR MATERIALS

POTWs

33 U.S.C. § 1311(b)(1)(B) (POTWs shall meet secondary treatment standards by July 1, 1977)

40 C.F.R. § 122.2 ("Publicly owned treatment works ('POTW') means any device or system used in the treatment (including recycling and reclamation) of municipal sewage or industrial wastes of a liquid nature which is owned by a 'State' or 'municipality.' This definition includes sewers, pipes, or other conveyances only if they convey wastewater to a POTW providing treatment.")

State Water Control Bd. V. Train, 559 F.2d 921, 927 n.34, 10 ERC 1321 (4th cir. 1977) (deadline

for municipalities to comply with secondary treatment standards upheld despite lack of federal funding for treatment plant upgrades)

In re City of St. Joe and Florida Coast Paper Co., 7 E.A.D. 275 (EAB 1997) (held that a municipally-owned industrial wastewater treatment facility that received mostly influent from industrial process wastes rather than municipal sewage is still a POTW under NPDES)

64 Fed. Reg. 42434 (1999) (Final Rule: National Pollutant Discharge Elimination System Permit Application Requirements for Publicly Owned Treatment Works and Other Treatment Works Treating Domestic Sewage)

See also SECONDARY TREATMENT STANDARDS

PRE-ENFORCEMENT REVIEW

Michigan Peat v. EPA, 175 F.3d 422, 48 ERC 1817 (6th Cir. 1999) (EPA approved of state-issued 404 permit on condition that certain changes were made; applicant refused to sign permit as changed and state issued "state only" permit that was less strict to avoid takings claim; when applicant sued to have EPA held to the terms of the state-issued permit and EPA defended on grounds that pre-enforcement review not allowed under CWA; held that no pre-enforcement review issued involved because EPA's approval of state-issued permit constituted final agency action)

Rueth v. EPA, 13 F.3d 227, 24 ELR 20214 (7th Cir. 1993) (no preenforcement review of 309(a) order requiring respondent to remove fill from wetland; "[I]f Agency compliance orders are not reviewable until the enforcement stage, an agency's initial determination that it has the authority to either require permitting or issue orders in the absence of a permit application must also be unreviewable.")

Southern Pines Associates v. United States, 912 F.2d 713 (4th Cir. 1990) (no pre-enforcement review)

Hoffman Group, Inc. v. EPA, 902 F.2d 567 (7th Cir. 1990) (Congress intended to preclude judicial review of an EPA compliance order unless the government initiated enforcement action in U.S. Dist. Ct.)

Inn of Daphne, Inc. v. United States, 1998 U.S. Dist. LEXIS 13991 (S.D. Al. 1998) (Corps' cancellation of § 404 permit application for failure to respond to Corps' request to investigate presence of historical sites held not reviewable becuase is not final agency action; plaintiff needed to reapply and have the permit actually denied before seeking relief from the court)

Michigan Peat v. EPA, 7 F. Supp. 2d 896 (E.D. Mich. 1998), aff'd in part, rev'd in part, 175 F.3d 422, 48 ERC 1817 (6th Cir. 1999) (held that peat mining co.'s challenge to EPA's disapproval of state's proposed 404 permit was premature since permit never was issued and pre-enforcement review is not allowed; claims against State of Michigan also dismissed under 11th Amendment grounds)

Charfoos and Co. v. West, 1998 U.S. Dist. LEXIS 7112 (E.D. Mich. 1998) (no pre-enforcement review of Corps decision to exercise jurisdiction over wetland; plaintiff argued that Corps had delegated authority to regulate wetland in question to state)

South Fork of the Eel River Envt'l League v. U.S. Army Corps of Engineers, 1997 U.S. Dist. LEXIS 9260 (N.D. Cal. 1997) (plaintiffs' alleged that the USACE failed to enforce the terms of a 404 permit; court dismissed this issue as unreviewable based on the principle that an agency's decision not to take enforcement action is presumed to be immune from judicial review under 5 U.S.C. §701(a)(2))

Mulberry Hills Development Corp. v. United States, 772 F. Supp. 1553 (D. Md. 1991) (defendant not entitled to pre-enforcement review of Corps § 404(s) cease and desist order)

See also COMPLIANCE ORDERS; WETLANDS: Compliance Orders

PRETREATMENT

A. Generally (§ 307(b))

33 U.S.C. § 1317(b) (pretreatment authority) and (d) (unlawful to violate pretreatment reg)

33 U.S.C. § 1342(a)(3) and (b)(8) (authority to delegate to municipalities)

33 U.S.C. § 1317(b)(1) (removal credits)

33 U.S.C. § 1319(f) (Wrongful introduction of pollutants into treatment works)

40 C.F.R. Part 403 (General Pretreatment Regulations for Existing and New Sources of Pollution)

South Holland Metal Finishing Co. v. Browner, 97 F.3d 932 (7th Cir. 1996) (citing American Paper, case dismissed for lack of jurisdiction where company sought judicial review of EPA position that co. that moved old pretreatment equipment from previous site to new one was subject to the new source standards in 40 CFR 433.17; court held that Region's interpretative ruling here was not a decision by the Administrator, was never promulgated, and was not an effluent standard or other limitation under § 509(b)(1)E))

Modine Manuf. Corp. v. Kay, 791 F.2d 267, 24 ERC 1449 (3d Cir. 1986) (challenge to applicability of bright dipping standards to plaintiff's facility rejected on grounds that record showed that EPA intended its pretreatment regulations to apply to bright dipping operations)

Cerro Copper Products Co. v. Ruckelshaus, 766 F.2d 1060 (7th Cir. 1985) (challenge to pretreatment standards for wastewater rejected; discussion of removal credits)

Modine Manuf. Corp. v. Ruckelshaus, 770 F.2d 1073 (3d Cir. 1985), cert. denied, 106 S. Ct. 525 (1986) (petition for review of its challenge to pretreatment regulations as promulgated summarily denied)

National Association of Metal Finishers v. EPA, 719 F.2d 624, 648, 19 ERC 1785 (3d Cir. 1983), rev'd on other grounds sub nom., Chemical Manufacturers Ass'n v. NRDC, 470 U.S. 116, 105 S. Ct. 1102, 84 L. Ed. 2d 90, 22 ERC 1305 (1985) (comprehensive discussion of pretreatment regulations in context of industry and environmentalist challenges to them; includes analysis of "interference" and "pass through" provisions, definition of "new source," FDFs and variances for toxics, removal credits, etc.; discussion of meaning of § 402(b)(8))

RSR Corp. v. Browner, 924 F. Supp. 504, 42 ERC 2146 (S.D.N.Y. 1996) (court rejected plaintiffs argument that the treatment of the facility's wastewater at the POTW prior to being discharged into "navigable waters" precluded a "point source," holding that a facility that discharges into a POTW is a "point source.")

United States v. City of Detroit, No. 89-72937 (E.D. Mich. Sept. 30, 1996) (summary judgment entered in favor of City holding that State's failure to incorporate the City's approved pretreatment program as an express condition of the City's NPDES permit precluded EPA and Michigan from enforcing the requirements of the program against the City)

Metal-Cote, Inc. v. City of Detroit,789 F. Supp. 235 (E.D. Mich. 1992) (held that Detroit had authority to enforce pretreatment ordinance against outside the city limits that was discharging to the city's POTW; jurisdiction exists under 40 C.F.R. §§ 403.11, 403.8(f) and local ordinances)

Int'l Union, UAW v. Amerace Corp., Inc., 740 F. Supp. 1072, 1079, 32 ERC 1790 (D.N.J. 1990) ("The purpose of these pretreatment standards is to 'prevent the discharge of any pollutant through [POTWs] . . . which pollutant interferes with, passes through or otherwise is incompatible with such works.")

United States v. Alley, 755 F. Supp. 771, 33 ERC 1319 (N.D. Ill. 1990) (constitutionality of pretreatment regulations upheld in criminal enforcement case)

United States v. Velsicol Chemical Corp., 438 F. Supp. 945, 948, 9 ERC 1723 (W.D. Tenn. 1976) (defense rejected that EPA lacked jurisdiction over discharge to sewer system; defendant argued its discharges were not point source discharges under the CWA; court held that defendant was discharging to the Mississippi R. through the city sewer system)

S. Rep. No. 92-414, 92nd Cong. 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 3668, 3727 ("Comprehensive water pollution abatement requires that controls should be extended to any industrial discharge into municipal waste treatment works in order to prevent pollutants from entering such works if they would impair the effectiveness of the waste treatment works or if they would pass untreated or inadequately treated waste through the treatment works into navigable waters.")

64 Fed. Reg. 39564 (1999) (Proposed Rule: Streamlining the General Pretreatment Regulations for Existing and New Sources of Pollution)

55 Fed. Reg. 30107 (1990) ("[I]ndustrial users must comply with all applicable pretreatment requirements under federal law, whether or not they are contained in the permit or equivalent individual control mechanism. As a corollary, compliance by the industrial user with the terms of a permit does not shield it from liability for failure to comply with federal requirements not set forth in the permit.")

Gold, *EPA's Pretreatment Program*, 16 B.C. Envrtl Aff. L. Rev. 459 (1989)

B. Categorical

40 C.F.R. Part 413 (Electroplating Point Source Category - several pretreatment requirements contained in subparts)

40 C.F.R. Part 414 (Organic Chemicals, Plastics, and Synthetic Fibers - several pretreatment requirements contained in subparts)

40 C.F.R. Part 415 (Inorganic Chemicals Manufacturing Point Source Category - several pretreatment requirements contained in subparts)

United States v. Clark Equip. Co., 42 ERC 1734 (D.N.D. 1996) (discharges from "wash booth" associated with equipment manufacturing operations are subject to pretreatment standards because: (1) discharges from ancillary activities of metal finishing processes are subject to regulation under CWA, (2) "testing" operations are among ancillary activities listed in EPA regulation, and (3) court determines wash booth activities are testing operations)

United States v. Sheyenne Tooling & Mfg. Co., 952 F. Supp. 1420 (D.N.D. 1996) ($60,150 penalty assessed against metal finisher held liable for violations of categorical pretreatment standards)

United States v. Alley, 755 F. Supp. 771, 33 ERC 1319 (N.D. Ill. 1990) (motion to dismiss criminal indictment denied; held that general prohibitions of 403 are in addition to, not a substitute for, the specific categorical standards found in 413)

Public Int. Res. Grp. of N.J. v. Ferro Merchandising Equipment Corp., 1989 US DIST LEXIS 16958, 29 ERC 202 (D.N.J. 1989) (28 violations of average nickel and chromium limits; motion for reconsideration denied)

In re Labarge, Inc., Docket No. CWA-VII-91-W-0078 (ALJ Greene Feb. 5, 1996) ($125,000 for pretreatment violations by circuit board manufactured)

In re ICPC Etched Cirucuits, Inc., Docket No. CWA-IX-FY94-47, 1996 CWA LEXIS 18 (ALJ Nissen August 29, 1996) (accelerated decision entered for plaintiff that respondent violated categorical standard at 40 C.F.R. § 433.17 by discharging to POTW copper in excess of categorical standard)

In re B.J. Carney Industries, Inc., Docket No. 1090-09-13-309(g) (ALJ Head 1996), aff'd in part, rev'd in part, 7 E.A.D. 171 (EAB 1997), appeal dismissed, ___ F.3d ___, 1999 U.S. App. LEXIS 23005 (9th Cir. 1999) (PCP-contaminated groundwater pumped from pole-treating facility to POTW held to be process wastewater within meaning of 40 CFR § 401.11(q); discharges violated no discharge standard of 40 CFR § 429.75)

63 Fed. Reg. 71054 (1998) (request for comments on proposed categorical standards for industrial laundries)

62 Fed. Reg. 66182 (1997) (proposed pretreatment standards for laundries)

52 Fed. Reg. 1526 (1987) (national categorical standards regulate industries in a manner separate from General Pretreatment regulations)

47 Fed. Reg. 38,462 (1982) (proposed Metal Finishing pretreatment regulations, which established BAT for most indirect dischargers)

C. Criminal

United States v. Hartsell, 127 F.3d 343, 45 ERC 1356 (4th Cir. 1997) (conviction for illegal discharges to sewer system in violation of pretreatment standards 1upheld; court rejected defendants' argument that sewer system was not "navigable waters" and therefore not within the jurisdiction of the CWA)

United States v. Iverson, 1998 U.S. App. LEXIS 31062 (9th Cir. 1998) (affirming jury convictions of the president of a chemical company for unlawfully discharging wastewater into a municipal sewage system; held that local water laws prohibit the discharges and do not require the government to prove that the discharges affected water)

United States v. Sun-Wise Inc., No. 97-40019 (D.S.D. Apr. 6, 1998) (2 employees sentenced to prison and company fined $30,000 for dumping metal treating wastes into sewer line in violation of no-discharge requirement)

United States v. Aluminum Color Industries, Inc., No. 4:94CR-264 (N.D. Ohio) (plea agreement for illegal discharges (low pH) to sewer system)

D. Failure to Implement

United States v. City of Erie, Pa., No. 94-281 (W.D. Pa. July 21, 1995) (motion to dismiss denied in case against city for failure to enforce pretreatment violations; court rejected collateral estoppel argument, lack of subject matter jurisdiction, and argument that prayer for injunctive relief was too general)

Illinois Public Int. Res. Group v. PMC, Inc., 835 F. Supp. 1070 (N.D. Ill. 1993) (penalties for alleged failure to comply with pretreatment standards and local limits; motion to dismiss denied)

United States v. City of Beaumont, 786 F. Supp. 634, 35 ERC 1106 (E.D. Tex. 1992)

(city ordered to pay $400,000 for failure to implement pretreatment program; city did not identify SIUs, issue pretreatment permits, require self-monitoring or bring enforcement actions for 3 years; city's failure to implement may have resulted in significant toxic pollutant discharges; city cannnot challenge pretreatment program provisions in discharge permit in context of enforcement action; and penalty amount is appropriate where city saved over $300,000 by failing to implement according to schedule)

In re Borough of Chambersburg Wastewater Treatment Plant, Docket No. CWA-III-063 (ALJ Lotus, Feb. 4, 1994) (in case for alleged failure to enforce against SIUs, ALJ held that letter from delegated state to city requiring it to add a pretreatment program to its NPDES permit constituted a minor permit modification and the pretreatment program was enforceable)

E. Interference/Pass-Through

40 C.F.R. § 403.3(n) (definition of pass through) and (i) (definition of interference)

Arkansas Poultry Federation v. EPA, 852 F.2d 324, 329 (8th Cir. 1988) (rejected constitutional and APA challenges to EPA's pass through and interference regulations; "EPA argues that under the Act the industrial user has an 'implicit duty, if not an express legal duty, to determine what level of [pretreatment] is needed to avoid causing POTW noncompliance with these requirements.' 52 Fed. Reg. at 1595. Under the 1987 definitions, the industrial user has an additional incentive to contact its local POTW about the POTW's NPDES permit limits, sludge handling requirements and, if any, applicable local limits - compliance with local limits is an affirmative defense.")

United States v. Municipal Authority of Union Township & Dean Dairy Products, Inc., No. 1-94-621 (M.D. Pa. Dec. 14, 1995) (summary judgment granted to U.S. on interference case, rejecting IU's arguments that there were QA/QC problems with the lab causing potentially incorrect results to be reported on their DMRs; also rejected argument that conventional pollutants cannot interfere with a POTW and that problems at the POTW were caused by operation of the POTW not by the IU)

Int'l Union, UAW v. Amerace Corp., Inc., 740 F. Supp. 1072, 1081, 32 ERC 1790 (D.N.J. 1990) (discharges of prohibited substances to the POTW are presumed to pass through in unacceptable amounts)

In re City of Yankton, 5 E.A.D. 376 (EAB 1994) (interpreting 40 C.F.R. § 403.8(a), held that Region VIII failed to meet its burden of proving a nexus between nature and character of City's influent and role city-run pretreatment program would play in preventing interferences or pass throughs)

In re City of Yankton, S.D., Docket No. NPDES-SD-0023396 (ALJ Nissen Jan. 21, 1993) (in accordance with 40 C.F.R. § 403.8(a), the permitting authority may require implementation of a pretreatment program by POTW's having a design flow of 5 mgd or less, only if the deciding official makes findings that a pretreatment program is warranted in order to prevent "interference" with the POTW or "pass through."; In accordance with 40 C.F.R. § 124.85(a)(2), EPA has the burden of supporting any

challenged permit conditions. A pretreatment program has not been shown to be warranted in order to prevent "interference" with the POTW or "pass through" and the requirement will be deleted from the permit)

F. Local Limits

40 C.F.R. § 122.21(j)(4) ("written technical evaluation of need to reissue local limits")

40 C.F.R. § 403.5(c)(1) ("Each POTW developing a POTW Pretreatment Program pursuant to § 403.8 shall develop and enforce specific limits to implement the prohibitions listed in paragraphs (a)(1) and (b) of this section.")

40 C.F.R. § 403.5(d) (local limits are enforceable as federal standards)

40 C.F.R. § 403.8(f)(4) (local limits requirement for POTWs)

United States v. Mastex Industries, Inc., No. 90-30202-F (D. Mass. Apr. 15, 1992) (despite lack of clear authority under CWA, EPA may enforce city pretreatment standards which are stricter than EPA standards)

United States v. Revlon, Inc., 1987 EPA Consent LEXIS 87 (Jul. 21, 1987) (defendant agrees to comply with local limits)

PRIMA FACIE CASE

United States v. Law, 979 F.2d 977, 978-79 (4th Cir. 1993), cert. denied, 113 S. Ct. 1844 (1993) (plaintiff need only establish prima facie elements: "The origin of pollutants in the treatment and collection ponds is therefore irrelevant. The proper focus is upon the discharge from the ponds into [navigable waters].")

Committee to Save Mokelumne River v. East Bay Municipal Utility Dist., 13 F.3d 305, 309, 38 ERC 1001, 1003 (9th Cir. 1993), cert. denied, 513 U.S. 873 (1994) ("To establish a violation of the Act's NPDES requirements, a plaintiff must prove that defendants (1) discharged, i.e., added (2) a pollutant (3) to navigable waters (4) from (5) a point source.")

National Wildlife Fed. v. Consumers Power Co., 862 F.2d 580, 583 (6th Cir. 1988) (NPDES permits are required for any given set of circumstances if five elements are present: "(1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source.")

National Wildlife Federation v. Gorsuch, 693 F.2d 156, 165, 18 ERC 1105 (D.C. Cir. 1982) (five elements of NPDES requirements are "(1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source.")

Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300, 1318 (S.D. Iowa 1997) ("To establish a CWA violation, plaintiffs must show the discharge of pollutants into navigable waters from a 'point source.'")

Long Island Soundkeeper Fund, Inc. v. New York Athletic Club, 94 Civ. 0436 (RPP) (S.D.N.Y. Mar. 20, 1996) ("A violation of the effluent limitations of the Act is demonstrated where a person discharges a pollutant into navigable waters from a point source without a permit as required by the Act." Id. at 27, citing Velsicol)

Student Public Interest Research Group v. P.D. Oil and Chem. Storage, Inc., 627 F. Supp. 1074, 1090 (D.N.J. 1986) (in order to establish the liability of a defendant for its effluent limit violations, the United States must prove that the Defendant (1) is a "person" (2) who is or was "in violation of any permit condition . . . in a permit" issued pursuant to the Clean Water Act and (3) does not have a valid defense)

Michigan v. City of Allen Park, 501 F. Supp. 1007, 1014, 19 ERC 2163 (E.D. Mich. 1980), aff'd, 667 F.2d 1028 (6th Cir. 1981) (in order to establish a prima facie case, EPA must show that (1) the discharger (2) discharged (3) a pollutant (4) from a point source (5) into Waters of the United States)

United States v. Velsicol Chemical Corp., 438 F. Supp. 945, 948, 9 ERC 1723 (W.D. Tenn. 1976) (the 301 prohibition of discharge without a permit "applies when all of the following elements are present:

1. a person
2. discharge of a pollutant to
3. navigable waters
4. through a point source
5. while not in compliance with certain other provisions of the FEPCA. . .")

In re General Motors Corp., No. CWA-A-O-011-93 (ALJ Hoya June 28, 1996), aff'd, 7 E.A.D. 465 (EAB 1997), aff'd, 168 F.3d 1377, 48 ERC 1257 (D.C. Cir. 1999) (once prima facie elements are established, complainant has met burden of proof; not necessary to show where the pollutants came from as long as shown that they were discharged)

In re Urban Drainage and Flood Control District; Kemp & Hoffman, Inc.; and City of Lafayette, Docket No. CWA-VIII-94-20-PII (ALJ Vanderheyden Feb. 14, 1995) (dismissed this action against one respondent upon EPA's failure to establish a prima facie case; held that liability will attach under § 301 if the Respondent is the legal cause of the discharge; causation requirement is fulfilled if Respondent had responsibility, control or authority over the discharges; EPA failed to establish that the dismissed respondent the legal cause of the discharge)

See also "POLLUTANT;" "DISCHARGE OF POLLUTANTS"

REAUTHORIZATION

S. 2093, "Water Pollution Prevention and Control Act of 1994"

H.R. 3948 Substitute (4-21), "Water Quality Act of 1994"

EPA, "President Clinton's Clean Water Initiative," (aka "Greenbook") EPA doc. No. 800-R-94-001 (1994) (Clinton administration's proposals for amendments to the CWA)

SAFE DRINKING WATER ACT (SDWA)

Trinity American Corp. v. EPA, 150 F.3d 389, 47 ERC 1071 (4th Cir. 1998) (court rejected several challenges to EPA order requiring chemical plant to test near-by home owners' drinking water wells; held that Trinity was not an innocent landowner because record was clear that releases had occurred to the ground from the Trinity plant; SDWA emergency powers very broad to allow EPA to issue order)

Legal Environmental Assistance Foundation, Inc., v. EPA, 1997 U.S. Dist. LEXIS 20992 (11th Cir. Aug. 7, 1997) (held that EPA's interpretation of the term "underground injection" as excluding hydraulic fracturing activities associated with methane gas production was inconsistent with Part C of the SDWA, and petition granted for review of EPA order denying citizens' petition requesting withdraw of Alabama UIC program)

Ciba-Geigy Corp. v. EPA, 46 F.3d 1208 (D.C. Cir. 1995) (dismissal of challenge to EPA's final rule setting MCL and MCLG for atrazine)

American Water Works Ass'n v. EPA, 40 F.3d 1266 (D.C. Cir. 1994) (various holdings on review of the EPA's final rule under the SDWA promulgating a national primary drinking water regulation for lead)

Imperial Irrigation Dist. v. EPA, 4 F.3d 774 (9th Cir. 1993) (emergency order vacated because EPA lacked jurisdiction over canal company; canal not considered "piped" water within meaning of 42 U.S.C. § 300f(4))

Arco Oil and Gas Co. v. EPA, 14 F.3d 1431 (10th Cir. 1993) (EPA's finding that ARCO obtain a Class I EPA permit pursuant to SDWA for operation of an injection well which was regulated as a Class II well by the Colorado Oil and Gas Conservation Commission is (1) in EPA's narrow interpretation of "natural gas" under SDWA, and (2) not arbitrary or capricious)

United States v. Wright, 988 F.2d 1036 (10th Cir. 1993) (Defendant convicted for making a false written report "in any matter within the jurisdiction of any department or agency of the US" after falsifying water quality data required by SDWA)

Mattoon v. City of Pittsfield, 980 F.2d 1 (1st Cir. 1992) (Summary judgment granted to City for citizens failed to demonstrate "ongoing" violation, a prerequisite to recovery under SDWA; SDWA preempted federal common-law nuisance and civil rights claims)

National Wildlife Federation v. EPA, 980 F.2d 765 (D.C. Cir. 1992) (EPA cannot refuse to initiate proceedings to withdraw primacy once it has made determination that state no longer is in compliance with SDWA)

Western Nebraska Resources Council v. EPA, 943 F.2d 867 (8th Cir. 1991) (EPA's exemption of 3,000 acres of an aquifer from the state's UIC program is permissible under the SDWA)

National Resources Defense Council, Inc. v. EPA, 824 F.2d 1211 (D.C. Cir. 1987) (EPA's decision not to establish recommended level for vinylidene chloride based on compound's carcinogenicity did not violate SDWA)

National Resources Defense Council, Inc. v. EPA, 812 F.2d 721 (D.C. Cir. 1987) (dismissal of challenge to EPA's rule establishing recommended maximum contaminant level for fluoride under the SDWA)

Phillips Petroleum Co. v. EPA, 803 F.2d 545 (10th Cir. 1986) (dismissal of oil company's challenge to EPA's regulation establishing underground injection control program for Indian mineral reserve)

Montgomery County v. EPA, 662 F.2d 1040 (4th Cir. 1981) (EPA acted rationally within SDWA when designating seven drainage basins in the Piedmont as a single aquifer)

United States v. Mass. Water Res. Auth., No. 98-10267 (D. Mass. May 3, 1999) (defendant held in violation of surface water filtration rule, but judge put request for injunctive relief on hold while defendant construction $261 million ozone treatment plant; held that EPA's interpretation of the surface water filtration rule as "when in doubt, filter," is fair; "In sum, while the issue is by no means open and shut, I agree with the MWRA that the SDWA does not deprive a court of discretion in fashioning remedies for a violation of the surface water treatment rule.")

United States v. Selleck, Inc., (W.D. WA. 1993) (TRO granted for violations of MCL limits for coliforms and for failure to monitor)

United States v. Hydrocarbon Resources, Inc., Civ. No. 92-115 (E.D. KY. 1993) (summary judgment granted to U.S. in enforcement of $125,000 administrative order for violation of SDWA relating to injection wells)

United States v. North Adams, Civ. No. 89-30048-F (D. Mass. May 18, 1992) (monthly average violation equals 30; two-day average violation equals 2; violations at disparate water sources on any one day are treated as distinct violations; failure to monitor considered serious violations; size of service area (16,000) weighed in favor of imposition of penalty; economic benefit equals several million dollars; good faith efforts and ability to pay considered; awarded penalty of $67,200)

United States v. City of North Adams, MA, No. 89-30048-F (D. Mass. March 28, 1991) (court rejected defendant's jurisdictional challenge on grounds that concurrent states action had not been filed, as required by the Act, within 30 days of the notice from EPA and the EPA suit was more comprehensive)

United States v. City of North Adams, MA, 777 F. Supp. 61, 33 ERC 2005 (D. Mass. 1991) (summary judgment entered on behalf of U.S. for violation of federal turbidity standards for drinking water, violation of federal coliform standards and monitoring provisions)

Environmental Defense Fund v. Costle, 578 F.2d 337, 11 ERC 1209 (D.C. Cir. 1978) (EPA did not abuse its discretion in setting maximum contaminant levels for fluoride and in failing to require monitoring of sodium and sulphates)

Narragansett Indian Tribe of Rhode Island v. Narragansett Electric Co., 878 F. Supp. 349, aff'd in part, rev'd in part, 89 F.3d 908 (1st Cir. 1996) (D.R.I. 1995) (application of state's regulations in furtherance of SDWA are preempted on tribe-owned property)

Environmental Coalition v. Romer, 796 F. Supp. 457, 35 ERC 1867 (D. Colo. 1992) (attorney fees awarded to prevailing party who forced state's compliance with SDWA)

United States v. Bethlehem Steel Corp., 829 F. Supp. 1047 (N.D. Ind. 1993) (corporation ordered to pay administrative penalty for violating RCRA and SDWA by failing to perform the corrective action program required by Underground Injection Control (UIC) Permits)

United States v. Midway Heights County Water District, 695 F. Supp. 1072, 27 ERC 2185 (E.D. Cal. 1988) (stay of preliminary injunction requiring the water district to come in compliance with SDWA denied)

Western Nebraska Resources v. Wyoming Fuel Co., 641 F. Supp. 128 (D. Neb. 1986) (district court does not have the jurisdiction under the citizen suit provision of SDWA to review claims of overall inadequacy of EPA's action in prepromulgation notice and in approval of Nebraska underground injection control program provision)

In re Federated Oil & Gas of Traverse City, Michigan, 7 E.A.B. ___ (EAB 1997) (petition denied challenging UIC permit granted by Region V under the rationale that petitioners concerns did not raise issues over which the EAB has review authority; "[I]n order to obtain review of a contested permit condition, a petitioner must demonstrate why the Region's response to a particular objection or set of objections is clearly erroneous or otherwise warrants review.")

In re Paul Durham, 1997 SDWA LEXIS 1 (Apr. 14, 1997) (ALJ holds testimony based on the Safe Drinking Water Information System is sufficient to support finding that system is public water system)

In re Anthony J. Taylor, Andover Water Corporation, Docket No. PWS-NJ-CFP-03 (Order for Accelerated Decision, Aug. 14, 1992) at 3 ("The self-submission of data is critical to the success of our public water supply program under the SDWA. Without this data, EPA and the State of New Jersey cannot know whether a drinking water supply is safe. Therefore, any failure to submit data significantly undermines the fundamental mechanism of the public water supply program and requires the use of Agency enforcement resources.")

64 Fed. Reg. 23397 (1999) (proposal to have public waters systems monitor for 10 unregulated chemical substances and one unregulated microbial contaminant)

SECONDARY TREATMENT STANDARDS

33 U.S.C. § 1311(b)(1)(B) (POTWs shall meet secondary treatment standards by July 1, 1977)

40 C.F.R. Part 133 (Secondary Treatment Regulation)

Maier v. EPA, 114 F.3d 1032 (10th Cir. 1997) (EPA may control nitrogenous oxygen demand on a case-by-case basis through the permitting process rather than through a generally applicable rule; EPA's denial of a petition for a rulemaking to establish secondary NOD treatment standards was not arb. or capricious; CWA § 301(b)(1)(B) does not require EPA to promulgate secondary treatment regulations for every pollutant that can be controlled by secondary treatment, and

EPA's position is a reasonable and permissible reading of the statute, to which the court must defer)

In re Metropolitan Dade Co., Miami-Dade Water and Sewer Auth., 1996 EPA ALJ LEXIS 80 (ALJ Pearlstein 1996) (EPA motion for summary determination on challenge to calculation of alternative percent removal requirements denied on grounds that genuine issues of material fact exist)

In re City of Hollywood, Fla., 5 E.A.D. 157 (EAB 1994) (held that City of Hollywood had failed to demonstrate its eligibility for an adjustment of the 85% removal requirement)

50 Fed. Reg. 23382, 23386 (1985) ("Under this final rule, NPDES permitting authorities would be allowed to modify the percent removal requirement in existing secondary treatment permits on a case-by-case basis, based on the removal capability of the treatment plant, influent wastewater concentration and the I/I situation.")

See also POTWs

SECONDARY TREATMENT WAIVERS (§ 301(h))

33 U.S.C. § 1311(h) (Modification of secondary treatment requirements)

40 C.F.R. § 124.54 (Special provisions for State certification and concurrence on applications for section 301(h) variances)

40 C.F.R. Part 125, Subpart G (Criteria for Modifying the Secondary Treatment Requirements Under Section 301(h) of the Clean Water Act)

Puerto Rico Aqueduct and Sewer Authority v. Browner, 35 F.3d 600, 39 ERC 1269 (1st Cir. 1994) (upheld EPA's reject of request for 301(h) waiver on grounds that applicant had not provided sufficient evidence to show that its discharge would not "interfere . . . with the attainment or maintenance of that water quality which assures protection and propogation of a balanced, indiginous population of shellfish, fish, and wildlife . . . ")

In re Mayaguez Regional Sewage Treatment Plant, 4 E.A.D. 772 (EAB 1993), aff'd sub nom, Puerto Rico Aquadcut & Sewer Auth. v. EPA, 35 F.3d 600 (1st Cir. 1994), cert. denied, 513 U.S. 1148 (request for evidentiary hearing following RA's denial of application for 301(h) permit denied)

See also OCEAN DISCHARGES

SINGLE OPERATIONAL UPSET (§ 309(c)(5)/(d)/(g)(3))

33 U.S.C. § 1319(c)(5), (d) and (g)(3) ("For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.")

Public Int. Research of N.J. v. Powell Duffryn, 913 F.2d 64, 76-77 (3d Cir. 1990), cert. denied, 498 U.S. 1109 (1991) (in order to take advantage of SOU defense, an upset must be involved; SOU is a defense to penalty, not liability)

United States v. Gulf States Steel Inc., 1999 U.S. Dist. LEXIS 8834 (N.D. Ala. 1999) (held that single operational upset defense does not apply to multiple days of violations, but to multiple violations on the same day; court rejected defendants argument that violations caused by hot weather should equate an entire summer's worth of permit violations to one violation of the Act)

United States v. Smithfield Foods, Inc., 972 F. Supp. 338 , 342 n.7, 45 ERC 1387, 1390 n.7 (E.D. Va. 1997), affirmed in part, reversed in part, ___ F.3d ___, 1999 U.S. App. LEXIS 22092 (4th Cir. 1999) (single operational upset not an affirmative defense, but rather a limiting factor on the calculation of the number of days of violation under § 309(d))

Public Interest Research Group of New Jersey, Inc. v. Elf Atochem N. America, Inc., 817 F. Supp. 1164, 36 ERC 1855, 1868 (D. N.J. 1993) (3 violations occurring as a result of a single operational upset treated as a single violation)

Allen County Citizens for the Environment, Inc. v. BP Oil Co., 762 F. Supp. 733, 21 ELR 21204 (W.D. Ohio 1991) (the single operational upset defense, which was added in the '87 amendments, shows Congress' intent to "treat a single upset as a single violation.")

EPA, "Guidance Interpreting Clean Water Act Sections 309(c)(5), 309(d), and 309(g)(3): Single Operational Upset" (Sept. 27, 1989) ("An exceptional incident which causes simultaneous, unintentional, unknowing (not the result of a knowing act or omission), temporary noncompliance with more than one Clean Water Act effluent discharge pollutant parameter. Single operation upset does not include Clean Water Act violations involving discharge without an NPDES or locally issued permit or noncompliance to the extent caused by improperly designed or inadequate treatment facilities.")

See also UPSET DEFENSE

SLUDGE (§ 405)

33 U.S.C. § 1345 (Disposal or use of sewage sludge)

40 C.F.R. Part 501 (State sludge management plans regulations)

40 C.F.R. Part 503 (Standards for the use or disposal of sludge)

United States v. Cooper, 173 F.3d 1192, 48 ERC 1477 (9th Cir. 1999) (upholding conviction for illegal disposal of sludge; sludge regulations do not supersede NPDES permits; non-permittees can be liable for violations of NPDES permit)

Missouri v. City of Glasgow, 152 F.3d 802, 47 ERC 1241 (8th Cir. 1998) (city liable for discharge of sludge from its drinking water treatment facility without a permit; city was denied permit when it refused to pay a state-required permit fee which the city claimed violated the

Missouri Constitution)

Scalamandre & Sons, Inc., v. Kaufman, 113 F.3d 556 (5th Cir. 1997) (award of damages for defamation reversed, court finding no actual malice in broadcast addressing sludge land application; "defamation lawsuit should not be used as a threat to force individuals to muzzle their truthful, reasonable opinions and beliefs.")

Leather Industries of America, Inc. v. EPA, 40 F.3d 392, 39 ERC 1865 (D.C. Cir. 1994) (§ 405 regulations on metals content of sludge used for land application remanded for modification or additional justification)

Welch v. Rappahannock County Board of Supervisor, 888 F. Supp. 753, 40 ERC 2135 (W.D. Va. 1995) (county ordinance banning land application of sludge by superseded by CWA)

In re City of Salisbury, Maryland, Docket No. CWA-III-219 (ALJ Biro July 30, 1999) (motion for accelerated decision on liability for violations reported in sludge reports denied on grounds of disputed issues of material facts regarding accuracy of sludge report submitted to EPA; motion granted re counts for failure to submit reports to EPA on all sampling events; held that 40 C.F.R. § 503.17(a) is clear and gives respondent fair notice of reporting requirement)

64 Fed. Reg. 52551 (1999) (monitoring requirements relaxed and other changes to regulations made)

64 Fed. Reg. 42552 (1999) (Final Rule: Standards for the Use or Disposal of Sewage Sludge)

54 Fed. Reg. 18781 (1989) (NPDES sewage sludge permit regulations)

SPCC (§ 311(j)(1)(C))

33 U.S.C. § 1321(j)(1)(C) (requirement for promulgation of regulations re oil spills)

40 C.F.R. Part 112 (Oil Pollution Prevention)

In re Ashland Oil, Inc., 4 E.A.D. 235 (EAB 1992) (Respondent's amendment of its SPCC plan five months after replacement of tank violated § 112.5; EAB affirmed $55,125 penalty for SPCC violations based on inadequacy of existing SPCC plan; penalty was calculated on basis of $750 per day of violation)

In re 1836 Realty Corp., No. CWA-2-I-98-1017 (ALJ Gunning Mar 23, 1999) (SJ motion by Respondent denied, rejecting argument that SPCC does not apply because facility not located in an "environmentally sensitive area" and because there was no "reasonable expectation" that discharged oil could reach navigable waters)

In re Pepperell Associates, No. CWA-2-I-97-1088 (ALJ Gunning Feb. 26, 1999) ($24,876 assessed for heating oil spill that violated OPA and SPCC regs; the spill originated from an UST that leaked in a basement and entered navigable waters via the drain system; some oil also entered the POTW; held that once one tank was disconnected, it could no longer be counted in

calculating whether the SPCC regs applied to the respondent)

In re Alaska's Fishing Unlimited Lodges, Docket No. 10-97-0062 OPA (RJO Anderson Feb. 22, 1999) (held that no penalty should be assessed against tank owner who violated SPCC regs on grounds that none of the local competitors complied either, so no economic benefit accrued, and EPA should not have filed a penalty action when it was attempting to encourage Respondent to comply with the law)

In re Pepperell Associates, Docket No. CWA-2-I-97-1088 (ALJ Gunning Oct. 9, 1998) (SPCC regulations held to apply to tanks that could discharge to man-made retention basin that was connected to surface waters via a sewer conduit; these facts rendered the retention basin a "navigable waterway.")

See also OIL SPILLS

STATE CERTIFICATION (§ 401)

A. Generally

33 U.S.C. § 1341(a)(1) ("Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into navigable waters" shall obtain a certification from the State where the discharge originates "that any such discharges will comply with the applicable provisions of section 301, 303, 306, and 307" of the CWA)

33 U.S.C. § 1341(d) (state certifications shall "set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification . . .")

33 U.S.C. § 1344(t) ("Noting in [§ 404] shall preclude or deny the right of any State . . . to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State. . .")

40 C.F.R. § 124.55(e) ("Review and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures in [Part 124].")

40 C.F.R. § 131.4(c) (an Indian Tribe which is treated in the same manner as a State for purposes of the water quality standards program is the certifying agency for discharges on Indian lands)

PUD No. 1 of Jefferson Co. v. Washington State Dept. of Ecology, 511 U.S. 700, 114 S. Ct. 1900, 128 L. Ed. 2d 716, 38 ERC 1593, 24 ELR 20945 (1994) (401(d) requires the state to assure compliance with state water quality standards in light of the permitted

"activity" not just the "discharge"; thus Washington's minimum stream flow requirement is a permissible condition of a section 401 certification)

Citizens Interested in Bull Run v. R.L.K. & Co., 1998 U.S. App. LEXIS 3926 (9th Cir. 1998) (dismissal of suit against ski area for discharge of road salt upheld; held that salt in snow that runs off during spring not an "activity" within the meaning of 401(a), so F.S. permit need not be certified)

Howard W. Heck & Assoc. v. U.S., 134 F.3d 1468, 46 ERC 1381, 1383 (Fed. Cir. 1998) ("The CWA specifically makes submission by the applicant of certification by the state in which the discharge will originate a prerequisite for issuance by the Corps of a section 404 permit. . . . Should the state refuse to give its approval, the provisions of 33 C.F.R. § 320.4(j) grant the Corps discretion to deny the permit without prejudice.")

Oregon Natural Desert Ass'n v. Thomas, 151 F.3d 945, 46 ERC 1993 (9th Cir. 1998) (held that 401 certification does not apply to nonpoint source pollutants, such as manure from grazing on public lands; distinguished dam cases (Consumers Power et al.) on grounds that dams are point sources but they don't discharge pollutants)

North Carolina v. FERC, 112 F.3d 1175, 45 ERC 1443 (D.C. Cir. 1997), cert. denied, 118 S. Ct. 1036 (1998) (held that the withdrawal of water resulting in a decrease in the volume of a pre-existing discharge is not an activity that "results in a discharge" for purposes of § 401(a)(1) because the term "discharge" contemplates "the addition, not the withdrawal, of a substance or substances." In reaching this conclusion, the majority relied on the definition of "discharge of pollutant" at § 502(12) of the CWA ("an addition of any pollutant to navigable waters from any point source") to give meaning to the separately defined term "discharge.")

Ackels v. EPA, 7 F.3d 862 (9th Cir. 1993) (EPA has authority to accept State certification beyond the 60-day period specified in the regulations)

United States v. Marathon Dev. Corp., 867 F.2d 96 (1st Cir. 1989) (if state determines that discharges from certain category of activity will not meet state water quality requirements, federal government is prohibited from authorizing activity by federal permit)

Fredericksburg v. Federal Energy Regulatory Com., 876 F.2d 1109 (4th Cir. 1989) (license issued by FERC to hydroelectric co. to build powerhouse at dam was invalid, since co. never submitted required application to state water control board, and thus did not "request" certification within meaning of Commission's regulations)

Roosevelt Campobello International Park Commission v. EPA, 684 F.2d 1041, 1056, 17 ERC 2023 (1st Cir. 1982) ("Section 401(a) of the Clean Water Act empowers the state to certify that a proposed discharge will comply with the Act and 'with any other appropriate requirement of state law.' Any such requirement 'shall become a condition on any Federal license or permit.'")

Oregon Natural Desert Ass'n v. Thomas, No. 94-522-HA (D. Or. 1996), rev'd 151 F.3d

945, 46 ERC 1993 (9th Cir. 1998) (in challenge to grazing permits issued by Forest Service, court held that § 401 applies to all federally permitted activities that may result in a discharge, including discharges from nonpoint sources)

Idaho Conservation League v. Caswell, No. CV 95-394-S-MHW (D. Idaho 199_) (held that Forest Service approval of the construction of two logging roads in a National Forest was not subject to state certification under § 401 on grounds that roads are nonpoint sources; "Section 401 is only intended to encompass those projects which resulted in a `point source discharge.'")

Society for the Protection of New Hampshire Forest v. Site Evaluation Committee, 115 N.H. 163, 337 A.2d 778 (1975) (to discharge heated water and waste into Atlantic Ocean from Seabrook facility, public service co. would need both permit from Water Supply and Pollution Control Commission, and finding from Site Evaluation Committee that discharge would not adversely affect water quality)

In re American Cyanamid Co., 4 E.A.D. 790, 801 n.11 (EAB 1993) (the certification process does not allow a state to block the issuance of an EPA permit on the grounds that state law allows a less stringent condition than one EPA proposes to include)

In re Miami-Dade Water and Sewer Auth. Dept., 4 E.A.D. 133, 144 n.10 (EAB 1992) ("While a State may not condition or deny a certification on the grounds that State law allows a less stringent permit condition, 40 CFR § 124.55(c), a State is required to include in the certification a 'statement of the extent to which each condition of the draft permit can be made less stringent without violating the requirements of State law, including water quality standards.' 40 CFR § 124.53(e)(3).")

In re Shell Oil Co., 3 E.A.D. 324 (CJO 1990) (EPA must include all necessary limits based on state standards even if state certifies without the limits in the permit)

In re Champion International Corporation, 3 E.A.D. 309 (CJO 1990) (state's failure to notify the applicant of its certification under 40 C.F.R. § 124.53(d) is not a basis to reject the certification, and is an issue to be addressed by the state)

44 Fed. Reg. 32,930 (1979) (commenting on the language of (now) 124.55(c)) ("State certification rights proceed from the authority under section 510 of the Act to set more stringent limitation than those required by the Act. States may not require EPA to disregard or downgrade Federal requirements.")

EPA, "A Primer on CWA Section 401" (Nov. 30, 1993)

USEPA GCO 76-12 (State may not withdraw certification under 401 on basis that while effluent limitations contained in NPDES permit are sufficient to meet state thermal water quality standards actual discharge is not meeting such water quality standards)

1 Grad, *Treatise on Environmental Law* § 303, at 30129 (1983) ("The certification requirement provides the states with a first line of defense against federally licensed or permitted activities that may have adverse effects on the State's waters.")

Debra L. Donahue, *The Untapped Power of Clean Water Act Section 401*, Ecology L.Q. 201, 278-79 (1996)

See also WATER QUALITY STANDARDS: State Authority (§ 510)

B. Challenges to State Certification Should Be in State Court

40 C.F.R. § 124.55(e) ("Review and appeals of limitations and conditions attributable to state certification shall be made through the applicable procedures of the state and may not be made through the procedures in this part.")

Dubois v. U.S.D.A., 102 F.3d 1273, 43 ERC 1824 (1st Cir. 1996) (challenge to F.S. special use permit as not in compliance with antidegradation requirements of state water quality standards rejected on grounds that proper forum for challenging state certification is in state, rather than federal court)

Scott v. City of Hammond, Indiana, 741 F.2d 992, 995 (7th Cir. 1984) ("The only recognized avenue for challenge to the substance of EPA's actions taken with respect to state submissions [under CWA § 303] is a suit for judicial review under the [APA].")

Roosevelt Campobello Int'l Park Commission v. EPA, 684 F.2d 1041, 1056 (1st Cir. 1982) ("[T]he proper forum to review the appropriateness of a state's certification is the state court and . . . [F]ederal courts and agencies are without authority to review the validity of requirements imposed under state law or in a state's certification.")

Dubois v. U.S. Dept. of Agriculture, 1995 U.S. Dist. LEXIS 16608 (D.N.H. 1995), rev'd, 102 F.3d 1273, 43 ERC 1824 (1st Cir. 1996) (claim that Forest Service accepted an erroneous state certification in violation of the APA rejected, holding that F.S. is not required under the CWA to independently determine whether the proposed activity will comply with state water quality requirements, which is the State's duty; plaintiffs cannot circumvent state administrative remedies by raising a claim for the first time in federal court to challenge a stat's certification)

Town of Summersville, 60 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,291, at 61,990 (1992) (review of the appropriateness of § 401 conditions is solely within the purview of state courts)

Carex Hydro, 52 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,216 at 61,769 (1990) (review of the appropriateness of § 401 conditions is solely within the purview of state courts)

Central Maine Power Co., 52 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,033 at 61,172 (1990) (review of the appropriateness of § 401 conditions is solely within the purview of state courts)

Mobile Oil Corp. v. Kelley, 426 F. Supp. 230, 235 (S.D. Ala. 1976) (401 certifications are to be reviewed in state, not federal courts)

In re Portland Water District, 7 E.A.D. ___ (EAB 1997) (Regional Administrator's denial of an evidentiary hearing request upheld on grounds that permit limit was attributable to State certification)

In re District of Columbia, 6 E.A.D. 470 (EAB 1996) (combined sewer overflow conditions in city's NPDES permit are not "attributable to State certification" and, therefore, are appealable to the RA)

In re City of Fitchburg, 5 E.A.D. 93 (EAB 1994) (challenges to permit limits attributable to state certification must be made through state procedures)

In re General Electric Co., Hookset New Hampshire, 4 E.A.D. 468, 470-71 (EAB 1993) ("Challenges to permit limitations and conditions attributable to State certification will not be considered by the Agency. . . .[T]he person seeking a relaxation of the requirement must look to the State for relief. . . . Permit conditions are 'attributable to State certification' when, *inter alia*, the State indicates (in writing) that these conditions are necessary in order to comply with State law and cannot be made less stringent and still comply with State law.")

C. Compliance Schedules

In re City of Haverhill, Wastewater Division, 5 E.A.D. 211 (EAB 1994) (permit cannot include compliance schedule for water quality limits attributable to state water quality certification)

In re Star Kist Caribe, Inc., 3 E.A.D. 172 (CJO 1990), aff'd, (EAB 1992, Order Denying Modification Request) (schedules of compliance in permits are only allowed where the State clearly authorizes such schedules through statute or regulation)

D. Interjurisdictional Water Bodies

Arkansas v. Oklahoma, 503 U.S. 91, 34 ERC 1193 (1992) ("Since 1973, EPA regulations have provided that an NPDES permit shall not be issued 'when the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States.'")

National Wildlife Federation v. FERC, 912 F.2d 1471, 1483, 20 ELR 21098 (D.C. Cir. 1991) (a 401 certification is needed only from the state in which the discharge originates, not affected downstream states)

Lake Erie Alliance for the Protection of the Coastal Corridor v. U.S. Army Corps of Engineers, 526 F. Supp. 1063, 1075, 18 ERC 1050 (W.D. Pa. 1981), aff'd, 707 F.2d 1392 (3d Cir. 1983) (if a facility is in one state, but he discharge point is in the other, the 401 certification comes from the state where the facility is located)

E. Questioning State Certification

American Rivers, Inc. v. Federal Energy Regulatory Commission, 129 F.3d 99, 45 ERC

1563 (2nd Cir. 1997) (court rejected the position of FERC that it has authority to decide whether conditions of a state certification under § 401 of the CWA are unlawful and, therefore, not include such conditions as part of a hydropower license; held, instead, that FERC "is bound by the language of § 401 to incorporate all state-imposed certification conditions into hydropower licenses and that the legality of such conditions can only be challenged by the licensee in a court of appropriate jurisdiction.")

Puerto Rico Sun Oil Co. v. EPA, 8 F.3d 73, 37 ERC 1729 (1st Cir. 1993) (permit issuance overturned where permit was based on stayed water quality standards that state had found to be in error)

American Paper Inst. v. EPA, 996 F.2d 346, 352, 36 ERC 2025 (D.C. Cir. 1993) (a state may refuse to certify if the permit limits do not "comply" with the state's own interpretation of its water quality standards)

United States Dep't of the Interior v. FERC, 952 F.2d 538, 548, 22 ELR 20546 (D.C. Cir. 1992) ("FERC may not alter or reject conditions imposed by the states through section 401 certificates.")

In re Boise Cascade Corp., 4 E.A.D. 474 (EAB 1993) (to comply with 124.53(d), and thus make any resulting permit condition "attributable to state certification" under 124.55(e), the state certification letter must make clear that the requirement cannot be made less stringent and still comply with the state water quality standards)

In re General Electric Co., Hookset New Hampshire, 4 E.A.D. 468, 470 (EAB 1993) ("It is well established that the Agency may not 'look behind' a State certification issued pursuant to § 401 of the Clean Water Act, . . . for the purpose of relaxing a requirement of that certification.")

In re American Cyanamid Co., 4 E.A.D. 790, 801 n. 12 (EAB 1993) (to impose more stringent limits than specifically certified by the state, "the Region would have to provide a compelling reason for rejecting the State's interpretation of the standard.")

In re City of Jacksonville, 4 E.A.D. 150, 157-158 (EAB 1992) ("The Region's duty under CWA § 401 to defer to considerations of State law is intended to prevent EPA from *relaxing* any requirements, limitations, or conditions imposed by State law. . . . When the Region reasonably believes that a state water quality standard requires a more stringent permit limitation than specified by the State, the Region has an independent duty under CWA § 301(b)(1)(C) to include the more stringent permit limitation.")

In re Lone Star Steel Co., 3 E.A.D. 713 (CJO 1991) (Agency may not look behind a State certification issue pursuant to § 401 of the CWA for the purpose of relaxing a requirement of certification; general reference to state law in certification is sufficient to meet requirement of providing cites to state law supporting certification)

In re Champion International Corporation, 3 E.A.D. 309 (CJO 1990) (Agency may not look behind a State certification issue pursuant to § 401 of the CWA for the purpose of relaxing a requirement of certification; state's failure to notify the applicant of its

certification under 40 C.F.R. § 124.53(d) is not a basis to reject the certification, and is an issue to be addressed by the state)

In re Homestake Mining Co., 2 E.A.D. 195, 197 n.4 (CJO May 19, 1986) (EPA may not look behind a State certification issue pursuant to § 401 of the CWA for the purpose of relaxing a requirement of certification)

In re Ina Road Water Pollution Control Facility, 1 E.A.D. 99 (CJO 1985) (where the state adopts a less stringent condition based on an interpretation of the state's water quality standards that is not a clear error, EPA may not substitute its own interpretation; however, if the state commits clear error in issuing its certification, e.g., by failing to include limits which are a part of the state's standards, EPA must, pursuant to 301(b)(1)(C), include the necessary limits)

Lisa M. Bogardus, State Certification of Hydroelectric Facilities Under Section 401 of the Clean Water Act, 12 Va. Envtl. L.J. 43, 95 (1992) (summarizing Keating, in part, to hold that "neither a federal agency nor a federal court may review the appropriateness of conditions attached to the certificate or review the grant or denial of a certificate")

F. 3-Mile Limit to State Certification

Natural Resources Defense Council, Inc. v. EPA, 863 F.2d 1420, 1434-1436, 28 ERC 1609 (9th Cir. 1988) (state jurisdiction for 401 certification purposes ends at 3 miles off shore)

See also STATE JURISDICTION

G. Waiver of Right to Certify

40 C.F.R. § 124.53(c)(3) (for NPDES permits, the "reasonable period of time" for the state to certify is 60 days from the issuance of a draft permit, unless the RA finds "in rare circumstances" that longer period of time is necessary)

Caribbean Petroleum Corp. v. EPA, 28 F.3d 232, 39 ERC 1250 (1st Cir. 1994) (EPA issuance of a NPDES permit pending state review of state Water quality standards certification appropriate; "We decline to visit on EPA the responsibility for unexplained, if not inexplicable, EQB delays in undertaking or completing its promised reconsideration [of the Water quality standards], nor to compromise in the meantime the important public interests served by the Clean Water Act.")

Puerto Rico Sun Oil Co. v. EPA, 8 F.3d 73, 37 ERC 1729 (1st Cir. 1993) (EPA may, in its discretion, accept certification after expiration of the "reasonable period;" that is the right to certify is waived, but the certification itself is valid even if submitted late)

Ackles v. EPA, 7 F.3d 862, 37 ERC 2118 (9th Cir. 1993) (if state fails to specify which conditions may be made less stringent, the certification is still valid, but the state waives its right to object to less stringent conditions)

In re Ketchikan Pulp Co., 6 E.A.D. 675 (EAB 1996) (where state failed to certify permit with time frame set out by Region, state was deemed to have waived certification, and Region was correct to no include mixing zones, which must be certified by the state)

In re American Cyanamid Co., 4 E.A.D. 790, 801 (EAB 993) (where the State waives certification, the Region's interpretation of the State's water quality standards will be upheld if "reasonable")

STATE JURISDICTION

33 U.S.C. § 1370 (except as where expressly provided, the Act should not "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.")

Natural Resources Defense Council, Inc. v. EPA, 863 F.2d 1420, 1434 (9th Cir. 1988) (state jurisdiction for purposes of NPDES permits is 3 miles off shore; based on definition "navigable waters" used in §§ 401 and 402 of CWA)

S. Rep. No. 414, 92nd Cong., 1st Sess., 42 (1971), *reprinted in* Leg. Hist. at 1495 ("The [Senate] Committee [on Public Works] has added definitions of the terms territorial seas, contiguous zone, and ocean to describe clearly the jurisdictional limits of the Act, and provide a basis for its relationship to other laws of the United States as well as to international law.")

See also "NAVIGABLE WATERS"

STATE LIABILITY FOR JUDGEMENTS (§ 309(e))

33 U.S.C. § 1319(e) ("Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.")

United States v. City of Geneva, No. 85 C 3917 (N.D. Ill., June 27, 1986) at 14 (joining the state as a party under § 309(e) is mandatory, regardless of whether the Federal government has alleged that a specific State law prevents a municipality from raising revenues to comply with a judgment)

United States v. City of Guymon, Oklahoma and the State of Oklahoma, No. 84 C 2368 (W.D. Okla., March 18, 1985) (order denying State's motion to dismiss)

STATE NOTIFICATION OF ENFORCEMENT ACTION

33 U.S.C. § 1319(b) ("Notice of the commencement of [a civil judicial action] shall be given

immediately to the appropriate State.")

33 U.S.C. § 1319(g)(1) (". . . the Administrator . . . may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.")

United States v. Pennzoil Exploration and Production Co., (W.D. Pa. April 18, 1991) (notice to the state under § 309(b) is not a condition precedent to federal enforcement of the CWA; failure to notify the state must not result in dismissal of the subsequent federal CWA lawsuit)

United States v. City of Colorado Springs, CO, 455 F. Supp. 1364, 1366 (D. Colo. 1978) (notice to the state under § 309(b) is not a condition precedent to federal enforcement of the CWA; failure to notify the state must not result in dismissal of the subsequent federal CWA lawsuit)

STATUTE OF LIMITATIONS

A. Generally

28 U.S.C. § 2462 (bars suits for civil penalties "unless commenced within five years from the date when the claim first accrued.")

E.I. DuPont de Nemours & Co. v. Davis, 264 U.S. 456, 462, 68 L. Ed. 788, 44 S. Ct. 364 (1924) ("an action on behalf of the United States in its governmental capacity . . . is subject to no time limitation, in the absence of congressional enactment clearly imposing it.")

United States v. Telluride Co., 146 F.3d 1241, 46 ERC 1897 (10th Cir. 1998) ("historically, 'statutes of limitation are not controlling measures of equitable relief'")

Bertha Building Corp. v. National Theatres Corp., 269 F.2d 785, 788-789 (2d Cir. 1959) (28 U.S.C. § 2462 covers civil-penalty suits by the United States)

United States v. SCM Corp., 667 F. Supp. 1110, 1123 (D. Md. 1987) (5-year statute applies to § 113(b) of the CWA)

See also WETLANDS: Statute of Limitations

B. Citizen's Suits

See CITIZEN SUITS: Statute of Limitations

C. Discovery Rule

Public Interest Research Group v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 31 ERC 1905 (3d Cir. 1990), cert. denied, 498 U.S. 1109 (1991) (five-year statute of limitations for citizen suits under CWA begins to run when defendant files its discharge monitoring reports rather than at time of discharge since responsibility for monitoring effluent rests

with defendant and public cannot reasonably be deemed to have known about any violation until permit holder files its DMRs)

United States v. Material Service Corp., 1996 U.S. Dist. LEXIS 14471 (N.D. Ill. 1996) (court held that 404 violations accrued for statute of limitations purposes when the government discovered the violation in March 1993, and therefore, none of the government's claims were barred by the statute of limitations; court looked to self-reporting structure of CWA and general public policy concerns)

United States v. Telluride Co., 884 F. Supp. 404 (D. Colo. 1995), rev'd in part, 146 F.3d 1241, 46 ERC 1897 (10th Cir. 1998) (404 penalty case barred by 5-year statute of limitations; held that discharge of fill in violation of 301 is not a continuing violation and the 5-year statute of limitations begins to run from the date of discharge)

United States v. Winward Properties, Inc., Civil No. 1:91-CV-348-RLV (N.D. Ga. March 31, 1993) (wetlands case; statute of limitations does not begin to run until the government knew or should have known of violation; statute of lim. applies to both legal and equitable relief)

United States v. Aluminum Co. of American, Civ. No. 6:92CV564 (E.D. Tex. 1993) (statute of limitations does not begin to run until EPA receives DMR)

D. Injunctive Relief

United States v. Banks, 115 F.3d 916, 918 45 ERC 1281 (11th Cir. 1997) (held that the five year statute of limitations under 28 USC § 2426 did not apply to injunctive relief requested by the United States in its sovereign capacity; § 2426 on its face applies only to penalties and similar relief, but defendants had argued for application of the concurrent remedy rule, under which equitable relief is barred if a statute of limitations would bar a concurrently sought penalty; held that the concurrent remedy rule was inapplicable to claims for injunctive relief brought by the United States in enforcing the CWA)

Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc., , 913 F.2d 64, 31 ERC 1905 (3d Cir. 1990), cert. denied, 498 U.S. 1109 (1991) (no statute of limitations for injunctive relief under CWA)

STORM WATER

33 U.S.C. §§ 1342(l)(2) (Storm water runoff from oil, gas and mining)

33 U.S.C. §§ 1342(p) (Municipal & Industrial Storm water Discharges)

40 C.F.R. § 122.26 (Storm water discharges)

Defenders of Wildlife v. Browner, ___ F.3d ___, 1999 U.S. App. LEXIS 22212 (9th Cir. 1999) (held that EPA not arbitrary and capricious by not requiring municipal stormwater permits to

include numeric effluent limits designed to ensure compliance with state water quality standards; EPA has discretion to use BMPs instead; "the Water Quality Act [of 1987] did not require municipal stormsewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)C). . . [I]dustrial dischargers must comply strictly with state water-quality standards. Congress chose not to include a similar provision for municipal storm-sewer discharges.")

San Francisco Baykeeper v. City of Saratoga, 1998 U.S. App. LEXIS 3942 (9th Cir. 1998) (City may be liable for storm water discharges from storm drain owned by CALTRANS, but which was located on City property, if it is found that city was an operator of the drain under 40 C.F.R. 122.26(a)(3)(vi))

Hughey v. JMS Dev. Corp., 78 F.3d 1523, 42 ERC 1449 (4th Cir. 1996) (defendant developer held not liable for storm water unpermitted discharges from construction site where storm water permit was not available from state; good summary of history of storm water regulation)

Concerned Area Residents for the Environment v. Southview Farm and Richard Popp, 34 F.3d 114, 39 ERC 1385 (2d Cir. 1994), cert. denied, 115 S. Ct. 1793 (1995) (runoff of manure applied to farm field during storm events held not to be storm water; "[W]e must uphold the verdict to the extent that the jury had a reasonable basis to find that the discharges . . . were not the result of rain, but rather simply occurred on days when it rained.")

American Mining Congress v. EPA, 965 F.2d 759 (9th Cir. 1992) (upheld provision of EPA's storm water rule which classifies storm water discharges from inactive mines as "associated with industrial activity" and thus subject to NPDES permitting under § 402(p) of the CWA)

Natural Resources Defense Council, Inc. v. EPA, 966 F.2d 1292, 34 ERC 2017 (9th Cir. 1992) (EPA ordered to meet statutory deadlines for compliance with requirement for promulgation of storm water regulations; EPA definition of "municipal separate storm sewer systems serving" based on rational connection; portion of rule exempting various types of "light industry" from the definition of "discharge associated with industrial activity" was arbitrary and capricious; etc.)

Waste Action Project v. Clark County, No. C98-5271RJB (W.D. Wash. Jan. 13, 1999) (county liable for storm water discharges without a permit where state notified county that storm water outfall required a permit)

Mamo v. Galiher, 1998 U.S. Dist. LEXIS 18924 (D. Haw. 1998) (construction of farming access roads does not require a storm water permit because it is a nonpoint source activity)

San Francisco Baykeeper v. Tidewater Sand & Gravel Co., 46 ERC 1780, 1784 (N.D. Ca. 1997) (defendant held liable for violations of storm water general permit; discharge of a pollutant not a predicate to a CWA violation so long as a permit has been violated; discharges from defendant's sand & gravel operation held to be "associated with industrial activity" under 40 C.F.R. § 122.26(c)(1))

Buchholz v. Dayton Int'l Airport, 1995 U.S. Dist. LEXIS 9490 (S.D. Ohio 1995) (storm water discharges from airport containing de-icing operations held to violate storm water permit; given public interest in airline safety, defendant given time to bring discharges under control)

Molokai Chamber of Commerce v. Kukui, Inc., 891 F. Supp. 1389 (D. Haw. 1995), aff'd, 58 F.3d 35 (2nd Cir.1995) (defendant held liable for construction of a pipeline without first recieving notice of coverage under the storm water GP and where state had not notified defendant of the state's acceptance of the BMP plan)

Beartooth Alliance v. Crown Butte Mines, CV 93-154-BLG-JDS (D. Mont. Oct. 13, 1995) (historic discharges from adits and pits that were exacerbated by recent exploration work held to be point source discharges, not storm water)

City of New York v. Anglebrook Ltd. Partnership, 891 F. Supp. 900, 903-04, 40 ERC 1813 (S.D.N.Y. 1995) (motion to dismiss citizen's complaint alleging storm water violations denied; permit violation constitutes violation of the CWA even in the absence of a discharge of pollutants)

Natural Resources Defense Council, Inc. v. Van Loben Sels, 1994 U.S. Dist. LEXIS 20061 (C.D. Cal. 1994) (held that Cal. Transp. Dept. violated its storm water permit by failing to adopt a permit compliance plan and properly training and supervising its employees regarding compliance; also held that defendant did not take adequate precautions to prevent contaminated water from entering the storm water drainage system)

In re Arizona Municipal Storm Water NPDES Permits, 7 E.A.D. 646 (EAB 1998) (petition for evidentiary hearing rejected on multiple grounds; held that no numeric effluent limits needed to meet state water quality standards where effective BMPs are employed)

In re General Motors Corp., No. CWA-A-O-011-93 (ALJ Hoya June 28, 1996), aff'd, 7 E.A.D. ___ (EAB 1998), aff'd, 168 F.3d 1377, 48 ERC 1257 (D.C. Cir. 1999) (held that manufacturer violated CWA by discharging from its plant storm water containing lead, copper and zinc in excess of NPDES permit requirements; rejected argument that EPA must show that the source of the metals was not rainfall or the corrosive effect of rainfall on the plant's buildings)

64 Fed. Reg. 15158 (1999) (proposal to develop rule to address storm water management for construction activities)

60 Fed. Reg. 40230 - 40235 (1995) (Storm Water Discharges; Amendment to Requirements for National Pollutant Discharge Elimination System Permits; Final Rule)

55 Fed. Reg. 47990 - 48091 (1990) (NPDES permit application regulations for storm water discharges; in promulgating the storm water regulations, EPA intended "to embrace the broadest possible definition of point source consistent with the legislative intent of the [CWA] and court interpretations to include any identifiable conveyance from which pollutants might enter the waters of the United States." Id. at 47997)

53 Fed. Reg. 4158 (1988) (in amending § 122.21, deletion of existing storm water discharge permit regulations and permit application deadlines for Group I and Group II storm water discharges)

Pendergast, "Applicability of the NPDES Program to Discharges of Storm Water Associated with Construction Activity at, or Construction of, Livestock Feeding Facilities" (February 5,

1998)

STRICT LIABILITY

A. Generally

Atlantic States Legal Foundation, Inc. v. Tyson Foods, 897 F.2d 1128 (11th Cir. 1990) ("There was one simple and straightforward way for Tyson to avoid paying civil penalties for violations of the Clean Water Act: after purchasing the plant, Tyson could have ceased operations until it was able to discharge pollutants without violating the requirements of its NPDES permit. Tyson chose not to do this and it must now bear the consequence of that decision.")

Chemical Mfrs Ass'n v. EPA, 870 F.2d 177, 229 (5th Cir. 1989) (petitioners argued that a statistical model used by EPA to establish 95th percentile effluent limits "demonstrates that a well-operated plant . . . can be expected to perform within the . . . monthly effluent limitations only 95 percent of the time." The court held that petitioners' argument was "based on an apparent misunderstanding of the EPA statistical model." It relied on the Agency's explanation that permit limits based on a 95th percentile value "should result in compliance at all times apart from instances of upsets. . .")

Stoddard v. Western Carolina Regional Sewer Authority, 784 F.2d 1200, 1208 (4th Cir. 1986) (liability under the CWA is a form of strict liability)

United States v. Coastal States Crude Gathering Co., 643 F.2d 1125, 1127, 15 ERC 2105 (5th Cir. 1981), cert. denied, 454 U.S. 835, 70 L. Ed. 2d 114, 102 S. Ct. 136, 16 ERC 1512 (1981) (there are no defenses to liability in a claim for penalties under the CWA)

Minnehaha Creek Watershed District v. Hoffman, 597 F.2d 617, 627, 13 ERC 1009 (8th Cir. 1979) (the act provides no justification for the determination "that whether the discharge of a particular substance listed in 502(6) constitutes the discharge of a `pollutant' . . . depends upon the purpose for which the discharge is made.")

United States v. Earth Sciences, Inc., 599 F.2d 368, 374, 13 ERC 1417 (10th Cir. 1979) (Clean Water Act is a strict liability statute; "The regulatory provisions of the FWPCA were written without regard to intentionality, . . . making the person responsible for the discharge of any pollutant strictly liable . . . Willful or negligent violations of the Act are separately punishable by criminal penalties under 33 U.S.C. § 1319(c)(1). The Act would be severely weakened if only intentional acts were proscribed.")

United States v. Tex-Tow, Inc., 589 F.2d 1310, 1313, 12 ERC 1593 (7th Cir. 1978) (owners and operators are liable for civil penalties with no provision for any defenses)

California Public Interest Research Group v. Shell Oil Co., 840 F. Supp. 712, 714-715 (N.D. Cal. 1993) (CWA "makes dischargers, such as Shell, 'strictly liable' for any violation of a NPDES permit. Thus, neither good faith, impossibility, nor data reporting errors, are accepted as valid defenses to liability, although such factors may be relevant

to the penalty phase." (citations omitted))

Public Interest Research Group v. Yates Industries, Inc., 757 F. Supp. 438, 445 (D.N.J. 1991) ("Mere verbal representations by officials that certain portions of a permit will not be enforced, without formal modifications in the permit, will not excuse the holder from the terms of the permit.")

United States v. Quaker State Corp., Civ. No. 88-306-Erie (W.D. Pa. April 2, 1991) (liability under § 309 of the CWA is strict)

United States v. Ohio Edison, 725 F. Supp. 928, 934 (N.D. Ohio 1989) (even assuming the defendant is without fault in this matter, the statute does not require fault to support a penalty)

Pennsylvania Environmental Defense Foundation v. Mazurkiewicz, 712 F. Supp. 1184, 1192, 30 ERC, 1480, 1486 (M.D. Pa. 1989) ("The individuals or entities responsible for the discharge of a pollutant in violation of the terms of a National Pollutant Discharge Elimination System permit are strictly liable; no intent or negligence need be shown.")

Fishel v. Westinghouse Electric Corp., 640 F. Supp. 442, 16 E.L.R. 20634 (M.D. Pa. 1986) (Clean Water Act is a strict liability statute)

Mumford Cove Assoc. v. Groton, 640 F. Supp. 392, 395 (D. Conn. 1986) (defense of reasonable effort to comply with permit not acceptable because CWA is strict liability statute; "enforcement of the Clean Water Act does not depend upon establishing a direct causal link between violations of NPDES permit and pollution.")

United States v. Tom-Kat Development, Inc., 614 F. Supp. 613, 614 (D.C. Alaska 1985) (good faith not a defense)

United States v. St. Bernard Parish, 589 F. Supp. 617, 619, 21 ERC 1950 (E.D. La. 1984) ("liability imposed for permit violations under the Clean Water Act is a variety of strict liability where neither fault nor intent is relevant to determination thereof.")

United States v. Amoco Oil Co., 580 F. Supp. 1042, 1050 (W.D. Mo. 1984) (liability imposed under civil penalty provision of § 309(d) is variety of strict liability, and neither fault nor intent are relevant thereto, except in connection with amount of penalty imposed)

United States v. Board of Trustees of Fla. Keys Community College, 531 F. Supp. 267, 274, 18 ERC 1188 (S.D. Fla. 1981) (defense of contractor that it relied in good faith on owner's representation that permits were in place not a defense to unpermitted filling of slough; "[C]ivil liability under the [CWA and Rivers and Harbors Act] is predicated on either (1) performance, or (2) responsibility for or control over performance of the work, in the absence of the necessary federal permits.")

United States v. General Motors Corp., 403 F. Supp. 1151, 1157, 8 ERC 1707 (D. Conn. 1975) (refusing to consider whether third party was sole cause in CWA penalty action

because this defense is not in the penalty provision and Court cannot "legislatively graft a defense embodied in some subsections of Sec. 1321, into a Subsection of the Act from which Congress clearly omitted it.")

In re Dr. Marshall C. Sasser, 3 E.A.D. 703, 707 (CJO 1991) ("[G]ood faith is not a defense to an alleged violation of § 301.")

In re City of Port St. Joe and Florida Coast Paper Co., 7 E.A.D. 275 (EAB 1997) ("We assume that Petitioners believe that the Region estimated 5% noncompliance with the TSS limit because the Region calculated the TSS limit from the City's data using a '95th percentile value.' That argument rests on a misconception. A limit based on a *95th percentile value* is not a limit that necessarily will be exceeded *5% of the time*. Rather, a 95th percentile value is the value that is exceeded by *5% of the sampels* in a given distribution." (emphasis in original))

In re Town of Luray, Docket No. CWA-III-185 (ALJ Kuhlman Nov. 4, 1997) (accelerated decision granted in favor of EPA; ALJ ruled that CWA is a strict liability statute, therefore Respondent's assertion that it had "done all that could be humanly expected" had no relevance in determining liability)

In re Puerto Rico Urban Renewal & Housing Corp., Docket No. CWA-II-89-249 (ALJ Nissen June 29, 1993) (owner of sanitary collection system strictly liable for unpermitted discharges of untreated wastewater to river notwithstanding that the discharges resulted from illegal connections to system by third parties)

B. Accidents

United States v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1978) (liability found where recirculation sumps at gold leaching operation were overwhelmed by greater-than-expected snow melt runoff, causing cyanide discharges)

O'Leary v. Moyer's Landfill, Inc., 523 F. Supp. 642, 655 (M.D. Pa. 1986) ("The essence of a point source discharge is that it be from a `discernible, confined, and discrete conveyance.' . . . Contrary to defendants' assertions, this has nothing to do with the intent of the operators. . . .")

In re Chevron U.S.A., Inc., Docket No. IX-FY88-54 (May 3, 1990) (Class I proceeding in which Chevron discharged 104,000 gallons of aviation fuel into Pearl Harbor from a ruptured pipeline. Defense that this was exclusively a § 311 case denied and Agency allowed to proceed under 309(g). Hearings Officer also rejected argument that "discharges" under § 301(a) must be expected or anticipated, and that a NPDES permit is a prerequisite to § 309 enforcement)

C. Act of God Defense

United States v. ConAgra, 1997 U.S. Dist. LEXIS 21401 (D. Id. 1997) (CWA is a strict liability statute and act of God is not a defense to liability)

D. De Minimis Defense

Sierra Club v. Union Oil Co., 813 F.2d 1480, 1490-91, 25 ERC 1801 (9th Cir. 1987), vacated on other grounds, 108 S. Ct. 1102-03 (1988), judgment reinstated, 853 F.2d 667 (9th Cir. 1988) ("The Clean Water Act and the regulations promulgated under it make no provision for 'rare' violations.")

United States v. Alcoa, 824 F. Supp. 640, 649 (E.D. Tenn. 1993) (a "violation is a violation no matter how statistically insignificant.")

International Union v. Amerace Corp., Inc., 740 F. Supp. 1072, 1083, 32 ERC 1790 (D.N.J.1990) ("The Clean Water Act recognizes neither a good faith nor a de minimis defense.")

Mumford Cove Assoc. v. Groton, 640 F. Supp. 392 (W.D.N.Y. 1989) (enforcement of CWA does not depend upon establishing direct causal link between violations of NPDES permit and pollution of freshwater stream, and violations are not be excused on ground that they were "technical" or insignificant in nature)

Connecticut Fund for the Environment v. Upjohn Co., 660 F. Supp. 1397, 1416, 26 ERC 1495, 1510 (D. Conn. 1987) (court rejected defendant's argument that no violation occurred "when defendant discharged only a de minimis amount of wastewater into the river. The FWPCA does not distinguish between small discharges and large discharges. To the extent, in whatever amount of wastewater was discharged to the river, defendant exceeded the effluent limitations on a given day, a violation occurred.")

In re Shell Chemical Co., 2 E.A.D. 158 (CJO 1986) (rejects Shell's argument that 100% compliance policy is not required by CWA; EPA relies on upset defense to provide relief to industry from 100% compliance rule)

E. Impossibility

Driscoll v. Adams, 181 F.3d 1285, 48 ERC 2093 (11th Cir. 1999) (defense of impossibility for discharge without a permit limited to where defendant shows minimal discharge and good faith attempts to comply)

United States v. Boldt, 929 F.2d 35, 41 (1st Cir. 1991) (CWA does not recognize defense of economic or business necessity)

United States v. CPS Chemical Co., Inc., 1991 Dist. Ct. LEXIS 17670 (E.D. Ark. 1991) (". . . impossibility is not, as a matter of law, a valid defense to CWA liability.")

United States v. City of Hoboken, 675 F. Supp. 189, 198 (D.N.J. 1987) ("impossibility is not, as a matter of law, a valid defense to Clean Water Act liability.")

Proffitt v. Lower Bucks County Joint Mun. Auth., 1987 U.S. Dist. LEXIS 8085 (E.D. Pa. 1987) ("While difficulty or impossibility of complying with the Act and the permit issued thereunder may be appropriate considerations in fashioning a remedy for a

violation, such matters are irrelevant in determining whether a violation occurred.")

TAKINGS

Rith Energy Inc. v. United States, 44 Fed. Cl. 108, 48 ERC 1951 (Fed. Cl. 1999) (takings claim by coal mining company for denial of mining permit denied where acid mine drainage from mine was contaminating drinking water supplies because under Tennessee law, such contamination is considered a nuisance)

Kinross Copper Corp. v. State, 1999 Ore. App. LEXIS 760 (Or. Ct. App. 1999) (State's denial of a copper company's application for an NPDES permit to discharge mining wastes into state waters did not effect a taking of private property; in order for the company to have a private property right to discharge wastewater into state waters, the right must have come into existence separately after compliance with state law regarding the creation and recognition of state water rights)

See also WETLANDS: Takings

TECHNOLOGY-BASED STANDARDS

See EFFLUENT GUIDELINES

TERRITORIAL SEAS

33 U.S.C. § 1362(8) ("[T]erritorial Seas means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.")

Pacific Legal Foundation v. Quarles, 440 F. Supp. 316 (C.D. Cal. 1977), aff'd, 614 F.2d 225 (9th Cir. 1980), cert. denied, 449 U.S. 825, 101 S. Ct. 88, 66 L. Ed. 2d 29 (general demarcation line between jurisdiction of FWPCA and Marine Protection Act with exception of pipes or outfalls, is three-miles limit of territorial seas)

THERMAL DISCHARGES (§ 316)

33 U.S.C. § 1326 (Thermal Discharges)

40 C.F.R. § 124.66 (Special procedures for decisions on thermal variances under section 316(a))

Sierra Club v. Georgia Power Co., 180 F.3d 1309, 48 ERC 2119 (11th Cir. 1999) (upholding denial of preliminary injunction against continued violations of temperature limit in NPDES permit; public interest not served by requiring power plant to cut production to comply)

National Wildlife Federation v. Gorsuch, 693 F.2d 156 n. 48, 18 ERC 1105 (D.C. Cir. 1982)

("Congress recognized that heat was different in kind than the other listed pollutants. The House bill contained a separate definition for "thermal discharge." H.R. 11,896, 92d Cong., 2d Sess. § 502(17) (1972), reprinted in 1 Congressional Research Service, Environmental Policy Division, 93d Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972, at 893, 1071 (Comm. Print 1973) . . . This definition does not appear in the Act as enacted, but Congress did make special provision for thermal discharges in § 316(a), 33 U.S.C. § 1326 (a), which permits EPA to relax the § 402 technology-based effluent limits so long as the discharge will not prevent the "propagation of a balanced, indigenous population of shellfish, fish, and wildlife.")

Seacoast Anti-Pollution League v. Costle, 587 F.2d 306, 308, 13 ERC 1001 (1st Cir. 1979) (EPA finding that nuclear power plant discharges won't violate § 316 upheld as supported by substantial evidence)

Cronin v. Browner, No. 93 Civ. 0314 (AGS) (S.D. N.Y. July 24, 1995) (in citizen suit seeking to compel EPA to promulgate regulations pursuant to § 316(b) of the CWA, held that federal courts have jurisdiction to enter a proposed consent decree where plaintiffs have made a substantial allegation that EPA has failed to fulfill a mandatory duty; jurisdiction is not dependent on a finding on the merits, *i.e.*, that EPA does, in fact, have a mandatory duty that is unfulfilled)

See also POLLUTANT (definition of "pollutant" under § 502(6) includes "heat")

TMDLs

33 U.S.C. § 1313(d)(1)(C) (requires each state to develop total maximum daily loads ("TMDLs") for each water body that cannot meet water quality standards after point sources are subject technology-based effluent standards)

40 C.F.R. § 122.4(i) (no permit shall be issued to a new source or new discharger where the discharge will cause or contribute to violations of water quality standards unless applicant can prove the TMDL provides a sufficient load allocation and no net decrease in water quality will result)

40 C.F.R. § 130.2(i) ("*Total maximum daily load* (TMDL). The sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background. If a receiving water has only one point source discharger, the TMDL is the sum of that point source WLA plus the LAs for any nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments. TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure. If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be less stringent. Thus, the TMDL process provides for nonpoint control tradeoffs.")

40 C.F.R. § 130.7 (Total maximum daily loads (TMDL) and individual water quality-based effluent limitations)

Miccosukee Tribe v. United States, 105 F.3d 599, 601 (11th Cir. 1997) (applying § 303(d) regarding state promulgation of water quality standards and concluding that "even it a state fails

to submit new or revised standards [to the EPA], a change in state water quality standards could invoke the mandatory duty imposed on the Administrator to review new or revised standards.")

Dioxin/Organochlorine Center v. Clarke, 57 F.3d 1517, 40 ERC 1961 (9th Cir. 1995) (court rejected challenges by environmental group that TMDL did not comply with Water quality standards and by industry that no TMDL for dioxin could be established because there are no technology-based effluent guidelines for dioxin)

Longview Fibre Co. v. Rassmussen, 980 F.2d 1307, 23 ELR 20454 (9th Cir. 1992) (challenge to EPA's dioxin TMDL by pulp mills and citizens' groups dismissed on jurisdictional grounds; held that TMDLs may not be challenged in the Courts of Appeals, since § 509(b) of the CWA does not specifically list EPA actions under section 303(d) as reviewable in those courts)

Scott v. Hammond, 741 F.2d 992, 21 ERC 1474 (7th Cir. 1984) (If state fails over long period of time to submit proposed TMDL, prolonged failure may amount to "constructive submission" by state of no TMDLs, and EPA may be under duty to either approve or disapprove "submission.")

Environmental Defense Fund v. Costle, 657 F.2d 275, 294-95, 11 ELR 20459, 20469-70 (D.C. Cir. 1981) (EPA did not identify salinity as a pollutant until December 28, 1978 and thus the states' duty to submit TMDL calculations did not arise until June 28, 1979; EDF's claim was premature since EPA did not have the occasion to approve or disapprove the state the state TMDL submissions before the EDF filed its motion for summary judgment)

Defend the Bay v. Marcus, No. 97-3997 (N.D. Cal. 1999) (in consent decree, EPA agrees to set a schedule for TMDLs for 156 waterways in Los Angeles and Ventura counties)

American Canoe Assoc., Inc. v. EPA, 30 F. Supp. 2d 908, 47 ERC 2100 (E.D. Va. 1998) (motion to dismiss granted in part, denied in part; held that state's failure to submit TMDLs for water bodies on 303(d) list a "constructive nonsubmission," which triggers EPA requirement to write TMDLS itself)

Sierra Club v. Hankinson,No. 1:97-CV-3683 (N.D. Ga. Dec. 22, 1998) (in consent decree, EPA agrees to ensure that TMDLs be prepared for 702 segments of the Mississippi over 10 years)

Natural Resources Defense Council v. Fox, 30 F. Supp. 2d 369 (S.D. N.Y. 1998) (citizen suit CWA claims dismissed for lack of jurisdiction; held that CWA "does not provide any particular date by which EPA must intervene [when a state fails to prepare TMDLs]. Therefore, EPA has at least some discretion to determine at what point it is appropriate to deem state inaction a 'constructive submission' meriting intervention."; APA claims, however, upheld: "[W]hile EPA has some discretion as to when to deem stae inaction a 'constructive submission', that discretion is not unfettered. . . . In the context of the Act's overall scheme and the provisions concerning TMDLs in particular (including the specific deadlines for initial implementation of some, if not most, TMDLs), it is clear that TMDLs are to be established promptly by the states or, if they are dilatory, by EPA. Promptly, in this context, means within months or, perhaps, with a very few years. Promptly does not mean over the span of decades.")

Hayes v. Browner, 1998 U.S. Dist. LEXIS 21677 (N.D. Okla. 1998) (held that EPA has a nondiscretionary duty to issue TMDLs when state fails to submit TMDLs over an 18-year period;

case nevertheless dismissed for failure to abide by 60-day notice requirement; also discussion and rejection of APA causes of action by citizen plaintiffs)

Sierra Club v. Hankinson, 939 F. Supp. 865, 868 (N.D. Ga. March 25, 1996) (EPA found to be arbitrary and capricious in failing to disapprove two Georgia TMDLs; "If a state fails to submit a WQLS list or TMDL determinations over a long period of time, this prolonged failure may amount to the 'constructive submission' by that state of no WQLS list or TMDLs, thus triggering EPA's mandatory duty to approve or disapprove of the constructive submissions and, upon disapproval, to promulgate a WQLS list or TMDL determinations.")

Idaho Sportsmen's Coalition v. Browner, 951 F. Supp. 962, 43 ERC 1289 (W.D. Wash. 1995) (EPA acted arbitrarily and capriciously in approving schedule giving Idaho until 2021 to establish TMDLs)

Sierra Club v. Hankinson, 939 F. Supp. 872 (N.D. Ga. 1996) (summary judgment entered against EPA, holding that 2 TMDLs submitted by Georgia "clearly do not satisfy the requirements of § 303(d) because they do not provide daily limits for priority pollutants on identified WQLSs." "EPA's failure to disapprove of Georgia's inadequate TMDL submissions was arbitrary and capricious in violation of the [APA] and that EPA's failure to promulgate TMDLs for Georgia violates the [CWA].")

Natural Resources Defense Council, Inc. v. Fox, 909 F. Supp. 153, 42 ERC 1935 (S.D.N.Y. 1995) (EPA summary judgment motion denied; held that state's intent re TMDL is irrelevant; "Mere objective failure to submit TMDLs for water-quality-limited segments is enough to trigger the non-discretionary duties of the EPA." question remained whether state's waste load allocations constituted TMDLs)

Idaho Sportsmen's Coalition v. Browner, No. C93-943WD (W.D. Wash. 1995) (EPA has no mandatory duty under § 303(d) to develop TMDLs for Idaho because no "constructive submission of no TMDLs" had occurred (in fact the state had done 2 in 15 years); court held, however, that EPA had violated a duty under the CWA and EPA's regulations and was arb. & cap. in failing to determine, with Id., a reasonable schedule for the development of TMDLs for all 303(d)-listed waterbodies)

Sierra Club v. Browner, 843 F. Supp. 1304, 38 ERC 1234 (D. Minn. 1993) (summary judgment in EPA's favor where court held that state of Minn. had not made a "constructive submission of no water quality limited segments" or "no" TMDLs by failing to promulgate TMDLs)

Dioxin/Organochlorine Center v. Longview Fibre Co., Civ. No. C93-33D (W.D. Wash. August 10, 1993) (court upheld EPA's TMDL for dioxin in the Columbia River against attacks by environmental organizations and industry)

Alaska Center for the Environment v. Reilly, 762 F. Supp. 1422, 32 ERC 2110 (W.D. Wash. 1991), aff'd, 20 F.3d 981 (1994) (EPA must promulgate TMDL water quality standards under § 303(d) where state failed to submit proposal for more than decade, because failure amount to "constructive submission" of no limits and thus EPA's mandatory duty is triggered; "Congress' repeated use of the term 'shall' in section 303(d) clearly places a mandatory duty upon the EPA to take affirmative action after disapproving a state's unacceptable submission. Read in light of

commom sense and the fact thatCongress set out such short time lines in this section, . . . Congress intended that EPA's affirmative duties be triggered upon a state's failure to submit a list or any TMDL at all." 762 F. Supp. at 1427.)

Homestake Mining Co. v. EPA, 477 F. Supp. 1279, 1288 (D.S.D.1979)(EPA had not identified the pollutants at the time of the Cheyenne River Basin Plan's adoption; although South Dakota had not established TMDLs as required by §303(d), the court held that they were not yet required until 180 days after EPA's identification of pollutants).

In re Ketchikan Pulp Co., 6 E.A.D. 675, 688 (EAB 1996) (held that KPC not entitled to an evidentiary hearing on TMDL issue because it was not properly raised during the public comment period)

In re City of Tulsa, OK, 3 E.A.D. 505, 507 (CJO 1991) (Region did not wrongfully rely upon anti-backsliding exception provided in § 303(d)(4(A)(i) when issuing the renewed permit because waste load allocation that formed the basis for the effluent limitation in the renewed permit was revised ans was in effect prior to the issuance of the renewed permit)

50 Fed. Reg. 1774-1784 (1985)

Draft Memorandum of Robert Perciasepe, Assistant Administrator for Water, EPA, "New Policies for Developing and Implementing Total Maximum Daily Loads (TMDLs) (Mar. 21, 1997)

EPA, "Guidance to Water Quality-based Decisions: The TMDL Process" (April 1991)

GAO, "Water Pollution; More EPA Action Needed to Improve the Quality of Heavily Polluted Waters" (January 1989) (Chapter 2: EPA Region X States Have Just Begone to Set TMDL's)

Oliver A. Houck, *TMDLs III: A New Framework for the Clean Water Act's Ambient Standards Program*, 28 ELR 10415 (1998)

Oliver A. Houck, *TMDLs, Are We There Yet?: The Long Road Toward Water Qaulity-Based Regulation Under the Clean Water Act*, 27 ELR 10391 (1997)

Oliver A. Houck, *TMDLs: The Resurrection of Water Quality Standards-Based Regulation Under the Clean Water Act*, 27 ELR 10329 (1997)

Note, *TMDL Litigation: So What Now?*, 17 Va. Envt'l L.J. 83 (1997)

See also WATER QUALITY STANDARDS; NONPOINT SOURCES

TOXICITY LIMITS

40 C.F.R. § 125.3(c)(4) (limits may be expressed, where appropriate, in terms of toxicity)

Natural Resources Defense Council, Inc. v. EPA, 859 F.2d 156, 28 ERC 1401 (D.C. Cir. 1988)

(although toxicity appears to be an attribute of pollutants rather than a pollutant itself, the CWA authorizes the use of toxicity as a measure to regulate effluents)

UIC

Arco Oil and Gas Co. v. EPA, 14 F.3d 1431, 37 ERC 2125 (10th Cir. 1993) (EPA decision to reclassify a UIC well from Class II oil and gas well to a Class I hazardous, industrial or municipal waste well as a permissible construction of the SDWA)

Western Nebraska Resources Council v. EPA, 943 F.2d 867, 33 ERC 1992 (8th Cir. 1991) (No. 90-2158) (EPA approval of exemption of 3000-acre aquifer from protection in Nebraska upheld)

Phillips Petroleum Co. v. United States E.P.A., 803 F.2d 545, 547 n.2 (10th cir. 1986) ("Underground injection is defined by the SDWA to mean the `subsurface emplacement of fluids by well injection.' Underground injection is a potentially widespread hazardous waste disposal practice that poses serious threats to groundwater sources of drinking water.")

See also GROUNDWATER, DISCHARGES TO

UPSET DEFENSE

40 C.F.R. § 122.41(n) ("Upset means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventative maintenance, or careless or improper operation.")

Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 31 ERC 1905 (3d Cir. 1990), cert. denied, 498 U.S. 1109 (1991) (upset defense is not available to a defendant who has not fulfilled the reporting requirements of the permit, 913 F.2d at 76 n.20; "it is disingenuous at best for [the defendant] to argue that it was in a near continual state of operation upset for the six years of violations involved in this suit," *id.* at 77)

Oklahoma v. EPA, 908 F.2d 595, 613 (10th Cir. 1990) ("Significantly, an industry-proposed defense for violation of water-quality-based permit limits was deleted in the final rule.")

Atlantic States Legal Foundation v. Tyson Foods, Inc., 897 F.2d 1128, 1139 n. 19, 31 ERC 1201 (11th Cir. 1990) ("`Upset' is a term of art referring to an exceptional incident and does not include noncompliance due to improperly designed or inadequate treatment facilities.")

Chemical Manufacturers Association v. EPA, 870 F.2d 177, 230 (5th Cir. 1989) (discussion of relationship between upset defense and the creation of technology-based standards)

Natural Resources Defense Council, Inc. v. EPA, 859 F.2d 156, 206-211 (D.C. Cir. 1988) (CWA does not require EPA to allow upset defense for water-quality-based effluent limits, although regulation denying defense for water-quality-base effluent limits held arb. & cap. on grounds that

EPA did not provide grounds for conclusions that upset defense was unworkable for water-quality-based effluent limits)

Sierra Club v. Union Oil Co., 813 F.2d 1480 (9th Cir. 1987), vacated on other grounds, 485 U.S. 931 (1988), opinion reinstated, 853 F.2d 667 (9th Cir. 1988) (upset not a defense if state-issued permit doesn't include it)

Marathon Oil Co. v. EPA, 564 F.2d 1253 (9th Cir. 1977) (upset defense for technology-based limits held required; upset provision required because BPCT assumes 97.5% compliance, yet permit requires 100% compliance)

United States v. ConAgra, 1997 U.S. Dist. LEXIS 21401 (D. Id. 1997) (upset defense not applicable to water-quality-based effluent limit violations; court rejected argument that Natural Resources Defense Council, Inc. v. EPA required that EPA apply upset defense to wq-based violations)

United States v. City of Toledo, 867 F. Supp. 598, 602 (N.D. Ohio 1994) (upset defense rejected on grounds that defendant had not complied with notice or other requirements of defense; Summary judgment entered for plaintiff)

California Public Interest Research Group v. Shell Oil Co., 840 F. Supp. 712, 714-715 (N.D. Cal. 1993) (upset defense not available if not in the permit)

International Union, UAW v. Amerace Corp, Inc., 740 F. Supp. 1072, 1082-83, 32 ERC 1790, 1799, 21 ELR 20097 (D.N.J. 1990) (upset defense rejected for failure to show that it complied with the conditions necessary to prove an upset)

Public Interest Research Group v. U.S. Metals Refining Co., 681 F. Supp. 237, 244, 26 ERC 2004 (D.N.J. 1987) (holding that violations that occurred "winter after winter after winter," were not upsets and that to hold otherwise would not encourage the defendant "to examine the treatment facility and to take steps to prevent future noncompliance")

Student Public Interest Research of N.J. v. Jersey Central Power & Light Co., 642 F. Supp. 103, 108, 24 ERC 1627, 1631 (D.N.J. 1986) (no upset found where violations were numerous and longstanding)

Atlantic States Legal Foundation v. Al Tech Specialty Steel Corp., 635 F. Supp. 284, 287, 24 ERC 1506 (N.D.N.Y. 1986) (upset defense not available for violations of water-quality-based effluent limits)

In re Shell Chemical Co., 2 E.A.D. 158 (CJO 1986) (rejects Shell's argument that 100% compliance policy is not required by CWA; EPA relies on upset defense to provide relief to industry from 100% compliance rule)

49 Fed. Reg. at 38,038 (1984) (upset defense rejected for WQ-based effluent limits on grounds that continuous monitoring would be required to ensure Water quality standards are not violated; "although the proposal would seemingly allow permitees to claim an upset defense, the costs, burdens, and technical difficulties of establishing that water quality standards were not violated

would make the defense nearly impossible to establish.")

47 Fed. Reg. 52,089 (1982) (EPA propsed to extend upset defense to WQ-based limits)

44 Fed. Reg. 32,854, 32,863 (1979) ("violations of . . . water quality based effluent limitations are not subject to a defense of upset.")

See also SINGLE OPERATIONAL UPSET; BYPASS

WATER QUALITY RELATED EFFLUENT LIMITATIONS

33 U.S.C. § 1312 (when a permitting authority determines that "discharges of a pollutant from a point source ... would interfere with the attainment or maintenance of [applicable] water quality standards, ... effluent limitations (including alternative effluent control strategies) for such point source ... shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.")

Oklahoma v. EPA, 908 F.2d 595, 614, 31 ERC 1741 (10th Cir. 1990) ("effluent limits more stringent than those required by [§ 301(b)(2)] must, if feasible, be established by EPA and imposed on any sources responsible for interfering with the desired water quality in a specific stream segment.")

Natural Resources Defense Council, Inc. v. EPA, 859 F.2d 156, 28 ERC 1401 (D.C. Cir. 1988) ("Under § 302(a), the Administrator must impose these more stringent limits when necessary to 'assure public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water.'")

Sierra Club v. Union Oil Co. of Ca., 813 F.2d 1480, 25 ERC 1801 (9th Cir. 1987), vacated on other grounds, 108 S. Ct. 1102-03 (1988), judgment reinstated, 853 F.2d 667 (9th Cir. 1988) ("Water quality standards are designed to ensure the survival of wildlife in navigable waters and to protect recreational activities in and on the water. 33 U.S.C. § 1312(a). In contrast with technology-based standards, which are based on the feasibility of limiting effluent levels, water quality-based limitations relate to the environmental effects of different effluent levels.")

In re Perfect Packed Products Co., NPDES Permit Op. No. 37 (1976) (requirement of meeting water quality standards exists independent of § 302; accordingly, effluent limitations designed to meet water quality standards are not subject to cost-benefit analysis of § 302 even where such limitations are more stringent than those represeting best available technology economically achievable)

In re United States Pipe & Foundry Co., NPDES Permit Op. No. 2 (1974) (permit issued in 1974 and scheduled to expire in 1979 should contain conditions to meet requirement of § 301 as related to § 303 standards or to meet effluent limitations established pursuant to § 302 procedures)

S. Rep. No. 414, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3668, 3712-13 ("The

limitations necessary to achieve a given level of water quality in one reach of a waterway may require more control of effluents than that attainable through application of the best available technology. Where that is desirable to implement the policies of the Act, and feasible, [this section] provides the authority to impose controls based on water quality. . . . . The concept of 'alternative effluent control strategies' is necessary to account for [certain] difficulties in simply setting more stringent effluent limitations. . . . Further reduction of the level of effluent entering the affected waters may not be possible through control technology, yet essential to water quality. Alternative effluent control strategies, such as the transportation of effluents to other less affected waters or the control of in-plant processes would have to be developed.")

EPA General Counsel Opinion No. 58 (1977) (EPA has an independent obligation to calculate water quality-based effluent limits under 122.44(d) and include those limits in the permit, whether or not the state certifies to those limits)

See also STATE CERTIFICATION; WATER QUALITY STANDARDS

WATER QUALITY STANDARDS

A. Generally

33 U.S.C. § 1313 (Water quality standards and implementation plans)

40 C.F.R. Parts 130 (Water Quality Planning and Management) and 131 (Water Quality Standards)

PUD No. 1 of Jefferson Co. v. Washington State Dept. of Ecology, 511 U.S. 700, 114 S. Ct. 1900, 128 L. Ed. 2d 716, 38 ERC 1593, 1593, 24 ELR 20945 (1994) (state "water quality standards provide 'a supplemental basis . . . so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.'")

Adams v. EPA, 38 F.3d 43, 47 (1st Cir. 1994) (EPA can rely on the presumption that by complying with state water quality standards, there will be no unreasonable degradation of the marine environment)

American Paper Institute v. EPA, 996 F.2d 346, 36 ERC 2025, 2026 (D.C. Cir. 1993) (§ 301 "mandates that every permit contain (1) effluent limitations that reflect the pollution reduction achievable by using technologically practicable controls . . . and (2) any more stringent pollutant release limitations necessary for the waterway receiving the pollution to meet 'state water quality standards.'")

Natural Resources Defense Council, Inc. v. EPA, 16 F.3d 1395, 37 ERC 1953, 1955 (4th Cir. 1993) ("Water quality standards are a critical component of the CWA regulatory scheme because such standards serve as a guideline for setting applicable limitations in individual discharge permits.")

Sierra Club v. Union Oil Co. of Calif., 813 F.2d 1480, 1489 (9th Cir. 1987), vacated on

other grounds, 485 U.S. 931 (1988) ("States establish water quality standards that specify the uses to be made of a body of water and the maximum levels of pollutants allowable in view of those uses. Water quality standards are designated to ensure the survival of wildlife in navigable waters and to protect recreational activities in and on the water. 33 U.S.C. § 1312(a). . . [W]ater quality-based limitations relate to the environmental effects of different effluent levels.")

Northwest Indian Cemetary Protective Ass'n v. Peterson, 565 F. Supp. 586, 19 ERC 2115, 13 ELR 20793 (N.D. Cal. 1983), aff'd in part, vacated in part, 764 F.2d 581, 15 ELR 20682 (9th Cir. 1985) (under § 313, federal agencies must comply with state water quality standards)

In re Star-Kist Caribe, Inc., 2 E.A.D. 758, 1989 NPDES LEXIS 10 (CJO 1989) (whether State should have approved mixing zone and included it in the water quality certification is a matter of state law and must be challenged in state proceedings, not on appeal to the Administrator)

Western Carolina Regional Sewer Auth. v. DHEC, No. 98-ALJ-07-0267-CC (S.C. DHEC June 21, 1999) (held that S. Carolina improperly placed its water bodies on a CWA list of impaired waters based on phosphorus enrichment and violated notice-and-comment procedures in the process)

H.R. 999, "The Beaches Environmental Awareness, Cleanup, and Health Act of 1999" (requires EPA to establish national standards for testing and monitoring coastal recreational water and notifying visitors of health concerns related to those waters)

64 Fed. Reg. 2741 (1999) (draft MOA between EPA and Services re coordination of ESA and water quality efforts)

Oliver A. Houck, *TMDLs: The Resurrection of Water Quality Standards-Based Regulation Under the Clean Water Act*, 27 ELR 10329 (1997) (good summary of history of water quality standards)

See also TMDLs

B. Antidegradation

33 U.S.C. § 1313(c) (statutory authority for antidegradation regulations)

33 U.S.C. § 1313(d)(4)(B) (water quality standards may be revised only where consistent with antidegradation policy)

40 C.F.R. § 122.4(i) (no permit shall be issued to a new source or new discharger where the discharge will cause or contribute to violations of water quality standards unless applicant can prove the TMDL provides a sufficient load allocation and no net decrease in water quality will result)

40 C.F.R. § 131.12 (Antidegradation Policy)

PUD No. 1 of Jefferson Co. v. Washington State Dept. of Ecology, 511 U.S. 700, 731-732 114 S. Ct. 1900, 128 L. Ed. 2d 716, 38 ERC 1593, 24 ELR 20945 (1994) ("States must interpret their antidegradation policy in a manner 'consistent' with existing uses of the stream . . . the State's minimum stream flow condition is a proper application of the state and federal antidegration regulations, as it ensures that an 'existing instream water use' will be 'maintained and protected.'")

Miccosukee Tribe of Indians of Florida v. United States, 105 F.3d 599, 44 ERC 1765 (11th Cir. 1997) (if Everglades Forever Act is a water quality standard, EPA would have a nondiscretionary duty to review it to determine whether, among other things, the antidegradation provisions met minimal federal standards)

Dubois v. U.S.D.A., 102 F.3d 1273, 43 ERC 1824 (1st Cir. 1996) (challenge to F.S. special use permit as not in compliance with antidegradation requirements of state water quality standars rejected on grounds that proper forum for challenging state certification is in state, rather than federal court)

Manasota-88, Inc. v. Tidwell, 896 F.2d 1318, (11th Cir. 1990) ("Each state must adopt as part of its water quality standards an `antidegradation policy' consistent with and at least as stringent as the federal antidegradation rule. For outstanding national resource waters (`ONRWs') such as national or state parks, wildlife refuges, and waters of exceptional recreational or ecological significance, the quality of the waters must be maintained and protected under all circumstances.")

American Paper Institute, Inc. v. EPA, 890 F.2d 869 (7th Cir. 1989) (challenge to antideg. regulation through CWA § 509 failed where court held that 509(b)(1)(E) did not provide an avenue for judicial review of antideg. regulations because they are not "effluent limitations" within the meaning of 509)

The Raymond Proffitt Foundation v. EPA, 930 F. Supp. 1088, 42 ERC 1702 (E.D. Pa. 1996) (rejecting Defenders, § 1313(c)(4) held to be nondiscretionary duty; EPA ordered to "immediately" prepare and publish proposed regulations establishing a revised antidegradation policy for Pennsylvania; held that EPA had violated a mandatory duty to promptly propose an antidegradation policy for Pa., and that EPA also had unreasonably delayed in proposing such regulations. The court concluded that "a nineteen-month delay in preparing and publishing proposed regulations is not fulfilling a public duty promptly,' as commanded by Congress." Op. at 31)

Defenders of Wildlife v. Browner, 888 F. Supp. 1005, 1008-09 (D. Ariz. 1995) (§ 1313(b)(4) held to be discretionary)

West Virginia Coal Assoc. v. Reilly, 728 F. Supp. 1276 (S.D. W.V. 1989) (courted rejected plaintiffs challenge to EPA's objections to State-issued permits that allowed for in-stream treatment; EPA objected on grounds that allowing in-stream treatment would violate State's antidegradation policy)

Big Fork Mining Co. v.Tennessee Water Quality Control Bd., 620 S.W.2d 515 (Tenn. App. 1981) (court rejected challenge to state antideg. regulation as unconstitutionally

vague; terms "high quality water" and "waters of exceptional recreational or ecological value" have commonly understood meaning and are not impermissibly vague)

64 Fed. Reg. 46058 (1999) (proposed change to anti-degradation regulations: new or expanding facilities that discharge into impaired waters would have to offset their releases of a pollutant on a one-and-one-half to one ratio; applies only to those waters for which no TMDL has been set)

48 Fed. Reg. 51,402 (1983)

2 W. Rodgers, Jr., Environmental Law: Air and Water, § 4.17 at 265 ("The first [policy choice of the 1983 amendments] is the decision to restate the antidegradation policy in terms of protecting existing uses not physical parameters, a tactic that accommodates some formal decline as being within the range of popular acceptance." (footnotes omitted))

Hines, A Decade of Nondegradation Policy in Congress and the Courts: The Erratic Pursuit of Clean Air and Clean Water, 62 Iowa L. Rev. 643, 658-660 (1977)

C. Compliance Schedules

40 C.F.R. § 122.47 (requires that compliance schedules (whether WQBELs or other effluent limits) require compliance as soon as possible but no later than any statutory deadline; new sources and new dischargers are eligible for compliance schedules only with respect to requirements issued or revised after commencement of construction of the facility but less than three years before commencement of discharge)

In re Star-Kist Caribe, Inc., 4 E.A.D. 33 (EAB 1992) (held that EPA may not include a compliance schedule in a NPDES permit for coming into compliance with state water quality standards unless the state standards expressly permit such a compliance schedule)

D. Designated Uses

40 C.F.R. § 131.10 (designation of uses)

PUD No. 1 of Jefferson Co. v. Washington State Dept. of Ecology, 511 U.S. 700, 114 S. Ct. 1900, 128 L. Ed. 2d 716, 38 ERC 1593, 24 ELR 20945 (1994) ("A state water quality standard 'shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses.'")

Miccosukee Tribe of Indians of Fl. v. EPA, 105 F.3d 599, 602, 44 ERC 1765 (11th Cir. 1997) ("The Administrator must determine whether [state] standards are scientifically defensible and protective of designated uses.")

Natural Resources Defense Council, Inc. v. EPA, 16 F.3d 1395, 37 ERC 1953, 1956 (4th Cir. 1993) ("[T]he following three factors are considered when adopting or evaluating a water quality standard: (1) one or more designated uses of the state waters involved; (2) certain water quality criteria, expressed as numeric pollutant concentration levels or

narrative statements representing a quality of water that supports a particular designated use; and (3) an antidegradation policy to protect existing uses and high quality waters.")

E. EPA Review of State Standards (§ 303(c))

33 U.S.C. § 1313(c) (Review; revised standards; publication)

40 C.F.R. § 131.5(a) ("Under section 303(c) of the Act, EPA is to review and to approve or disapprove State-adopted water quality standards. . . .")

40 C.F.R. § 131.6 (Minimum requirements for water quality standards submissions)

40 C.F.R. § 131.21(c) ("A State water quality standard remains in effect, even though disapproved by EPA, until the State revises it or EPA promulgates a rule that supersedes the State water quality standard.")

National Wildlife Federation v. Browner, 127 F.3d 1126, 45 ERC 1577 (D.C. Cir. 1997) (EPA has no mandatory duty to reject Michigan's decision to not elevate Lake Superior to a Tier III waterbody; EPA's state water quality standards review provision, 40 CFR § 131.20(c), requires only that EPA review state revisions, not existing state standard; held the EPA's interpretation of its regulations was neither "plainly erroneous," nor "inconsistent with the regulations.")

Natural Resources Defense Council, Inc. v. EPA, 16 F.3d 1395, 37 ERC 1953 (4th Cir. 1993) (states have primary role in establishing water quality standards, and EPA's sole function is to review those standards for approval and determine whether the state's decisions are scientifically defensible and protective of designated uses; held EPA not arbitrary in approving state standards for dioxin)

District of Columbia v. Schramm, 631 F.2d 854, 860 (D.C. Cir. 1980) (primary duty of compiling water quality standards rests with the state and the EPA merely retains a supervisory role)

Miccosukee Tribe of Indians of Florida v. United States, 1998 U.S. Dist. LEXIS 15838 (S.D. Fla. 1998) (held that State law that suspends enforcement of narrative nutrient water quality standards altered State water quality standards sufficiently to trigger EPA duty to review revised standards and approve or disapprove of such standards)

Alaska Clean Water Alliance v. Clark, No. C96-1762R, 1997 U.S. Dist.rict LEXIS 11144 (W.D.Wash. July 8, 1997) (new or revised state water quality standards become effective only after EPA has completed its review process and approved the standards under the CWA)

Idaho Conservation League v. Browner, 1997 U.S. Dist. LEXIS 9548 (W.D. Wash. 1997) (held that where EPA disapproves state water quality standards under 303(c), EPA has mandatory duty to promulgate standards; 2-year delay by EPA before disapproving state water quality standards was arb. & cap.)

Defenders of Wildlife v. Browner, 41 ERC 1769 (D. Ariz. 1995) (EPA unreasonably delayed issuance of water quality standards for State of Arizona where it had disapproved state standards in 1993; § 303(c)(4) directs EPA to propose federal standards "promptly" where a state fails to revise its standards within 90 days of EPA disapproval)

Miccosukee Tribe of Indians of Florida v. United States, No. 95-0533-CIV-DAVIS (S. D. Fla. July 25, 1995) (held that EPA had no mandatory duty to review new state legislation that tribe argued was a change in state water quality standards because the state had never submitted to EPA any proposed changes that would trigger 303(c)(2) and (3))

City of Albuquerque v. Browner, 865 F. Supp. 733 (D.N.M. 1993), aff'd, 97 F.3d 415 (10th Cir. 1996) ("The EPA, however, reviews proposed water quality standards only to determine whether they are stringent enough to comply with the EPA's recommended standards and criteria. If the proposed standards are more stringent than necessary to comply with the [CWA's] requirements, the EPA may approve the standards without reviewing the scientific support for the standards.")

Idaho Conservation League v. Rusell, 946 F.2d 717, 720 (9th Cir. 1991) ("There is no case law suggesting Section 303(c) leaves the Administrator any discretion to deviate from this apparently mandatory course.")

64 Fed. Reg. 37072 (1999) (Proposed 40 C.F.R. Part 131, EPA Review of State and Tribal Water Quality Standards)

See also STATE CERTIFICATION

F. "Fishable, Swimmable"

33 U.S.C. § 1251(a)(2) ("it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propogation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983")

Natural Resources Defense Council, Inc. v. EPA, 16 F.3d 1395, 37 ERC 1953, 1956 (4th Cir. 1993) (each submission by a state of its water quality standards to EPA for approval must "contain six elements . . . (6) general information to assist EPA in determining the adequacy of the scientific basis for standards that do not include the "fishable/swimmable" uses as set forth in 33 U.S.C. § 1251(a)(2). 40 C.F.R. § 131.6.")

H.R. 999, "The Beaches Environmental Awareness, Cleanup, and Health Act of 1999" (requires EPA to establish national standards for testing and monitoring coastal recreational water and notifying visitors of health concerns related to those waters)

GCO No. 78-6 "Oklahoma Water Quality Standards - Demonstration Necessary for `Downgrading' Use Classification" (April 11, 1978)

G. Indian Tribes

Montana v. EPA, 137 F.3d 1135, 46 ERC 1161 (9th Cir. 1998) (under § 518 of the CWA, EPA may authorize Indian tribes to set water quality standards that regulate activities of non-Indians who own property within reservations)

City of Albuquerque v. Browner, 865 F. Supp. 733 (D. N.M. 1993), aff'd, 97 F.3d 415, 43 ERC 1276 (10th Cir. 1996), cert. denied, 118 S. Ct. 410 (1997) (court upheld EPA's regulations for treating Indian Tribes in the same manner as States for purposes of the water quality standards program; rejected city's argument that Tribe may not develop water quality standards that are more stringent then Federal standards)

64 Fed. Reg. 37072 (1999) (Proposed 40 C.F.R. Part 131, EPA Review of State and Tribal Water Quality Standards)

See also INDIAN TRIBES

H. Interstate Jurisdiction

Arkansas v. Oklahoma, 503 U.S. 91, 34 ERC 1193 (1992) (EPA has authority to apply water quality standards of downstream state in issuing permit to point source in upstream state)

I. Narrative Standards

Natural Resources Defense Council, Inc. v. EPA, 673 F.2d 400, 403 (D.C. Cir. 1982) (the definition of effluent limitation in § 502(11) refers to any restriction on amount of pollution discharged, thus including all restrictions, not only numeric ones)

EDF v. Costle, 568 F.2d 1369, 1380 (D.C. Cir. 1981) (when it is infeasible for EPA to derive numeric limitations to include as permit conditions, agency may issue permits with conditions designed to reduce the level of effluent discharges to acceptable levels)

United States Steel Corp. v. Train, 556 F.2d 822, 840 (7th Cir. 1977) (narrative, non-numeric water quality based permit condition which prohibited discharges causing receiving waters to exceed temperatures permissible under state water quality standards was valid and enforceable)

In re Champion International Corp., NPDES Docket No. NC0000272 (ALJ Yost Feb. 12, 1992) (where the states only water quality standard for a particular pollutant is articulated in a narrative fashion, the permit writer is obliged to translate such standard into numerical limit on a case-by-case basis)

J. Need to Incorporate into Permit as Effluent Limit

Defenders of Wildlife v. Browner, ___ F.3d ___, 1999 U.S. App. LEXIS 22212 (9th Cir. 1999) (held that EPA not arbitrary and capricious by not requiring municipal stormwater permits to include numeric effluent limits designed to ensure compliance with state water

quality standards; EPA has discretion to use BMPs instead; "the Water Quality Act [of 1987] did not require municipal stormsewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)C). . . [I]dustrial dischargers must comply strictly with state water-quality standards. Congress chose not to include a similar provision for municipal storm-sewer discharges.")

Northwest Environmental Advocates v. City of Portland, 56 F.3d 979, 40 ERC 1801 (9th Cir. 1995), rehearing denied, 74 F.3d 945, 42 ERC 1286 (9th Cir. 1996), cert. denied, 518 U.S. 1018 (1996) (citizens can enforce narrative standard in permit that prohibits the violation of state Water quality standards)

American Paper Institute v. EPA, 996 F.2d 346, 36 ERC 2025, 2027 (D.C. Cir. 1993) ("[W]ater quality standards by themselves have no effect on pollution; the rubber hits the road when the state-created standards are used as the basis for specific effluent limitations in NPDES permits. . . [O]nce a water quality standard has been promulgated, section 301 of the CWA requires all NPDES permits for point sources to incorporate discharge limitations necessary to satisfy that standard.")

Oregon Natural Resources Council v. U.S. Forest Service, 834 F.2d 842, 850 (9th Cir. 1987) (citizens may file suit to enforce permit limitations derived from water quality standards, but not water quality standards themselves "[E]ffluent limitations may be derived from state water quality standards and may be enforced when included in a discharger's permit. We agree with defendants that it is not the water quality standards themselves that are enforceable. . .")

Trustees for Alaska v. EPA, 749 F.2d 549, 552-554, 21 ERC 2222, 2223 (9th Cir. 1984) ("Effluent limitations are a means of *achieving* water quality standards." (emphasis added))

Northwest Environmental Advocates v. City of Portland, CV No. 91-339-PA (D. Or. Dec. 13, 1991), rev'd, 56 F.3d 979, 40 ERC 1801 (9th Cir. 1995), rehearing denied, 74 F.3d 945, 42 ERC 1286 (9th Cir. 1996), cert. denied, 518 U.S. 1018 (1996) ("Given the distinction between effluent limitations and water quality standards . . . and the problems with analyzing violations of water quality standards as opposed to effluent limitations, [McClellan] is best interpreted to mean that state water quality standards can constitute effluent standards, violations of which may be actionable in a citizen suit, only if they are incorporated into an NPDES permit through effluent limitations." Id. at 15. "[M]ere reference to water quality standards in a permit does not make them 'effluent standards or limitations' for purposes of sections 1365(a)(1) and (f)." Id. at 16)

McClellan Ecological Seepage Situation v. Weinberger, 707 F. Supp. 1182, 1200 (E.D. Cal. 1988) ("[A] state water quality standard can constitute an effluent standard or limitation enforceable under [§ 1365(a)(1)] only if it has been incorporated into an NPDES permit.")

S. Rep. No. 98, 92nd Cong., 1st Sess. 5, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3675 ("Under this Act the basis of pollution prevention and elimination will be the application of effluent limitations. Water quality will be a measure of program

effectiveness and performance, not a means of elimination and enforcement.")

K. Notice and Comment

City of Albuquerque v. Browner, 865 F. Supp. 733 (D. N.M. 1993), aff'd, 97 F.3d 415 (10th Cir. 1996) (unlike standards promulgated by EPA under 303(b), no notice and comment period is required for EPA approval of state or tribe-issued water quality standards; "Congress clearly intended the EPA to have limited, non-rulemaking role in the establishment of water quality standards by states and tribes, and, consequently, no statement of basis or purpose for its actions was necessary.")

L. Reclassification

Alaska DEC v. Rybacheck, 42 ERC 1572 (AK Sp. Ct. 1996) (State's rejection of petition to reclassify receiving water to downgrade water use classifications for which agency had insufficient information upheld; State regulation governing reclassification procedures is reasonable where state adopted EPA reclassification regulation)

M. Site Specific Criteria

40 C.F.R. § 131.11(b)(1)(ii) (states have the opportunity to adopt water quality criteria that are ". . . modified to reflect site-specific conditions.")

EPA, Water Quality Standards Handbook (2nd Ed. 1993), Chapter 3.7 at 3-38 - 45 (Site-Specific Aquatic Life Criteria)

N. State Authority (§ 510)

33 U.S.C. § 1370 (states may not impose standards that are less strict than federal standards, but nothing in the CWA shall limit the state's authority to promulgate water quality standards that are stricter than minimum federal standards)

33 U.S.C. § 1344(t) ("Noting in [§ 404] shall preclude or deny the right of any State . . . to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State. . .")

City of Albuquerque v. Browner, 865 F. Supp. 733 (D. N.M. 1993), aff'd, 97 F.3d 415 (10th Cir. 1996) (§ 510 is ambiguous as applied to Indian Tribes because it is not specifically referenced in § 518; deference given to EPA's construction that § 510 applies to tribes as well as states)

New Hanover Township v. Corps of Engineers, 992 F.2d 470, 37 ERC 1189, 1192 (3d Cir. 1993) ("Pennsylvania is empowered by the Clean Water Act to set more stringent water quality standards than those set by the Act and its regulations.")

United States v. Marathon Development Corp., 867 F.2d 96, 99-100, 29 ERC 1145, 1147 (1st Cir. 1989) (states may deny certification of a nationwide wetlands permit in order to enforce their more stringent water quality standards)

S. Rep. No. 414, 92nd Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 3668, 3735 ("This section is substantially section 21(b) of existing law. . . It should also be noted that the Committee continues the authority of the State . . . to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within the State.")

See also STATE CERTIFICATION

WATERS OF THE UNITED STATES

See NAVIGABLE WATERS

WETLANDS (§ 404)

A. Generally

33 U.S.C. § 1344 (Permits for dredged or fill material)

33 U.S.C. § 1344(t) ("Noting in [§ 404] shall preclude or deny the right of any State . . . to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State. . .")

40 C.F.R. § 122.2 ("Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas)

40 C.F.R. Part 230 (Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Filled Materials)

40 C.F.R. Part 231 (Section 404(c) Procedures)

40 C.F.R. Part 232 (404 Program Definitions; Exempt Activities Not requiring 404 Permits)

40 C.F.R. Part 233 (404 State Program Regulations)

33 C.F.R. Part 320 (General Regulatory Policies)

33 C.F.R. Part 321 (Permits for Dams and Dikes in Navigable Waters of the United States)

33 C.F.R. Part 322 (Permits for Structures or Work in Or Affecting navigable Waters of the United States)

33 C.F.R. Part 323 (Permits for Discharges of Dredged or Fill Material into Waters of the United States)

33 C.F.R. Part 324 (Permits for Ocean Dumping of Dredged Material)

33 C.F.R. Part 325 (Processing of Department of the Army Permits)

33 C.F.R. § 328.3(b) (Corps' definition of "wetlands")

Michigan Peat v. EPA, 175 F.3d 422, 48 ERC 1817 (6th Cir. 1999) (EPA approved of state-issued 404 permit on condition that certain changes were made; applicant refused to sign permit as changed and state issued "state only" permit that was less strict to avoid takings claim; when applicant sued to have EPA held to the terms of the state-issued permit and EPA defended on grounds that pre-enforcement review not allowed under CWA; held that no pre-enforcement review issued involved because EPA's approval of state-issued permit constituted final agency action)

Alaska Center for the Environment v. West, 47 ERC 1225 (9th Cir. 1998) (general wetlands permit upheld in part on grounds that the activities it covered were similar in nature and would have minimal impact on the environment)

Friends of the Crystal River v. EPA, 35 F.3d 1073 (6th Cir. 1994) (EPA cannot give back permitting authority to state once revoked because that authority lies with Corps)

Buttrey v. United States, 690 F.2d 1170, 1180, 18 ERC 1241 (5th Cir. 1982), cert. denied, 461 U.S. 927 (1983) ("It would hardly be putting the case too strongly to say that the Clean Water Act and the applicable regulations do not contemplate that wetlands will be destroyed simply because it is more convenient than not to do so.")

Bragg v. Robertson, 54 F. Supp.2d 653, 48 ERC 1913 (S.D. W. Va. 1999) (settlement agreement on valley fills requiring U.S. to prepare programmatic EIS concerning mountaintop coal mining fair and reasonable; also contains discussion of need for 404 permits)

Inn of Daphne, Inc. v. United States, 1998 U.S. Dist. LEXIS 13991 (S.D. Al. 1998) (Corps' cancellation of § 404 permit application for failure to respond to Corps' request to investigate presence of historical sites held not reviewable becuase is not final agency action; plaintiff needed to reapply and have the permit actually denied before seeking relief from the court)

United States v. Hallmark Construction Co., 14 F. Supp.2d 1065 (N.D. Ill. 1998) (on motion for reconsideration, held that § 404 does grant Corps authority to bring an enforcement action in instances of a permitless discharge, and that the United States was a proper party plaintiff; upheld migratory bird rule)

United States v. Hallmark Construction Co., 46 ERC 2117 (N.D. Ill. 1998), vacated, 14 F. Supp.2d 1065 (N.D. Ill. 1998) (Corps enforcement authority applies only in instances where it has issued a § 404 permit; while EPA has enforcement authority over

discharges, the Corps does not unless it issued a permit)

Michigan Peat v. EPA, 7 F. Supp. 2d 896 (E.D. Mich. 1998), aff'd in part, rev'd in part, 175 F.3d 422, 48 ERC 1817 (6th Cir. 1999) (held that peat mining co.'s challenge to EPA's disapproval of state's proposed 404 permit was premature since permit never was issued and pre-enforcement review is not allowed; claims against State of Michigan also dismissed under 11th Amendment grounds)

United States v. Telluride Co., CV 93-K-2181 (D. Co. April 20, 1994) (court rejected consent decree as being too lenient toward defendant in wetlands enforcement action for illegal fill; to sign consent decree without careful review would not be in the public interest)

United States v. Torres, 656 F. Supp. 251, 25 ERC 1785 (D. P.R. 1987) (the Corps may enforce the provisions of the CWA in Puerto Rico)

Commenwealth of Puerto Rico v. Alexander, 438 F. Supp. 90, 96, 10 ERC 1575 (D.D.C. 1977) (§ 404 applies to Puerto Rico)

Executive Order No. 11990, "Protection of Wetlands" (1978), codified at 3 C.F.R. § 121, as amended by Executive Order No. 12608, 3 C.F.R. § 245 (1988)

Margaret N. Strand, *Wetlands Deskbook*, 2nd Ed., ELR (1997)

Comment, *Slowing the Net Loss of Wetlands: Citizen Suit Enforcement of Clean Water Act 404 Permit Violations*, 27 Envtl. L. 245 (1997)

Note, *Wetlands Permitting Under Section 404 of the Clean Water Act: Do Proposals for an Administrative Appeals Process Have Any Appeal?*, 13 Va. Envtl. L.J. 639 (1994)

Comment, *Purchaser Liability for the Restoration of Illegally Filled Wetlands Under Section 404 of the Clean Water Act* (1991)

Blumm and Zaleha, *Federal Wetlands Protection under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 Univ. Colo. L. Rev. 695 (19)

Houck, *Ending the War: A Strategy to Save America's Coastal Zone*, 47 Md. L. Rev. 358 (1988)

Jackson, *Wetlands the Commerce Clause: The Constitutionality of Current Wetland Regulation Under Section 404 of the Clean Water Act*, 7 Va. J. Nat. Resources L. 307 (1988)

Tripp & Herz, *Wetland Preservation and Restoration: Changing Federal Priorities*, 7 Va. J. Nat. Resources L. 221 (1988)

U.S. General Accounting Office, *Wetlands: The Corps of Engineers' Administration of*

the Section 404 Program (1988)

Conservation Foundation, *Protecting America's Wetlands: An Action Agenda - The Final Report of the National Wetlands Policy Forum* (1988)

Comment, *Restoration of Wetlands Under Section 404 of the Clean Water Act: An Analytical Synthesis of Statutory and Case Law Principles* (1988)

Rosenbaum, *The Supreme Court Endorses a Broad Reading of the Corps' Wetlands Jurisdiction Under FWPCA § 404*, 16 Envtl L. Rep. (Envtl. L. Inst.) 10,0008 (1986)

Nagle, *Wetlands Protection and the Neglected Stepchild of the Clean Water Act: A Proposal for Shared Custody of Section 404*, 5 Va. J. Nat. Resources L. 227 (1985)

Tripp, *Judicial Review of § 404 Wetlands Protection Actions: A Reaction*, 14 Envt'l L. Rep. (Envtl. L. Inst.) 10,096 (1985)

Want, *Federal Wetlands Law: The Cases and the Problems*, 8 Harv. Envtl. L. Rev. 1 (1984)

Tomesello, *Section 404 of the Clean Water Act: Risks of Regulatory Reform*, 58 Fla. Bar. J. 232 (1984)

Liebesman, *The Role of EPA's Guidelines in the Clean Water Act Section 404 Permit Program - Judicial Interpretation and Administrative Application*, 14 Envt'l L. Rep. (Envtl. L. Inst.) 10,272 (1984)

President's Task Force on Regulatory Reform, *Administrative Reforms to the Regulatory Program Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act* (May 7, 1982)

Parish & Morgan, *History, Practice, and Emerging Problems of Wetlands Regulation: Reconsidering Section 404 of the Clean Water Act*, 17 Land & Water L. Rev. 43 (1982)

Myhrum, *Federal Protection of Wetlands Through the Legislative Process*, 7 B.C. Envt'l Aff. L. Rev. 567 (1979)

Note, *The Clean Water Act of 1977: Midcourse Corrections in the Section 404 Program*, 57 Neb. L. Rev. 1092 (1978)

Thompson, *Section 404 of the Federal Water Pollution Control Act Amendments of 1977: Hydrologic Modification, Wetlands Protection, and the Physical Integrity of the Nations' Waters*, 2 Harv. Envt'l L. Rev. 264 (1977)

B. Adjacent Wetlands

33 C.F.R. § 328.3(c) (The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by manmade dikes or barriers,

natural river berms, beach dunes and the like are adjacent wetlands)

United States v. Riverside Bayview Homes, 424 U.S. 121, 133-134, 106 S. Ct. 455, 88 L. Ed. 2d 419 (1985) (upheld the Corps' application of § 404 permit requirements to adjacent wetlands; "the landward limit of Federal jurisdiction under section 404 must include any adjacent wetlands that form the border or are in reasonable proximity to other waters of the United States.")

United States v. Wilson, 133 F.3d 251, 45 ERC 1801 (4th Cir. 1997) (criminal conviction for unlawful dredge and fill overturned and remanded; court held that Corps definition of wetlands, which forbade activities that "could affect" interstate commerce, was invalid; "The regulation [33 CFR 328.3(a)(3)] requires neither that the regulated activity have a substantial affect on interstate commerce, nor that the covered waters have any sort of nexus with navigable, or even interstate, waters. Were this regulation a statute, because, at least at first blush, it would appear to exceed congressional authority under the Commerce Clause.")

Hobbs v. United States, 1991 U.S. App. LEXIS 27696, 22 ELR 20331 (4th Cir. 1991) (land held to be adj. wetland even though not directly abutting waters of U.S.)

Conant v. United States, 786 F.2d 1008, 24 ERC 1343 (11th Cir. 1986) (cease and desist order to stop unpermitted fill of adjacent wetlands to create a fish pond upheld; wetlands held to be navigable waters)

United States v. Tilton, 705 F.2d 429, 431 (11th Cir. 1983) (even without direct or indirect surface connection between wetlands in question and adjacent river, area cam under wetlands definition)

United States v. Banks, 873 F. Supp. 650, 40 ERC 1689 (S.D. Fla. 1995), aff'd, 115 F.3d 916 (11th Cir. 1997) (wetlands located 1/2 mile from navigable water were deemed adjacent rather than isolated; court used evidence of ecological links with neighboring navigable waters in determining the classification of wetlands)

United States v. Pozsgai, 1991 U.S. Dist. LEXIS 8255 (E.D. Penn. 1991), aff'd, 999 F.2d 719 (3d Cir. 1993) (citing 33 C.F.R. § 328.3(c) held that "[T]he courts have broadly construed the adjacency requirement to find that the wetlands in question are covered by the CWA even when the wetlands were separated by some distance or by barriers from the water body.")

United States v. Malibu Beach, Inc., 711 F. Supp. 1301, 1311, 29 ERC 1920 (D.N.J. 1989) (because the pool was subject to the ebb and flow of the tide from the harbor inlet, which is Waters of the U.S., the wetland was held to be adjacent)

United States v. Ciampitti, 583 F. Supp. 483, 494 (D.N.J. 1984), aff'd, 772 F.2d 893 (3d Cir. 1985), cert. denied, 475 U.S. 1014 (1986) ("[T]he existence of an artificial barrier, in this case a railroad embankment, which may prevent tidal flow to a site is not determinative of the limits of [sic] Corps' jurisdiction.")

United States v. City of Fort Pierre, 580 F. Supp. 1036, 20 ERC 1796 (D. S.D. 1984) (defense that slough is not an adjacent wetland because there is no hydrological connection between the Miss. R. and the slough rejected because the CWA does not require hydrological connection between waters of the U.S. and the adjacent wetland)

C. After-the-Fact Permits

33 C.F.R. § 326.3(e) (After-the-fact permit applications)

United States v. Cumberland Farms of Connecticut, 826 F.2d 1151, 1157, 26 ERC 1393 (1st Cir. 1987) (defendant bears the burden of proving the facts showing the applicability of the nationwide permit)

Friends of the Eartch v. Hintz, 800 F.2d 822 (9th Cir. 1986) (affirming a Corps after-the-fact permit where alternative sites were rejected as either too costly or logistically infeasible)

Salt Pond Associates v. Army Department, 38 ERC 2098 (D. Del. 1993) (challenge to Corp's denial of after-the-fact permit rejected; Corps had authority to issue cease and desist order where inspector had witnessed fill material placed on jurisdictional wetlands; due deference given to Corps' wetlands determination)

United States v. Boccanfuso, 695 F. Supp. 693, 700 (D. Conn. 1988) (Corps should process an afer-the-fact permit rather than issue a restoration order based on a five-year-old environmental assessment)

United States v. Cumberland Farms of Connecticut, 647 F. Supp. 1166, 1183 (D. Mass. 1986), aff'd, 826 F.2d 1151, 26 ERC 1393 (1st Cir. 1987) (discusses when Corps may deny an after-the-fact permit request; "When [defendant] refused to comply with the Corps remedial order, and instead continued further destruction of the wetland, the Corps was within its rights, and indeed was left with no other recourse, but to seek judicial enforcement of the remedial restoration order, rather than to process administratively an after-the-fact permit.")

Quinones Lopez v. Coco Lagoon Devel. Corp., 562 F. Supp. 188, 191-92 (D.P.R. 1983) (sustaining the issuance of an after-the-fact permit without public hearings or a state coastal zone certificate)

United States v. Alleyne, 454 F. Supp. 1164, 1172-73 (S.D.N.Y. 1978) (holding that a defendant in an illegal discharge suit was entitled to an evidentiary hearing on the issues of whether he should be issued an afer-the-fact permit, despite the fact that he never applied for such a permit)

D. Alternatives Analysis

33 U.S.C. § 1344(b) (requires development of guidelines that consider, among other things, "economic impact of the site on navigation and anchorage.")

40 C.F.R. Part 230 (Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material)

40 C.F.R. § 230.10(a) (where "there is a practicable alternative . . . which would have less adverse impact on the aquatic ecosystem," the Corps cannot issue a dredge or fill permit)

40 C.F.R. § 230.10(c) ("no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States.")

B&B Partnership v. United States, 133 F.3d 913, 45 ERC 1922 (4th Cir. 1997) (upheld Corps decision to deny 404 permit on grounds that environmental impacts to land outweighed public benefits of proposed landfill; held that evidence in the record provided a rationale basis for the Corps' denial of appellant's permit application)

National Wildlife Federation v. Whistler, 27 F.3d 1341 (8th Cir. 1994) (held that wetlands permit alternatives analysis may be limited to a severable portion of a development project when the portion of the development not requiring a permit would proceed regardless of permit and there is little or no net loss of wetlands)

James City County, VA v. EPA, 955 F.2d 254 (4th Cir. 1992) (remand ordered where district court reversed EPA veto of Corps 404 permit on grounds that EPA had not proved that the City had an alternate water source; court order district court to find whether EPA could have denied on environmental impact alone)

Norfolk v. United States Army Corps of Engineers, 968 F.2d 1438, 35 ERC 1013 (1st Cir. 1992) (basic proposition of CWA law is that if mitigation measures are insufficient, the permit should be denied)

Sylvester v. U.S. Corps of Eng'rs, 882 F.2d 407, 409 (9th Cir. 1989) ("Obviously, an applicant cannot define a project in order to preclude the existence of any alternative sites and thus make what is practicable appear impracticable.")

Bersani v. Robichaud, 850 F.2d 36, 44 (2d Cir. 1988), cert. denied, 489 U.S. 1089 (1989) (the presumption of alternatives creates "an incentive for developers to avoid choosing wetlands when they could choose an alternative upland site.")

Louisiana Wildlife Fed'n v. York, 761 F.2d 1044 (5th Cir. 1985) (affirming six Corps general permits against charges that the Corps limited its consideration to alternatives that would fulfill the applicant's avowed purpose of increasing soybean production and failed to consider alternative economic uses not envisioned by the applicant, reasoning that the guidelines imposed a duty to take into account the objectives of the applicant; not all requested fills were permitted, some mitigating measures were included, and EPA did not object)

Buttrey v. United States, 690 F.2d 1170, 1180, 18 ERC 1241 (5th Cir. 1982), cert. denied, 461 U.S. 927 (1983) (404 permit denied where Corps determined that total adverse effects of the proposal were outweighed the benefit to the public; the

presumption of practicable alternatives "is *very* strong." (emphasis in original))

Water Works and Sewer Board City of Birmingham v. U.S. Army Corps of Engineers, 983 F. Supp. 1052 (N.D. Al. 1997) (held that Corps regulation do not require Corps to consider impacts of water withdrawal on water supply in its 401(b)(1) review, only impacts on water supply from the addition of fill into the water)

Conservation Law Foundation v. Federal Highway Administration, 827 F. Supp. 871 (D.R.I. 1993), aff'd, 24 F.3d 1465 (1st Cir. 1994) (challenge to 404 permit for highway construction defeated where court held that nothing more was required of the Corps in evaluating practicable alternatives)

Fox Bay Partners v. U.S. Army Corps of Engineers, 831 F. Supp. 605, 37 ERC 1684 (N.D. Ill. 1993) (upheld Corps's denial of 404 permit where Corps found that proposed marina would contribute to significant degradation of environment through overcrowding; "[T]he Corps will deny a permit application if the discharges would not comply with the § 404 guidelines.")

Friends of the Earth v. Hall, 693 F. Supp. 904, 907 (W.D. Wash. 1988) (significant additional cost of an alternative may not by itself eliminate that alternative)

Louisiana Wildlife Fed'n., Inc. v. York, 603 F. Supp. 518, 528 (W.D. La. 1984) (Corps "must take into account the objectives of the applicant's project.")

National Audubon Soc'y v. Harz Mountain Devel. Co., 14 ELR 20,724 (D.N.J. 1983) (feasible alternatives not available because other sites would offer a less attractive marketing package to purchasers; project incorporated mitigating measures but those were deemed insufficient by EPA and federal fish and wildlife agencies)

Houck, *Hard Choices: The Analysis of Alternatives Under Section 404 of the Clean Water Act and Similar Environmental Statutes*, 60 U. Colo. L. Rev. 773 (1989)

E. Compliance Orders

Rueth v. EPA, 13 F.3d 227, 24 ELR 20214 (7th Cir. 1993) (EPA issued 309(a) order instructing developer to cease all discharges into wetlands and to commence restoration of the wetlands; complaint seeking injunctive relief and declaratory judgment against EPA's unauthorized issuance of 309(a) order dismissed because EPA had not issued a final appealable order)

Southern Pines Asoc. v. United States, 912 F.2d 713, 717 31 ERC 2020 (4th Cir. 1990) (developer challenged EPA's jurisdiction over an isolated wetland, arguing that it was not challenging EPA's compliance order, but EPA's jurisdiction over the wetlands; "allowing the parties to challenge the existence of EPA's jurisdiction would delay the agency's response in the same manner as litigation contesting the extent of EPA's jurisdiction. [The plaintiffs] can contest the existence of EPA's jurisdiction if and when EPA seeks to enforce the penalties provided by the Act.")

Hoffman Group, Inc. v. EPA, 902 F.2d 567 (7th Cir. 1990) (Corps issued cease and desist order and EPA issued 309(a) order to developer; held that Congress intended to preclude judicial review of an EPA compliance order unless the government initiated an enforcement action in the U.S. Dist. court)

Aminoil U.S.A., Inc. v. California Water Bd., 674 F.2d 1227, 17 ERC 1702 (9th Cir. 1982) (plaintiff filed suit in state court challenging Board determination that property was wetland and joined EPA on grounds that it had issued to plaintiff a 309(a) order re the wetlands; held: judicial review of EPA action, whether under the Act or § 10 of the APA, must await final EPA action and must be initiated in federal court)

Sharp Land Co. v. United States, 956 F. Supp. 691 (M.D. La. 1996) (Corps and EPA's motion to dismiss complaint granted on grounds that 309(a) orders issued to plaintiff regarding illegal fill of wetlands were not reviewable in federal court; plaintiff had sought judicial review of the compliance orders, a declaratory judgment that the government had "taken" land without compensation, and damages for slander; and alleged civil rights violation (interference with right to sell property))

Howell v. Army Corps of Engineers, 794 F. Supp. 1072, 1075 (D.N.M. 1992) ("forcing the agency into litigation before it completes its wetlands delineation and permitting process will frustrate the statutory scheme that allows the agency to resolve violations in a flexible manner without judicial interference.")

Leslie Salt Co. v. United States, 789 F. Supp. 1030, 1033-34 (N.D. Cal. 1991) ("issuance of cease and desist orders are not sufficient to create jurisdiction in this court.")

Mulberry Hills Dev. Corp. v. United States, 772 F. Supp. 1553, 1557-58 (D. Md. 1991) (CWA does not allow for pre-enforcement review of cease and desist orders)

See also COMPLIANCE ORDERS, PRE-ENFORCEMENT REVIEW

F. Criminal Violations

United States v. Wilson, 133 F.3d 251, 45 ERC 1801 (4th Cir. 1997) (criminal conviction for unlawful dredge and fill overturned and remanded; court held that Corps definition of wetlands, which forbade activities that "could affect" interstate commerce, was invalid; held also that 309(c)(1)(A) "requires the government to prove the defendant's knowledge of facts meeting each essential element of the substantive offense, but need not prove that the defendant knew his conduct to be illegal.")

United States v. Rapanos, 115 F.3d 367 (6th Cir. 1997), cert. denied, 118 S. Ct. 304, 139 L. Ed. 2d 234 (1997) (developer convicted of fillings wetlands without permit; open fields exception negates reasonable expectation of privacy; district court's granting of new trial based on use of testimony asserting Fourth Amendment rights reversed)

United States v. Pasquariello, 40 ERC 1009 (S.D. Fla. 1994) (developer held criminally liable for unpermitted fill of two small lakes with construction debris)

Mills v. United States, 36 F.3d 1052 (11th Cir. 1994), cert. denied, 514 U.S. 1112 (1995) (conviction for continuing to fill a wetland for a driveway after two cease & desist orders from Corps; court rejected argument that Congress lacked constitutional authority to delegate definition of wetland to Corps)

United States v. Burnett, (W.D. Wash. 1994) (defendants convicted of filling wetland after being told by USCOE and SCS that site was a wetland)

G. Delegations

Johnson v. U.S. Army Corps of Engineers, 6 F. Supp.2d 1105, 47 ERC 1311 (D. MN. 1998) (rejecting Mango, held that CWA does not specifically address subdelegation of § 404 permit issuance authority and that Corps' construction of the statute in delegating permit issuance authority by regulation from the Chief Engineer to the District Engineer was permissible)

United States v. Mango, 46 ERC 1294 (N.D.N.Y. 1998) (held that Corps issued 404 permit was invalid and unenforceable because CWA did not authorize redelegation of authority to issue permits from CEO Chief of Engineers to District Engineer)

Charfoos and Co. v. West, 1998 U.S. Dist. LEXIS 7112 (E.D. Mich. 1998) (no pre-enforcement review of Corps decision to exercise jurisdiction over wetland; plaintiff argued that Corps had delegated authority to regulate wetland in question to state)

H. Delineation Manual

United States v. Ellen, 961 F.2d 462 (4th Cir. 1992) (criminal conviction for filling wetlands not void on ex post facto principle just because the wetlands manual used to determine that filled land was wetland was not in effect at time of filling)

Hobbs v. United States, (4th Cir. 1991) (unpublished) (EPA's wetlands delineation manuals are interpretive, not substantive rules and are not, therefore, subject to the public notice and comment requirements of the APA)

I. Draining Wetlands

33 U.S.C. § 1344(f)(1)(A) ("[T]he discharge of dredged or fill material . . from normal farming . . . minor drainage . . is not prohibited. . .")

40 C.F.R. § 232.3(d)(3)(ii) ("Minor drainage in waters of the United States is limited to drainage within areas that are part of an established farming or silviculture operation . It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland (e.g., wetland species to upland species not typically adequate to lief in saturated soil conditions), or conversion from one wetland to another (for example, silviculture to farming).")

Orleans Audubon Soc'y v. Lee, 742 F.2d 901, 21 ERC 1984 (5th Cir. 1984) (installation of drainage culverts at issue did not involve a discharge regulated under the CWA)

Save Our Community v. EPA, 971 F.2d 1155, 35 ERC 1937 (5th Cir. 1992) (challenge to draining of wetlands dismissed on grounds that draining is not a dredge and fill subject to regulation and therefore requires no permit; "We must conclude that without the existence of an effluent discharge of some kind, there is no coverage under section 404." 35 ERC at 1944)

American Mining Congress v. U.S. Army Corps. of Engineers, No. 93-1754 SSH (D.C.C. Jan. 23, 1997) (Corps. regulations to prohibit draining of wetlands set aside by court)

In re Slinger Drainage, Inc.,8 E.A.D. ___ (EAB 1999) (rejecting NMA case as inapplicable, held that fall-back from drain tile laying machine to be "addition of pollutants" subject to regulation under CWA, and not "incidental fallback"; distinguished NMA on grounds that discharge in NMA was merely incidental to removal of materials from wetlands, whereas in Slinger, the discharge was part of the operation to remove wetlands material, insert a drain pipe, then redeposit all of the excavated material)

S. Rep. No. 95-370, at 76 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326 ("Minor drainage is intended to deal with situations such as drainage in Northwestern forests or other upland areas. The exemption for minor drainage does not apply to the drainage of swampland or other wetlands.")

58 Fed. Reg.45008 (1993) (proposed regulations re draining of wetlands)

40 Fed. Reg. 45,008, 45,025 (1993) ("The excavation of wetlands to place drainage tiles is currently regulated under Section 404 unless such activities qualify for a Section 404(f) exemption. Activities that involve replacing existing field drainage tiles where the replacement does not increase the extent of drainage beyond that provided by the original tiling would generally qualify for such an exemption.")

Kevin O'Hagen, *Pumping with Intent to Kill: Draining Wetlands*, 40 DePaul L.Rev. 1059 (1991)

J. Dredge and Fill

33 U.S.C. § 1344(a) ("The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.")

33 U.S.C. § 1344(t) ("Noting in [§ 404] shall preclude or deny the right of any State . . . to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State. . .")

33 C.F.R. § 323.2(c) ("The term *dredged material* means material that is excavated or dredged from waters of the United States.")

33 C.F.R. § 323.2(d) (definition of "discharge of dredged material")

33 C.F.R. § 323.2(e) ("The term *fill material* means any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterway. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402 of the CWA.")

40 C.F.R. Part 230 (Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material)

40 C.F.R. § 230.1(c) ("Fundamental to these Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern.")

40 C.F.R. § 232.2 (Definitions)

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985) (holding wetlands property to be subject to Corps' § 404 permitting authority after Corps sought to enjoin placement of fill materials on wetland area)

Resource Investments Inc. v. U.S. Army Corps of Engineers, 151 F.3d 1162, 47 ERC 1065 (9th Cir. 1998) (Corps does not have authority under 404 to stop proposed landfill because refuse to be disposed of in the landfill does not constitute "dredge and fill material;" the landfill does not meet the test of the Corps regulations for "material that is excavated or dredged from the waters of the United States;" authority to regulate solid waste rests with EPA)

Rueth v. EPA, 13 F.3d 227, 229, 24 ELR 20214 (7th Cir. 1993) ("Individual [dredge and fill] permits are only issued after extensive administrative proceedings and investigation which include site-specific documentation, public notice and consideration of all public comments on the specific activity.")

Save Our Community v. EPA, 971 F.2d 1155, 35 ERC 1937 (5th Cir. 1992) (challenge to draining of wetlands dismissed on grounds that draining is not a dredge and fill subject to regulation and therefore requires no permit; "We must conclude that without the existence of an effluent discharge of some kind, there is no coverage under section 404." 35 ERC at 1944)

West Virginia Coal Assn. v. EPA, 932 F.2d 934, 33 ERC 1353, 1355-56 (4th Cir. 1991) (court rejected argument that Corps, not EPA should regulate discharge of mining wastes into navigable waters. "Generally, the Army has authority over the discharge [of] fill while the EPA has authority over the discharge of pollutants. . . Appellants analysis falls short, however, since the Army regulations, 33 C.F.R. § 323.2(e), provide evidence that it did not intend to regulate the disposal of mining related spoil since the primary purpose of such fills and treatment ponds is to dispose of waste and treat sediment-laden water, not to create dry land or to change the bottom elevation of the water.")

Conant v. United States, 786 F.2d 1008, 24 ERC 1343 (11th Cir. 1986) (cease and desist

order to stop unpermitted fill of adjacent wetlands to create a fish pond upheld; wetlands held to be navigable waters)

United States v. Akers, 785 F.2d 814, 24 ERC 1121 (9th Cir. 1986), cert. denied, 479 U.S. 828 (1986) (plowing, discing and seeding of farmland constitutes "dredge and fill")

United States v. M.C.C. of Florida, 772 F.2d 1501, 23 ERC 1318 (11th Cir. 1985), vacated on other grounds, 481 U.S. 1034 (1987), readopted in relevant part on remand, 848 F.2d 1133 (11th Cir. 1988) (boats used in construction project discharged vegetation and sediment without a permit)

Orleans Audubon Soc. v. Lee, 742 F.2d 901, 21 ERC 1984 (5th Cir. 1984) (where on-sight investigator's report reflected the fact that he found no evidence that dredged or fill material had been deposited, the court found no basis to hold the Corps' decision that it did not have jurisdiction under section 404 to be arbitrary or capricious and thus the Corps handling of the matter was not actionable under the APA)

Save Our Wetlands, Inc. v. Sands, 711 F.2d 634, 647, 19 ERC 1710 (5th Cir. 1983) (held that "materials" produced by the clearing of wooded swampland did "not qualify as dredged or fill materials under [the Corps'] definitions.")

Avoyelles Sportsman's League, Inc. v. Marsh, 715 F.2d 897, 922, 19 ERC 1841 (5th Cir. 1983) (operation of a bulldozer in a wetlands constitutes a point source, subject to regulation under 404)

United States v. Tilton, 705 F.2d 429, 430, 19 ERC 1109 (11th Cir. 1983) (enjoining the further discharge of fill material "consisting of wood-chips, pine bark and soil" without § 404 permit)

Minnehaha Creek Watershed Dist. v. Hoffman, 597 F.2d 617, 13 ERC 1009 (8th Cir. 1979) (construction of dams and riprap involved placement of material such as rock, sand and cellar dirt into jurisdictional waters)

United States v. Bay-Houston Towing Co., 33 F. Supp.2d 596, 29 ELR 21011 (E.D. Mich. 1999) (peat bog operator's use of indigenous bog vegetation and clays to create haul roads and windrow foundations can constitute the discharge of "fill materials" under the Act)

Froebel v. Meyer, 13 F. Supp. 2d 843, 47 ERC 1359 (E.D. Wis. 1998) (citizen suit alleging sediment discharges from former impoundment area after dam was removed dismissed; held that no unpermitted dredge and fill occurred because sediment released from former impoundment behind deactivated dam was not "dredged" or "excavated")

United States v. Deaton, No. MJG-95-2140 (Court??, June 23, 1998) (following, but question validity of Wilson, held that sidecasting of material into wetland next to ditch that was being excavated was not "fill" and therefore not within the jurisdiction of the CWA)

United States v. Material Service Corp., 1996 U.S. Dist. LEXIS 14471 (N.D. Ill. 1996) (court held that 404 violations (filling wetlands with mine tailings) accrued for statute of limitations purposes when the government discovered the violation in March 1993, and therefore, none of the government's claims were barred by the statute of limitations; court looked to self-reporting structure of CWA and general public policy concerns)

United States v. Lambert, 915 F. Supp. 797, 26 ELR 21116 (S.D.W.Va. 1996) (owner of property and contractor who performed work liable for illegal dredge and fill; "The CWA imposes liability on the party who actually performed the work and on the party with responsibility for or control over performance of the work.")

United States v. Appel, 42 ERC 1822 (C.D. Cal. 1996) (defendant's operation of a bulldozer in the river channel was a point source discharge subject to regulation under § 404; prima facie case for illegal dredge and fill: "government must show: (1) that it has jurisdiction over the subject waters, (2) that the defendant discharged a pollutant into those waters, and (3) that the defendant did so without a permit from the Corps.")

Long Island Soundkeeper Fund v. New York Athletic Club, 42 ERC 1421, (S.D.N.Y. 1995) (motion to dismiss granted re unpermitted dredge and fill claim for lead shot from shotguns; no evidence that activity of defendant was intended to "raise the bottom elevation" of the receiving waters)

Friends of Santa Fe v. LAC Minerals, Inc., 892 F. Supp. 1333, 26 ELR 20135 (D.N.M. 1995) (Dolores Arroyo, an intermittent stream bed, held to be waters of U.S.; overburden material discharged to Arroyo held not be "dredge" or "fill" within meaning of 33 C.F.R. § 323.2(c))

United States v. Sargent County Water Resource District, 876 F. Supp. 1090, 40 ERC 1718 (D.N.D. 1994) (cleaning drainage ditch does not require 404 permit because the work was "maintenance" not "improvement")

Salt Pond Associates v. Army Department, 38 ERC 2098 (D. Del. 1993) (Corps had authority to issue cease and desist order where inspector had witnessed fill material placed on jurisdictional wetlands; due deference given to Corps' wetlands determination)

Orange Environment, Inc. v. County of Orange, 811 F. Supp. 926, 934, 36 ERC 1983 (S.D.N.Y. 1993) (held that EPA § 309(a) compliance order does not relieve operator of need to acquire a § 404 permit in order to place fill in a wetlands as part of a landfill expansion project)

United States v. Zanger, 767 F. Supp. 1030, 1033, 22 ELR 20231 (N.D. Cal. 1991) (prima facie elements for dredge and fill case)

United States v. Sinclair, 767 F. Supp. 200, 203, 21 ELR 21323 (D. Mont. 1990) (defendant moved cobbles around in stream; held that redeposition of indigenous materials in a streambed constitutes discharge of pollutants)

Golden Gate v. U.S. Army Corps of Engineers, 717 F. Supp. 1417, 1422 (N.D. Cal.

1988) ("permitless discharges of fill material that are in violation of the [CWA] may not be used to establish the normal circumstances of a site.")

United States v. Larkins, 657 F. Supp. 76, 85, 25 ERC 1911 (W.D. Kent. 1987), aff'd, 852 F.2d 189, 28 ERC 1001 (6th Cir. 1988), cert. denied, 489 U.S. 1016 (1989) (operation of a bulldozer in a stream river channel constitutes a point source, subject to regulation under 404)

United States v. Torres, 656 F. Supp. 251, 25 ERC 1785 (D. P.R. 1987) (preliminary injunction granted against wetlands owner in Puerto Rico for unpermitted fill of wetlands; held that area in question was jurisdictional wetlands)

United States v. Tull, 615 F. Supp. 610, 622, 20 ERC 2198 (E.D. Va. 1983), aff'd, 769 F.2d 182 (4th Cir. 1985), rev'd on other grounds, 481 U.S. 412 (1987) (operation of a bulldozer in a stream river channel constitutes a point source, subject to regulation under 404)

United States v. Bd. of Trustees of Fla. Keys Comm. College, 531 F. Supp. 267, 274, 18 ERC 1188 (S.D. Fla. 1981) (site covered with riprap ordered restored and $15,000 fine imposed)

State of Missouri ex rel. Ashcroft v. Department of the Army Corps of Engineers, 526 F. Supp. 660, 678 (W.D. Mo. 1980), aff'd, 672 F.2d 1297, 1304, 17 ERC 1001 (8th Cir. 1982) (erosion of soil as a result of releases of water is not a discharge regulated by the CWA)

In re Condor Land Co., No. CWA-404-95-106 (ALJ Pearlstein Dec. 8, 1998) ($32,160 assessed for unpermitted fill of wetlands when respondent used bulldozers and plows to clear land; held that land in question was jurisdictional wetlands, "redepositing" of dredge material constitutes a "discharge," and farm exemption does not apply)

In re Slinger Drainage, Inc., Docket No. 5-CWA-97-022 (ALJ Kuhlmann Sept. 14, 1998), affirmed, 8 E.A.D. ___ (EAB 1999) ($90,000 (full amount of proposed penalty) assessed for unpermitted fill of wetlands while installing tile drains; held that redeposition of side cast material generated during drenching to install drains constituted an "addition of pollutants under the CWA")

In re Urband Drainage and Flood Control Dist., and Kemp & Hoffman, Inc., Docket No. CWA-VIII-94-PII (ALJ Pearlstein June 24, 1998) ($80,000 assessed for unpermitted stream channel alteration in violation of 404; Region requested $125,000; penalty reduced penalty for lack of environmental impact; penalty was split: $75,000 against District and $5,000 against Kemp)

In re Britton Construction Co., Docket No. CWA-III-096 (May 21, 1997), aff'd, 8 E.A.D. ___ (EAB 1999) (discharge of fill material into regulated wetlands without a permit is a continuing violation that tolls the statute of limitations so long as the illegal fill remains in place)

In re Urban Drainage and Flood Control District and Kemp & Hoffman, Inc., Docket No. CWA-VIII-94-20-PII (ALJ Vanderheyden, February 14, 1995) (EPA sued City, which owned site, Irrigation District that organized unpermitted fill of wetlands on behalf of City, and contractor who actually performed work; dismissed this action against City upon EPA's failure to establish a prima facie case; held that liability will attach under § 301 if the Respondent is the legal cause of the discharge; causation requirement is fulfilled if Respondent had responsibility, control or authority over the discharges; EPA failed to establish that the City was the legal cause of the discharge) Cf. later decision by ALJ Pearlstein

In re Belcastro, Docket No. CWA-VIII-94-01-PI (Mar. 3, 1995) (discharge of fill material in the form of 2200 used tires into Hunter Wash held to violate § 301)

Annotation, *What Constitutes "Discharge of Dredge or Fill Material" Into Navigable Waters, So As to Be Subject to Permit Requirements Under § 404(a) of the FWPCA,* 72 ALR Fed. 703, supp.

K. Exemptions (§ 404(f))

33 U.S.C. § 1344(f)(1)(A) ("the discharge of dredged or fill material from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices . . . is not prohibited or otherwise subject to regulation . . .")

33 U.S.C. § 1344(f)(1)(E) ("the discharge of dredged or fill material . . .for the purposes of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, were such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized . . . is not prohibited by or otherwise subject to regulation . . .")

33 C.F.R. § 328.3(a)(8) (defines prior converted wetlands as those areas "that before December 23, 1985, were drained, dredged, filled, leveled, or otherwise manipulated . . . for the purpose, or to have the effect of, or making production of an agricultural commodity possible and an agricultural commodity has been produced as least once before December 23, 1985.")

Newton County Wildlife Ass'n v. Forest Service, 141 F.3d 803, 46 ERC 1694, 1698 (8th Cir. 1998), reh'g en banc denied, 1998 U.S. App. LEXIS 16225 (1998) (suit challenging logging sale by Forest Service dismissed; "[L]ogging and associated road building are exempt from dredge and fill permit requirements so long as construction and maintenance comply with best management practices. . . The administrative record contains no evidence those practices have not been followed.")

Gunn v. USDA, 118 F.3d 1233, 45 ERC 1091 (8th Cir. 1997) (held that SCS's

determination that plaintiff's farmland was converted wetlands reasonable and therefore not eligible for farm benefits program)

United States v. Brace, 41 F.3d 117 (3d Cir. 1994) (reversed lower court holding that defendant's activities were exempt under 404(f); held that activities that bring an area into farming are not part of an established operation; any established farming activity must be on the wetland site itself)

United States v. Akers, 785 F.2d 814 (9th Cir. 1986), cert. denied, 479 U.S. 828 (1986) (farming exemption from permit requirement of CWA inapplicable to proposed upland farming)

United States v. Huebner, 752 F.2d 1235, 1240-41 (7th Cir. 1985) (farmer's widening of roads through wetland violated BMP requirements and he failed to notify the Corp of the widening and obtain a permit; "It is clear that the amendments that create the subsection (f) exceptions on which defendants rely were not intended to exempt all farming operations from the permit requirements, but only those whose effect upon wetlands or other waters was so minimal as not to warrant federal review and supervision. . . .Congress intended that Section 1344(f) exempt from the permit process only `narrowly defined activities . . . that cause little or no adverse effects either individually or cumulatively [and which do not] convert more extensive areas of water into dry land or impede circulation or reduce the reach and size of the water body.'")

Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 926 (5th Cir. 1983) (activity that resulted in substantial alteration of the wetland did not fall within 404(f) exemption because it brought "an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced.")

Borden Ranch Partnership v. U.S. Army Corps. of Engineers, ?? (E.D. Cal. June 9, 1998) (plowing and discing operation in wetland held to be unpermitted fill; court rejected argument that activities fell within exemption for "normal farming activities" because purpose of discing was to bring wetlands into production, not to maintain existing farming operation)

United States v. Appel, 42 ERC 1822 (C.D. Cal. 1996) (prior converted wetlands exemption considered abandoned after five years without tillable crop production and such abandoned prior converted croplands revert to wetlands; prior converted wetlands exemption applies to wetlands, but not to rivers, streams and tributaries, which is where EPA claimed defendant had discharged pollutants; sheep grazing is not considered tillable agriculture)

In re Condor Land Co., No. CWA-404-95-106 (ALJ Pearlstein Dec. 8, 1998) ($32,160 assessed for unpermitted fill of wetlands when respondent used bulldozers and plows to clear land; held that land in question was jurisdictional wetlands, "redepositing" of dredge material constitutes a "discharge," and farm exemption does not apply)

Memorandum of Agreement Between the Department of the Army and the Environmental

Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act (Jan. 19, 1989)

3 Legislative History of the Clean Water Act of 1977 at 474 (Senate Debate, Dec. 15, 1977) (comments by Sen. Muskie, primary author of legislation) ("New subsection 404(f) provides that Federal permits will not be required for those narrowly defined activities that cause little or no adverse effects either individually or cumulatively. While it is understood that some of these activities may necessarily result in incidental filling and minor harm to aquatic resources, the exemptions do not apply to discharges that convert extensive areas of water into dry land or impede circulation or reduce the reach or size of the water body.")

L. Injunctive Relief

Rueth v. EPA, 13 F.3d 227, 24 ELR 20214 (7th Cir. 1993) (jurisdiction over isolated waters upheld; complaint seeking injunction against enforcement of compliance order to cease discharges to wetlands dismissed for lack of jurisdiction)

United States v. Bayshore Associates, Inc., 934 F.2d 1391 (6th Cir. 1991) (upheld restraining order by lower court that prevented defendant from dredging at its boat club because the disposal site included wetlands)

Conant v. United States, 786 F.2d 1008, 24 ERC 1343 (11th Cir. 1986) (cease and desist order to stop unpermitted fill of adjacent wetlands to create a fish pond upheld; wetlands held to be navigable waters)

United States v. Sexton Cove Estates, 526 F.2d 1657, 8 ERC 1657 (5th Cir. 1976) (when ordering restoration of a wetlands under Rivers and Harbors Act, court must consider degree and kind of environmental disturbance caused by dredging as well as practicality of proposed restoration plan that will confer maximum environmental benefits)

United States v. Van Leuzen, 816 F. Supp. 1171, 36 ERC 1993, 2000 (S.D. Tex. 1993) ("The duty to restore an intentionally filled wetlands is mandatory, absent equities.")

United States v. Cumberland Farms of Connecticut, 647 F. Supp. 1166, 25 ERC 1077, 1089, (D. Mass. 1986), aff'd, 826 F.2d 1151, 26 ERC 1393 (1st Cir. 1987) ("Any such restorative mandatory injunction must meet three criteria. First, it must confer maximum environmental benefits; second, it must be achievable as a practical matter; third, it must bear an equitable relationship to the degree and kind of wrong which it is intended to remedy.")

United States v. Robinson, 570 F. Supp. 1157, 1164-65, 20 ERC 1181 (M.D. Fla. 1983) (defendant ordered to restore wetland where unpermitted fill occurred to create space for patio; "When it appeared, however, that he might not be granted a permit, he resorted to what has been termed 'self help for the impatient.'" 20 ERC at 1188)

United States v. Bradshaw, 541 F. Supp. 880, 18 ERC 1611 (D. Md. 1981) (defendant

ordered to restore wetlands by submitting proposed restoration plan which plaintiff can oppose or offer alternatives to)

United States v. Weisman, 489 F. Supp. 1331, 1343, 17 ERC 1580 (M.D. Fla. 1980) (a wetlands restoration plan must: (1) confer maximum environmental benefits, (2) be achievable as a practical matter, and (3) bear an equitable relationship to the degree and kind of wrong which it is intended to remedy.)

See also INJUNCTIVE RELIEF

M. Isolated Wetlands

Leslie Salt Co. v. United States, 55 F.3d 1388 (9th Cir. 1995) cert. denied sub nom, Cargill, Inc. v. United States, 516 U.S. 955 (1995) (held that man-made salt pits that were frequented by migratory birds were jurisdictional waters of the U.S.; strong dissent by Justice Thomas in denial of cert. by S. Ct.)

Hoffman Homes, Inc. v. EPA, 999 F.2d 256 (7th Cir. 1993) (EPA regulations on isolated wetlands upheld; migratory bird test O.K., although held that there was not substantial evidence on the record to support a conclusion that the wetland in question was likely to be used by migratory birds; the court agreed with the CJO that the "regulation covers waters whose connection to interstate commerce may be potential rather than actual, minimal rather than substantial. . . It is reasonable to interpret the regulation as allowing migratory birds to be the connection between a wetland and interstate commerce.")

Hoffman Homes Inc. v. EPA, 961 F.2d 1310 (7th Cir. 1992), vacated, 999 F.2d 256 (7th Cir. 1993) (en banc) (EPA lacks authority to regulate intrastate wetlands that are not adjacent to waters of the United States. EPA claimed jurisdiction because migratory birds used the wetland. But the court held: "Since creation (of the states), migratory birds have flown interstate. But this annual traverse by itself does not affect commerce. The birds obviously do not engage in commerce. Until they are watched, photographed, shot at (or, we suppose, have potential to) engage in interstate commerce, migratory birds do not ignite the Commerce Clause.")

Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir. 1990), cert. denied, 498 U.S. 1126 (1991) (district court ruling that Corps. lacked jurisdiction over isolated wetlands remanded for determination whether presence of migratory birds created a sufficient connection to interstate commerce to sustain Corps. jurisdiction)

United States v. Krilich, 1999 U.S. Dist. LEXIS 4191 (N.D. Il. 1999) (in challenge to jurisdiction of court to enforce consent decree, held that isolated wetlands are subject to regulation under CWA)

United States v. Hallmark Construction Co., 14 F. Supp.2d 1065 (N.D. Ill. 1998) (upheld migratory bird rule, rejecting argument that it exceeded bounds of Commerce Clause)

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 998 F. Supp. 946 (N.D. Ill 1998) (upheld CWA 404 jurisdiction over a complex of isolated,

intrastate waters in a former gravel mining pit; isolated wetlands provide habitat to migratory birds whose existence supports interstate commerce)

National Wildlife Fed'n v. Laubscher (Pond 12), 662 F. Supp. 548, 549 (S.D. Tex. 1987) ("[A] wetland visited by migratory birds is a wetland within the jurisdiction of the [EPA and the Corps].")

Priolo, *Section 404 of the Clean Water Act: The Case for Expansion of Federal Jurisdiction Over Isolated Wetlands*, 30 Land & Water L. Rev. 91 (1995)

See also COMMERCE CLAUSE

N. Nationwide Permits

33 U.S.C. § 1344(e) (general wetlands permits)

33 U.S.C. § 1344(t) ("Nothing in [§ 404] shall preclude or deny the right of any State . . . to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State. . .")

33 C.F.R. § 330.5 (nationwide permits)

New Hanover Township v. Corps of Engineers, 992 F.2d 470, 37 ERC 1189 (3d Cir. 1993) (challenge to a nationwide permit determination by the Corps of Engineers is not ripe for judicial review until the applicant receives a § 401 water quality certification from the state)

United States v. Marathon Development Corp., 867 F.2d 96, 99-100, 29 ERC 1145, 1147 (1st Cir. 1989) (affirming a criminal conviction on the ground that a nationwide permit did not authorize the discharge because Mass. Had denied water quality certification; states may deny certification of a nationwide wetlands permit in order to enforce their more stringent water quality standards)

United States v. Cumberland Farms, 826 F.2d 1151, 1157 (1st Cir. 1987) (possession of a Nationwide permit is an affirmative defense)

United States v. Wichard, 718 F.2d 1094 (4th Cir. 1983) (held discharges ineligible for authorization under the "headwaters" nationwide permit)

Natural Resources Defense Council v. Walker, No. 98-CV-0560 (N.D. Cal. filed Feb. 11, 1998) (challenge to nationwide permits on grounds that the permitting program violates the ESA as well as other statutes)

United States v. Key West Towers, 696 F. Supp. 1467, 1468-69 (S.D. Fla. 1986) (possession of a Nationwide permit is an affirmative defense)

United States v. Lambert, 589 F. Supp. 366 (M.D. Fla. 1984) (held discharges ineligible for authorization under the "headwaters" nationwide permit)

61 Fed. Reg. 65874 (1996) (Corps of Engineers Final Notice of Issuance, Reissuance, and Modification of Nationwide Permits)

Note, *Environmental Law - Nationwide Permits for Categories of Waters Issued by the Corps of Engineers Under FWPCA Section 404: A Legitimate Interpretation Ratified by Congress?*, 61 N.C.L. Rev. 904 (1983)

O. Penalties

United States v. Krilich, 126 F.3d 1035, 45 ERC 1385 (7th Cir. 1997) (upholding $1.3 million in stipulated penalties for failure to complete wetlands mitigation project in time frame specified in consent decree; decree assessed $185,000 penalty for original unpermitted fill violation, and provided for $2,500/day stipulated penalty for failure to meet deadlines set out in the decree)

3M v. Browner, 17 F.3d 1453, 38 ERC 1258 (D.C. Cir. 1994) (5-year statute of limitations applies to EPA administrative penalty actions)

Sasser v. Administrator, 990 F.2d 127, 129 (4th Cir. 1993) ("Each day the pollutant remains in the wetlands without a permit constitutes an additional day of violation.")

Informed Citizens United, Inc. v. USX Corp., 36 F. Supp.2d 375, 29 ELR 2466 (S.D. Tex. 1999) (past fill of wetlands held to be continuing violation of CWA on grounds that fill had not yet been removed; case dismissed on other grounds (defendant held a valid COE permit for the fill))

United States v. Reeves, 923 F. Supp. 1530, 1534, 42 ERC 1283 (M.D. Fla. 1996) (each day fill remains in a wetland is a continuing violation, therefore statute of limitations did not begin to run when wetlands were filled in 1981)

United States v. Smith, Civil No. 3:94-2693-19 (D.S.C. 1996), aff'd, 46 ERC 2114 (4th Cir. 1998) (finding defendant's violations to be "intentional, flagrant, egregious and openly defiant," court fined defendant $35,000 ordered him to remove fill from 2.2 acres of wetlands; appeal of removal requirement rejected on grounds that district court had properly weighed the environmental benefits and costs when ordering removal of the fill material)

United States v. Telluride Co., 884 F. Supp. 404, 41 ERC 1273 (D. Colo. 1995), rev'd, 146 F.3d 1241, 46 ERC 1897 (10th Cir. 1998) (held that discharge of fill in violation of 301 is not a continuing violation and the 5-year statute of limitations begins to run from the date of discharge)

Prisco v. New York, 902 F. Supp. 374, 26 ELR 20415 (S.D.N.Y. 1995) (no continuing violation found where defendant discharged to wetland in distant past, but had not continued to do so for years)

United States v. Van Leuzen, 816 F. Supp. 1171, 36 ERC 1992 (S.D. Tex. 1993) (§ 309 requires that a court impose some fine on each defendant and that the duty to restore

intentionally filled wetlands is mandatory, absent equities; court ordered defendant to restore the entire wetland, including the area under the house, within 8 years, or a trustee would be appointed to remove the house and restore the wetland; based on ability to pay, $900 penalty assessed)

Bettis v. Town of Ontario, 800 F. Supp. 1113 (W.D.N.Y. 1992) (no continuing violation found where defendant had filled wetland in past, but had ceased fill activities, but had not removed material)

North Carolina Wildlife Assoc. v. Woodbury, 29 ERC [BNA] 1941 (E.D.N.C. 1989) (court determined that violation was "continuing" and "not wholly past" thus allowing a citizen suit)

United States v. Ciampitti, 669 F. Supp. 684 (D.N.J. 1987) (a day of violation constitutes not only a day that the violator actually placed the fill into the wetland, but also every day he allowed the illegal fill material to remain therein)

United States v. Cumberland Farms of Connecticut, 647 F. Supp. 1166, 1183, 25 ERC 1077 (D. Mass. 1986), aff'd, 826 F.2d 1151, 26 ERC 1393 (1st Cir. 1987) (a penalty for the violation of § 404 is assessed for each day the illegal fill material remains in the wetland)

United States v. Tull, 615 F. Supp. 610, 626, 20 ERC 2198 (D.C. Va. 1983), aff'd, 764 F.2d 182 (4th Cir. 1983) (a day of violation constitutes not only a day that the violator actually placed the fill into the wetland, but also every day he allowed the illegal fill material to remain therein)

In re Dr. Marshall C. Sasser, 3 E.A.D. 703 (CJO 1991), aff'd, Sasser v. EPA, 990 F.2d 127 (4th Cir. 1993) ($125,000 for illegal fill of wetlands)

In re Condor Land Co., No. CWA-404-95-106 (ALJ Pearlstein Dec. 8, 1998) ($32,160 assessed for unpermitted fill of wetlands when respondent used bulldozers and plows to clear land; held that land in question was jurisdictional wetlands, "redepositing" of dredge material constitutes a "discharge," and farm exemption does not apply)

In re Slinger Drainage, Inc., Docket No. 5-CWA-97-022 (ALJ Kuhlmann Sept. 14, 1998), affirmed, 8 E.A.D. ___ (EAB 1999) ($90,000 (full amount of proposed penalty) assessed for unpermitted fill of wetlands while installing tile drains)

In re Urband Drainage and Flood Control Dist., and Kemp & Hoffman, Inc., Docket No. CWA-VIII-94-PII (ALJ Pearlstein June 24, 1998) ($80,000 assessed for unpermitted stream channel alteration in violation of 404; Region requested $125,000; penalty reduced penalty for lack of environmental impact; penalty was split: $75,000 against District and $5,000 against Kemp)

In re Paul L. Smith, 1998 EPA RJO LEXIS 9 (RJO Hankinson 1998) ($12,000 assessed for unpermitted clearing of 0.43 acres of wetlands for new road)

In re Britton Construction, Docket No. CWA-III-096 (ALJ Pearlstein May 21, 1997), aff'd, 8 E.A.D. ___ (EAB 1999) ($2000 award ($125,000 proposed) for illegal dredge and fill of wetland; ALJ Pearlstein found that the statutory factors of CWA § 309(g)(3) warranted a "drastic reduction" from the $125,000 civil penalty proposed by the Region to $2000. Among the factors discussed were Respondents' reasonably prompt completion of the successful mitigation plan and the small, nonpristine ("trash-strewn") wetland at issue; buttressed by the lack of economic benefit and ability to pay the proposed penalty and "other matters.")

In re Donna Heptner East Penn Trucking Co., 1996 EPA RJO LEXIS 4 (RJO McCabe 1996) ($19,000 assessed against four respondents for filling total of less than one acre of wetlands at 3 sites)

P. Public Hearings

Water Works and Sewer Board City of Birmingham v. U.S. Army Corps of Engineers, 983 F. Supp. 1052 (N.D. Al. 1997) (held that § 404 does not require public hearing prior to making decision on permit application)

Sierra Club v. Alexander, 484 F. Supp. 455, 471, 14 ERC 1465 (N.D.N.Y. 1980), aff'd without opinion, 633 F.2d 206 (2d Cir. 1980) ("A federal agency is not required to conduct public hearings before making a threshold determination as to the need for an EOS so long as members of the public are given the opportunity to submit facts which might bear upon the agency decision.")

Q. Statute of Limitations

United States v. Telluride Co., 146 F.3d 1241, 46 ERC 1897 (10th Cir. 1998) (injunctive relief claim for restoration of wetlands not barred by statute of limitations because § 2462 applies only to penalties)

United States v. Banks, 115 F.3d 916 (11th Cir. 1997) (held that 28 USC § 2462 does not bar Corps suit seeking injunctive relief against a landowner who filled wetlands without a permit; § 2462 does not apply to equitable remedies, and the concurrent remedy rule does not apply against the government when it is acting to vindicate a sovereign or public interest)

United States v. Fisher Sand & Gravel, No. 2-98-CV-00276 (D. Wyo. May 17, 1999) (held that 5-year SOL in wetlands cases is tolled until any continuing violation is remedied.")

United States v. Reeves, 923 F. Supp. 1530, 1534, 42 ERC 1283 (D.Fla. 1996) (404 enforcement action not barred by SOL because violation is continuing one for as long as fill remains, so 5-year SOL had not begun to run)

United States v. Telluride Co., 884 F. Supp. 404, 41 ERC 1273 (D. Colo. 1995), rev'd in part, 146 F.3d 1241, 46 ERC 1897 (10th Cir. 1998) (404 penalty case barred by 5-year statute of limitations; held that discharge of fill in violation of 301 is not a continuing

violation and the 5-year statute of limitations begins to run from the date of discharge; concurrent remedy rule also bars injunctive relief)

United States v. Windward Properties, Inc. 821 F. Supp. 690, 695-96 (N.D. Ga. 1993) (denying defendant's motion for summary judgment because a genuine question of fact existed as to whether plaintiff "knew or reasonably should have known" that defendant was violating the CWA more than five years prior to bring the action)

In re Britton Construction Co., Docket No. CWA-III-096 (May 21, 1997), aff'd, 8 E.A.D. ___ (EAB 1999) (discharge of fill material into regulated wetlands without a permit is a continuing violation that tolls the statute of limitations so long as the illegal fill remains in place)

See also STATUTE OF LIMITATIONS; WETLANDS: Penalties

R. Takings

U.S. Const. amend. V ("No person shall be . . . deprived of life, liberty, or property without due process of law; nor shall property be taken for public use, without just compensation.")

Good v. United States, 1999 U.S. App. LEXIS 20826 (Fed. Cir. 1999) (held no taking where wetland permit was denied at recommendation of Fish & Wildlife because of threat to endangered species; court held that claimant lacked reasonable investment-backed expectations both at the time of purchase and at the time he actually initiated development activities)

Florida Rock Industries, Inc. v. United States, 1999 U.S. Claims LEXIS 215 (Fed. Cl. 1999) (held that 1980 wetlands permit denial led partial regulatory taking compensable under the 5th Amend.; court awarded $752,444 plus interest as result of claimant not being able to mine limestone on property purchased before wetlands laws were passed)

Robbins v. United States, 46 ERC 1505 (Cl. Ct. 1998) (takings claim denied where Corps found wetlands to be present because (1) cancellation of sales contract for site by prospective buyer did not constitute government taking, (2) assertion of regulatory authority over site did not constitute taking, (3) diminution of value of property did not amount to deprivation of all economically beneficial or productive use of site, (4) owners did not show their investment-backed expectations for developing site were reasonable, and (5) takings claims based on denial of 404 permit is not ripe for review where owners did not apply for permit)

Norman v. United States, 38 Fed. Cl. 417 (Cl. Ct. 1997) (summary judgment granted in favor of government for taking where Corps delineated wetland prior to sale of proper then redelineated after sale to find more wetlands on property; held that owner must be able to show a legally-cognizable property interest at the time of the alleged taking)

Good v. United States, 39 Fed. Cl. 81, 45 ERC 1518 (Cl. Ct. 1997) (held no taking of real property where property retained economic value after denial of § 404 permit and

plaintiff was aware of restrictive regulations prior to purchase and during investment in property)

Heck and Assoc. v. United States, 37 Fed. Cl. 245, 44 ERC 1642 (Cl. Ct. 1997), aff'd, 134 F.3d 1468, 46 ERC 1381 (Fed. Cir. 1998) (after plaintiff applied for a 404 permit, Corps requested additional information re alternative analysis -- plaintiff challenged agency's need for additional information and did not provide it; Corps subsequently canceled the permit application as incomplete; held that takings claim not ripe for adjudication because no substantive determination by federal government had been made regarding plaintiff's 404 permit application)

Broadwater Farms Joint Venture v. United States, 46 ERC 1158 (Fed. Cir. 1997) (Corps prohibition on development of 12 of 51 lots within development does not constitute a categorical taking requiring compensation under the 5th Amendment; remanded for determination of whether a partial regulatory taking has occurred; court held that it would rarely consider each lot of a residential subdivision a separate parcel because doing so would cause the Corps' protection of wetlands to "constitute a taking in every case where it exercises its statutory authority.")

Bayou des Families Development Corp. v. United States, 1996 U.S. Claims LEXIS 226 (Cl. Ct. 1996), aff'd, 130 F.3d 1034 (Fed. Cir. 1997) (takings claim held time barred where private project was denied 404 permit in 1979 to build levee and local government finally received permit, but for levee that would not protect the private development)

Broadwater Farms Joint Venture v. United States, 42 ERC 1831 (Cl. Ct. 1996) (court determined that plaintiff's loss in value due to Corps. cease and desist order was 28-44%, and held that this was insufficient to constitute a taking; also held that taking claim is limited to property owned at time of takings claim (owner bought a parcel for $592K, sold part of it for $900K before claim made)

City National Bank of Miami v. United States, 33 Fed. Cl. 759 (1995) (takings claim denied where local zoning laws would have prohibited the development even if the Corps had granted the 404 permit; the mere "fact that the federal government shares a common goal with states and localities . . . [is not sufficient to] openthe Federal Government to liability for hte effects of" state actions)

Plantation Landing Resort v. United States, 30 Fed. Cl. 63, aff'd 39 F.3d 1197, cert. denied, 514 U.S. 1095, 115 S. Ct. 1822 (1995) (held that denial of dredge and fill permit not a taking)

Marks v. United States, 34 Fed. Cl. 387 (1995) (no takings claim for order to stop filling lands below high water mark because such property is within the navigational servitude of the U.S. and are subject to the exclusive control of the federal government; also held that government's actions did not leave the plaintiff's land devoid of economic value, a prerequisite for a takings claim)

Florida Rock Industries, Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994), reh'd denied and suggestion en banc declined, 1994 U.S. App. LEXIS 16257 (June 21, 1994)

("the amount of just compensation should be proportional to the value of the interest taken as compared to the total value of the property, up to and including total deprivation, wether the taking is by physical occupation for the public to use as a park, or by regulatory imposition to preserve the property as a wetland so that it may be used by the public for ground water recharge and other ecological purposes." To determine this the court stated: "[A]re there direct compensating benefits accruing to the property, and others similarly situated, flowing from the regulatory environment? Or are benefits, if any, general and widely shared through the community and the society, while the costs are focused on few? Are alternative permitted activities economically realistic in light of the setting and circumstances, and are they realistically available? In short has the government acted in a responsible way, limiting the constraints on property ownership to those necessary to achieve the public purpose and not allocating to some number of individuals, less than all, a burden that should be borne by all?")

Creppel v. United States, 41 F.3d 627 (Fed. Cir. 1994) (takings claim against EPA and Corps held barred by statute of limitations (28 U.S.C. § 2401; claim arose from flood control project begun in the 1960's, that was significantly altered upon EPA's demand to retain wetlands in question rather than drain them)

Loveladies Harbor, Inc. v. United States, 27 F.3d 1545 (Fed. Cir. 1994), aff'd, 28 F.3d 1171 (Fed. Cir. 1994) (in 404 permit denial case, held that value of other land developed or sold before current regulatory environment existed should not be considered in determining regulatory taking of land at issue)

Tabb Lakes, Ltd. v. United States, 10 F.3d 769 (Fed. Cir. 1993) (held that issuance of cease and desist order requiring that plaintiff obtain a wetlands permit does not constitute temporary taking)

Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153, 31 ERC 1847 (1990) (denial of fill permit held to constitute a taking where wetland was purchased in 1956 and denial resulted in near complete loss of economic value of land)

Florida Rock Industries, Inc. v. United States, 791 F.2d 893, 898 (Fed. Cir. 1986), cert. denied, 479 U.S. 1053 (1987) (denial by Corp of permit to fill wetland held to be a taking where property was purchased in 1972, prior to promulgation of wetlands regulations, and fair market value of property fell substantially as a consequence of the wetlands classification)

Avoyelles Sportman's League, Inc. v. Marsh, 715 F.2d 897, 923, 19 ERC 1841 (5th Cir. 1983) (resolution of takings claim delayed because "there had not yet been a determination whether landowners can put their property to uses they desire")

Jentgen v. United States, 657 F.2d 1210 (Ct. Cl. 1981) (court rejected takings claim based on denial of permits to fill Florida mangroves because the upper range of the estimated value of the property's uplands (20 acres) and those wetlands that the Corps offered to permit (20 of the 80 acres applied for) was equal to the amount Jentgen originally paid for the property.")

Allain-Lebreton Co. v. Dept. of Army, 670 F.2d 43, 17 ERC 1169 (5th Cir. 1982) (since Corps' rejection of plaintiff's land as a site for flood control levee because land enclosed a tract of wetlands was not a taking, and in fact was a refusal to take, there was no case or controversy and complaint was properly dismissed)

United States v. Byrd, 609 F.2d 1204, 13 ERC 1954 (7th Cir. 1979) (takings claim dismissed as premature because claimant had not yet applied for Corps permit; argument rejected that requirement to obtain a permit was tantamount to a taking of property)

Executive Order No. 12630, "Government Actions and Interference With Constitutionally Protected Property Rights" (1989), codified at 3 C.F.R. § 554

Comment, *A Developer's Dream: The United States Claims Court's New Analysis of Section 404 Takings Challenges*, 18 B.C. Envtl. Aff. L. Rev. 319 (1991)

Note, *The Taking of Wetlands under Section 404 of the Clean Water Act*, 17 Envtl L. 111 (1988)

See also TAKINGS

S. "Tulloch" Rule

National Mining Assoc. v. Army Corps of Engineers, 145 F.3d 1399, 46 ERC 1769 (D.C. Cir. 1998) (Tulloch rule invalidated on grounds that "statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed rom the waters of the United States and a small portion of it happens to fall back. Because incidental fallback represents a net withdrawal, not an addition, of material, it cannot be a discharge.")

National Mining Assoc. v. Army Corps of Engineers, No. 97-5099 (D.C.Cir. 1997) (granted a motion by EPA and the Army Corps of Engineers to stay a lower court decision invalidating the wetlands "Tulloch" rule; rule, promulgated in 1993, expanded the activities regulated under § 404 of the Clean Water Act to include any discharges caused by land clearing and excavation that destroy or degrade waters of the U.S.; lower court had held that the regulation exceeded the agencies' authority under the Clean Water Act, invalidated the rule and issued an injunction forbidding the agencies from applying or enforcing the regulation)

United States v. Bay-Houston Towing Co., 33 F. Supp.2d 596, 29 ELR 21011 (E.D. Mich. 1999) (Tulloch rule held inapplicable where co. was dredge peat bog, moving peat to other part of bog and redepositing it in large quantities for drying; case involved much more than incidental fall back, and side-casting has always been regulated under 404)

United States v. Feinstein, No. 96-232-CIV-FTM-24 (D) (??, Fla.? June 12, 1998) (rejecting American Mining Conf., held that incidental fallback constitute a redeposit or addition of pollutants to waters of the U.S.; gave due deference to Corps interpretation of CWA)

National Mining Association v. Army Corps of Engineers, 962 F. Supp. 2, 44 ERC 1417 (D.D.C. 1997) (motion to amend order declaring Tulloch rule invalid denied on grounds that rule is invalid toward everyone not just the plaintiffs as the government argued)

National Mining Association v. Army Corps of Engineers, 951 F. Supp. 267, 43 ERC 2057 (D.D.C. 1997) (Corps exceeded its statutory authority when it promulgated Tulloch rule: (1) § 404 authorizes Corp. to issue permits for addition of pollutants into navigable waters at specified disposal sites, (2) incidental fallback does not constitute addition of pollutants, and (3) excavation sites are not specified disposal sites)

North Carolina Wildlife Federation v. Tulloch, Civ. No. C90-713-CIV-5-BO (E.D.N.C. 1992) (challenge to 404 permit that allowed incidental discharges; case settled, resulting in tightening of rule)

In re Slinger Drainage, Inc.,8 E.A.D. ___ (EAB 1999) (rejecting NMA case as inapplicable, held that fall-back from drain tile laying machine to be "addition of pollutants" subject to regulation under CWA, and not "incidental fallback"; distinguished NMA on grounds that discharge in NMA was merely incidental to removal of materials from wetlands, whereas in Slinger, the discharge was part of the operation to remove wetlands material, insert a drain pipe, then redeposit all of the excavated material)

64 Fed. Reg. 25119 (1999) (term "incidental fallback" removed from regulatory definition of dredge material by both Corps and EPA; "Deciding when a particular redeposit is subject to CWA jurisdiction will require a case-by-case evaluation.")

51 Fed. Reg. 41,206, 41,232 (1986) (exempted from regulation "de minimis, incidental soil movement occurring during normal dredging operations.")

T. EPA Veto of Corp.-Issued Permits (404(c))

33 U.S.C. 1344(c) (Denial or restriction of use of defined areas as disposal areas)

40 C.F.R. Part 231 (Section 404(c) Procedures)

Friends of the Crystal River v. EPA, 35 F.3d 1073, 39 ERC 1833 (6th Cir. 1994) (withdrawal of objection by EPA to 404 permit held invalid because it came after 90 period, which irrevocably passed jurisdiction over decision to Corps)

James City County v. EPA, 12 F.3d 1330, 1331, 37 ERC 2104 (4th Cir. 1993), cert. denied, 513 U.S. 823, 115 S. Ct. 87 (1994) (EPA decision to veto Ware Creek Reservoir Project under § 404(c) upheld; court relied heavily on due deference standard to determine that "adverse environmental impacts alone" would justify EPA's veto)

Hoffman Homes Inc. v. EPA, 961 F.2d 1310, 1312 n.2 (7th Cir. 1992), vacated, 999 F.2d 256 (7th Cir. en banc 1993) ("The EPA . . . has a veto power over the issuance of permits when it determines, after consulting with the Corps, that the dredging or fill materials 'will have an unacceptable adverse effect on municipal water supplies, shellfish beds . . .

wildlife, or recreational areas.'")

Holy Cross Wilderness Fund v. Madigan, 960 F.2d 1515, 1525, 23 ERL 20067 (10th Cir. 1992) ("The EPA may veto the issuance of a permit which will have an "unacceptable adverse effect" on, inter alia, a wetland ecosystem.")

National Wildlife Federation v. Hanson, 859 F.2d 313, 28 ERC 1560(4th Cir. 1988) (404(c) "authorizes the Administrator of the EPA to block or override a Corps' permit decision.")

Alameda Water & Sanitation Orders Dist. v. EPA, Civil No. 93-1032 (D. Colo. 1996) (challenge to EPA veto of "Two Forks Dam" permit upheld by finding that plaintiffs had no standing because permit applicant had no intention of building dam even if EPA veto overturned; also upheld EPA's determination that river involved is a unique and irreplaceable resource and that other alternatives to the dam would be far less damaging to the environment)

Friends of the Crystal River v. EPA, No. 1:92:CV:325 (W.D. Mich June 23, 1992) (conditional withdrawal of EPA objection to Michigan's issuance of a state wetlands permit is an unlawful attempt to revoke the Corps' statutory authority pursuant to § 404(j))

Reid v. Marsh, 20 ERC 1337, 1345 (N.D. Ohio Jan. 4, 1984) ("The statutory language [of section 404(c)] indicates that the EPA's authority in this regard is discretionary.")

Newport Galleria Group v. Deland, 618 F. Supp. 1179, 1182 (D.D.C. 1985) ("In short then, Congress gave the EPA wide discretion to determine when to initiate proceedings under section 404(c).")

44 Fed. Reg. 58,078 (1979) ("[S]ection 404(c) does not require a balancing of environmental benefits against non-environmental costs such as the benefits of the foregone project. This view is based on the language of 404(c) which refers only to environmental factors. The term "unacceptable" in EPA's view refers to the significance of the adverse effect - e.g. is it a large impact and is it one that the aquatic and wetland ecosystem cannot afford.")

S.Conf. Rep. No. 1236, 92d Cong., 2d Sess. 142 (1972) (conference committee report explaining that § 404 grants EPA the power to veto project that will adversely affect the listed resources)

Note, *Bersani v. EPA: The EPA's Authority Under the Clean Water Act to Veto Section 404 Wetland-Filling Permits*, 19 Envtl. L. 389 (1988)

U. Wetlands Determinations

National Wildlife Federation v. Hanson, 859 F.2d 313, 316 (4th Cir. 1988) (Corps and EPA have non-discretionary duty to make "reasoned wetlands determination" and citizens may sue the agencies to enforce)

Cascade Conservation League v. Segale, No. C95-781Z (W.D.Wa. Apr. 2, 1996) (motion to dismiss granted: disagreeing with Tidwell, Court held that EPA has a nondiscretionary duty to review Corps.' wetlands determination; also held that EPA's failure to reverse the Corps.' determination not reviewable under the APA because "agency inaction is presumed to be unreviewable under the APA.")

Environmental Defense Fund v. Tidwell, 837 F. Supp. 1344 (E.D.N.C. 1992) (EPA has non-discretionary duty to regulate dredged or fill material under § 1344)

National Wildlife Federation v. Hanson, 623 F. Supp. 1539 (E.D.N.C. 1985), aff'd, 859 F.2d 313 (4th Cir. 1988) (Corps determination that property was not a wetlands is arbitrary and capricious)

WHOLE EFFLUENT TOXICITY (WET)

33 U.S.C. § 1313(c)(2)(B) (if numeric limits are not available for toxic pollutants, state shall adopt criteria based on biological monitoring or assessment methods)

40 C.F.R. § 122.44(d)(1)(iv) ("When the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, that a discharge causes, has potential to cause, or contributes to an in-stream excursion above the numeric criterion for whole effluent toxicity, the permit must contain effluent limits for whole effluent toxicity.")

40 C.F.R. § 122.44(i)(1)(iv) and 40 C.F.R. § 122.41(j)(4) (use "test procedure specified in the permit for pollutants with no approved methods [as is the case with WET testing].")

Natural Resources Defense Council, Inc. v. EPA, 859 F.2d 156, 28 ERC 1401 (D.C. Cir. 1988) (EPA has authority to express permit limitations in terms of toxicity as long as the limits reflect the appropriate requirements of the CWA, as provided in 40 C.F.R. § 125.3(c)(4))

In re Arizona Municipal Storm Water NPDES Permits, 7 E.A.D. 646 (EAB 1998) (petition for evidentiary hearing rejected on multiple grounds; no WET testing required in storm water permit where state's approved toxicity implementation guidelines called for no toxicity testing in the relevant cycle of MS4 storm water permits while toxicity testing program appropriate for arid environments was being developed)

In re Florida Pulp and Paper Association & Buckeye Florida, L.P., 6 E.A.D. 49, 65 (EAB 1995) ("[T]he issue of whether a permit's designated test species are suitable surrogates for indigenous species is a genuine issue of material fact which, if adequately raised, requires an evidentiary hearing.")

In re City of Hollywood, Florida, 5 E.A.D. 157 (EAB 1994) (upheld permit provision based on state water quality standard, rejecting argument that the results of the WET were statistically invalid)

In re Broward County, Florida, 4 E.A.D. 705 (EAB 1993) (remanded to Region for factual determination of "whether the test species specified in the permit are significant to the

indigenous aquatic community and, if not , whether they will accurately predict how indigenous species would fare when exposed to Broward's effluent.")

In re American Cyanamid Co., 4 E.A.D. 790 (EAB 1993) (challenge to permit provision that prohibited any single toxicity test failure rejected; permittee had argued that EPA erred by including this provision when it knew that WET tests do not always yield accurate results; Board upheld Region's decision because it was based on 401 certification)

In re Miami-Dade Water and Sewer Authority Department, 4 E.A.D. 133 (EAB 1992) ("The range of variability of toxicity testing was obviously acceptable to the State of Florida, and that is what is determinative. Under CWA § 301(b)(1)(C), the Region is required to incorporate limitations into the permit as necessary to implement the State standard, without reviewing the scientific basis for the standard.")

In re City of Jacksonville, District II Wastewater Treatment Plant, 4 E.A.D. 150 (CJO 1992) (denial or request for evidentiary hearing on biomonitoring requirements in permit on grounds that no genuine issue of material fact raised in appeal)

In re Metropolitan Dade Co., Miami-Dade Water and Sewer Auth., 1996 EPA ALJ LEXIS 80 (ALJ Pearlstein 1996) (EPA motion for summary determination on challenge to WET testing requirements in permit denied on grounds that genuine issue of material fact existed as to whether the permittee's effluent reasonable could be considered toxic enough to require WET monitoring in the permit)

60 Fed. Reg. 53529 (1996) (final rule setting uniform WET test procedures)

54 Fed. Reg. 23,868, 23,875 (1989) ("Some commentors said EPA should use whole effluent toxicity testing only as a trigger for further investigation into the cause of the toxicity, and should not use whole effluent toxicity as an enforceable effluent limit. EPA cannot incorporate these suggestions. EPA requires whole effluent toxicity limits where necessary to meet water quality standards. EPA does not believe that a whole effluent toxicity trigger alone is fully effective because it does not, by itself, restrict the quantity, rate or concentration of pollutants in an effluent. Whole effluent toxicity limitations are enforceable in the same way as any other effluent limitation in an NPDES permit. Section 309 of the CWA provides that any single violation of an effluent limitation can be subject to an enforcement action, and section 309 applies to whole effluent toxicity limits in the same way as any other effluent limitation.")

EPA, "National Policy Regarding Whole Effluent Toxicity Enforcement" (August 14, 1995)