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August 19, 2016

Tinka Hyde (Hyde.Tinka@epa.gov) **Submitted Electronically**
Region 5 Water Division Director
United States Environmental Protection Agency
77 West Jackson Boulevard
Chicago, IL 60604-3590

RE: Petition for Withdrawal of Minnesota NPDES Program Authority
MPCA Authority to Implement Wild Rice Sulfate Water Quality Standard

Dear Ms. Hyde,

WaterLegacy appreciates the EPA's thorough investigation of our Petition for Withdrawal of Minnesota's NPDES Program Authority and the opportunity to review Minnesota's responses to EPA inquiries, including the Minnesota Attorney General's August 12, 2016 letter to the EPA. We've now had a chance to review this letter and the cases citing therein responding to EPA letters dated April 5, 2016 and June 28, 2016 asking whether the MPCA was authorized, despite recent Minnesota Session Laws restricting enforcement of the wild rice sulfate standard,[1] to administer existing federally-approved water quality standards as required under the Clean Water Act and implementing federal regulations at 33 U.S.C. §1311(b)(1)(C); 40 C.F.R. §123.25(a)(1); 40 C.F.R.§122.4 and 40 C.F.R. §122.44(d)(1).

In its inquiry, the EPA explained that the lack of authority to enforce an existing federally-approved water quality standard would provide grounds for withdrawal of a State's NPDES program pursuant to 40 C.F.R. §123.63(a)(1)(ii).

WaterLegacy believes that, when read carefully, the Minnesota Attorney General's letter admits that the MPCA does not presently have either full or unrestricted authority to enforce Minnesota's federally-approved wild rice sulfate water quality standard:

> The above-described legislative restriction is strictly limited to the Wild Rice Standard, does not affect other water quality standards or MPCA's authority to enforce those standards, and is only in place until no later than January 15, 2018 . . . MPCA also believes that it has adequate authority to revise the applicable Standard, and once the Standard is revised (subject to EPA approval), it will have full and unrestricted authority to enforce the Standard. (Minnesota Attorney General Letter, pages 4-5)

The Attorney General cites no provision of statute, regulation or case law suggesting that a State

[1] "Wild Rice Water Quality Standards," Laws of Minnesota 2015, 1st Spec. Sess. Chapter 4, Article 4, Section 136 and "Sulfate Effluent Compliance," Laws of Minnesota 2016, Chapter 165, Section 1.

that lacks the authority to implement its NPDES program in compliance with the Clean Water Act may somehow avoid the requirements of the Act if at some future time, given possible future contingencies and approvals, such authority might be secured.

The two cases cited by the Minnesota Attorney General are not on point. To the extent they address the concerns raise by EPA, they run contrary to the positions taken by Minnesota.

The first case cited by the Minnesota Attorney General, *Environmental Defense Fund, Inc. v. Costle*, 657 F. 2d 275 (D.C. Cir. 1981) pertains to EPA's approval of salinity standards for seven states. To the extent this case says anything pertinent to Minnesota's failure to implement existing water quality standards, it runs contrary to the position taken by Minnesota.

The Court of Appeals in *EDF v. Costle* explained the history of the Clean Water Act, "Section 303 of the Clean Water Act details the statutory provisions concerning water quality standards and implementation plans. Provisions regarding the maintenance of existing standards are included." 657 F. 2d at 279. The Court held that EPA was not required to propose new or revised standards for salinity because new information "which was allegedly indicative of the need for revised or new salinity standards" did not require EPA to act to replace an existing implementation plan. *Id.* at 293. "[A]lleged deficiencies within the plan do not render the current standards (now consisting of only numeric and narrative criteria and designated uses) inadequate." *Id.*

The case of American *Wildlands v. Browner*, 94 F. Supp. 2d 1150 (D. Colo. 2000) also involved a challenge to EPA's failure to promulgate new state water quality standards, rather than a state's refusal to implement existing federally-approved water quality standards. This is a diversion. EPA did not suggest in its inquiry letters to Minnesota, and no environmental group has argued that Minnesota is obligated to revise its existing wild rice sulfate standard. The concern expressed by WaterLegacy in its Petition for Withdrawal of Minnesota's NPDES Program Authority is the opposite. Whether or not Minnesota would be justified in revising its wild rice standard, until such revision is completed and approved by the EPA, our argument under the Clean Water Act is that Minnesota must enforce the *existing* federally-approved wild rice sulfate standard and may not adopt laws pertaining to its enforcement without EPA's approval in compliance with the Clean Water Act.

To the extent the *Wildlands v. Browner* case is pertinent to WaterLegacy's concerns and the questions raised by EPA, the case undermines Minnesota's argument. *Wildlands v. Browner* affirms the requirement under the Clean Water Act for states to obtain approval from EPA of changes in water quality standards. "When a state revises or adopts a new standard for water, such standards must be submitted to the Administrator of the EPA ("Administrator"), and shall be established taking into account their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, navigation, and other purposes. 33 U.S.C. § 1313(c)(2)(A)." 94 F. Supp 2d at 1153.

EPA also cannot approve a state water quality revision that conflicts with the Clean Water Act. "The CWA requires that states periodically review water quality standards and secure EPA's approval of any revision of those standards. EPA does not have the authority to approve state water quality standards that are inconsistent with the CWA. 33 U.S.C. § 1313(c)(3)." 94 F. Supp. 2d at 1160.

Based on the May 13, 2011 letter from EPA Region Five (Petition for Withdrawal Exhibit 16) as well as our own reading of the Clean Water Act, it is clear that a Minnesota law preventing enforcement of the federally-approved wild rice sulfate water quality standard would be inconsistent with the Clean Water Act, 33 U.S.C.§ 1313(c)(2)-(3). If Minnesota had sought EPA approval of its 2015 and 2016 Session Laws restricting enforcement of the wild rice sulfate standard, EPA would have been obligated to disapprove these laws.

WaterLegacy would note that there is precedent directly pertinent to the EPA's authority and obligation to act on our Petition for Withdrawal of Minnesota's NPDES Program Authority. In *Save the Valley, Inc. v. EPA*, 223 F. Supp. 2d 997,1015 (S.D. Ind. 2000), the court ordered the state of Indiana to bring its NPDES program into compliance with the Clean Water Act within 120 days and ordered that, should the State continue its failure to fulfill its obligations, within 150 days the EPA must conduct a public hearing to determine whether Indiana's NPDES program complied with the Clean Water Act. The court ruled that "absent immediate, appropriate corrective action" the EPA must provide notice and proceed to withdraw Indiana's NPDES program authority.

*Save the Valley* explained applicable requirements of the Clean Water Act:

> The EPA retains a high level of involvement and authority when a State administers its own NPDES permit program. . . . In a previous Entry denying Defendants' Rule 12(b)(1) and Rule 12(b)(6) motions to dismiss, we held that those sections of the Clean Water Act impose mandatory duties upon the Administrator of the EPA. *See Save the Valley, Inc. v. U.S. Envtl. Protection Agency,* 99 F. Supp. 2d 981 (S. D. Ind. 2000). Section 1319(a)(2) states that the EPA Administrator shall assume enforcement of a State's permit program when "the Administrator finds that violations of permit conditions or limitations … are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively …". 33 U.S.C. § 1319(a)(2). Section 1342(c)(3) states that the Administrator shall withdraw approval of a State's NPDES program when a State fails to take appropriate corrective action even after being notified by the Administrator that its program is noncompliant.

223 F. Supp. 2d at 1006. The court explained that EPA is required under the Clean Water Act to make findings when widespread violations are occurring in the State, to issue a compliance order to the State, and to give public notice if the State has not corrected the problem within 30 days. Once public notice is given, "the Administrator must enforce the permit conditions until the State remedies its problems," and, "if the State continues to fail in its enforcement of the NPDES program must withdraw approval of the State's program and make public the reasons for the withdrawal." *Id.*, *citing Save the Valley, Inc. v. EPA*, 99 F. Supp. 981, 984-985 (S.D. Ind. 2000)(Denial of dismissal under Fed. R. Civ. P. 12(b)(1) and 12(b)(6)); 33 U.S.C. §1342(c)(3).

The court opined, "The State of Indiana has an ongoing obligation to administer its NPDES program in accordance with federal statutes and regulations." 223 F. Supp. at 1008. As in Minnesota, the record in Indiana reflected EPA Region Five's efforts to obtain NPDES program compliance through an agreement with the State and advice to Indiana of its obligation to aggressively implement the NPDES program for facilities of concern and "when violations are discovered, enforce compliance." *Id*. at 1010-1011. The court in *Save the Valley* ordered the

State to come into compliance with Clean Water Act NPDES requirements, emphasizing "withdrawal will be appropriate if Indiana continues to fail to issue NPDES or NPDES-equivalent permits as required by the Act." *Id*. at 1014.

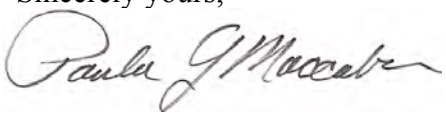
WaterLegacy appreciates the deliberate process by which the EPA has provided Minnesota with the opportunity to respond to our allegations that MPCA has failed to reissue expired and out-of-date NPDES permits for mining facilities and the opportunity to address WaterLegacy's concerns that the MPCA lacks requisite authority to enforce the existing federally-approved wild rice sulfate standard through NPDES permits. We believe that the July 13, 2016 letter of MPCA's Metallic Mining Sector Director, Ann Foss, as well the Minnesota Attorney General's letter of August 12, 2016 confirm the allegations made in WaterLegacy's July 2, 2015 Petition for Withdrawal of Minnesota NPDES Program Authority.

Ms. Foss' letter informed the EPA that, pending revision of the wild rice sulfate standard, the MPCA has no intention to reissue "delayed" permits for mining facilities. A documented in WaterLegacy's Petition for Withdrawal and Exhibits[2], these expired permits are subject to a prior Performance Partnership Agreement with the EPA and have multiple deficiencies, including "monitor only" requirements for toxic metals and other inadequate controls of pollutants. The Minnesota Attorney General has now confirmed that the MPCA lacks the authority to enforce the wild rice water quality standard, at least until the standard is revised.

As WaterLegacy's Petition for Withdrawal and Exhibits demonstrate, there is ample evidence that the MPCA initially concluded that the existing wild rice sulfate standard was "needed" and "reasonable," that a political controversy suppressed this opinion, and that elected leaders in Minnesota believe they should defer to a regulated party's insistence that it will not "agree" to a permit with the existing standard. Revision of Minnesota's existing wild rice sulfate standard will be controversial and may not comply with federal regulations that require changes in water quality standards to have an adequate scientific basis. 40 C.F.R. §§131.5,131.6. It should not be assumed that revisions of Minnesota's existing wild rice sulfate standard will be completed, let alone approved by January 2018.

WaterLegacy believes the time has come for EPA to proceed with findings that cause exists to commence hearings for withdrawal of Minnesota NPDES Program Authority. The Clean Water Act does not allow States, whether with the best of intentions or under the most egregious political pressure, to pick and choose if and when they will reissue expired and inadequate NPDES permits or which federally-approved water quality standards they will or will not enforce.

Sincerely yours,



Paula Goodman Maccabee
WaterLegacy Counsel/Advocacy Director

Enclosures (cited cases)

[2] Petition for Withdrawal and Exhibits are available at *NPDES Petition for Program Withdrawal in Minnesota*, https://www.epa.gov/mn/npdes-petition-program-withdrawal-minnesota

# Environmental Defense Fund, Inc. v. Costle

United States Court of Appeals for the District of Columbia Circuit

October 14, 1980, Argued ; April 21, 1981, Decided

No. 79-2432

**Reporter**
657 F.2d 275; 1981 U.S. App. LEXIS 14102; 211 U.S. App. D.C. 313; 11 ELR 20459; 16 ERC (BNA) 1185

ENVIRONMENTAL DEFENSE FUND, INC., PLAINTIFF-APPELLANT v. DOUGLAS M. COSTLE, as Administrator, U.S. Environmental Protection Agency, et al ., DEFENDANTS-APPELLEES

**Prior History:** **[**1]** Appeal from the United States District Court for the District of Columbia (D. C. Civil Action No. 77-1436).

## Core Terms

salinity, basin, River, numeric, water quality standards, levels, district court, water quality, pollution, revised, regulations, promulgate, projects, agency's action, on-farm, measures, requirements, provisions, Sections, implementation plan, plans, indicates, mandated, concentrations, narrative, alternatives, irrigation, basinwide, upper, establishment

**Counsel:** George W. Pring, Denver, Colo., with whom Paula C. Phillips, Denver, Colo., and William A. Butler, Washington, D. C., were on the brief, for appellant.

Lee C. Schroer, Atty., Environmental Protection Agency, and Thomas H. Pacheco, Atty., U. S. Dept. of Justice, Washington, D. C., with whom Angus MacBeth, Deputy Asst. Atty. Gen., and Edward J. Shawaker, Atty., U. S. Dept. of Justice, Washington, D. C., were on the brief, for federal appellees. James W. Moorman, Atty., U. S. Dept. of Justice, Washington, D. C., also entered an appearance for federal appellees.

Dennis Montgomery, Asst. Atty. Gen., Denver, Colo., with whom Evelyn R. Epstein, Asst. Atty. Gen., Phoenix, Ariz., Bruce S. Garber, Asst. Atty. Gen., Santa Fe, N. M., Dallin W. Jensen and Richard L. Dewsnup, Asst. Attys. Gen., for the State of Wyo., Salt Lake City, Utah, Emil Stipanovich, Jr., Deputy Atty. Gen., Los Angeles, Cal., and James V. LaVelle, Deputy Atty. Gen., Las Vegas, Nev., were on the brief, for state appellees.

**Judges:** Before TAMM and ROBINSON, Circuit Judges, and HARLINGTON WOOD, Jr., [*] Circuit **[**2]** Judge, United States Court of Appeals for the Seventh Circuit.

**Opinion by:** WOOD, Jr.

## Opinion

**[*277]** Plaintiff-appellant, the Environmental Defense Fund, Inc. ("EDF"), seeks review of an order and judgment denying its motion for summary judgment and granting federal and state defendants' cross-motions for summary judgment. EDF challenged certain action and inaction by the Environmental Protection Agency ("EPA"), the Department of the Interior ("Interior"), and the Bureau of Reclamation ("Reclamation") [1] concerning the control and abatement of salinity in the Colorado River. The seven states in the

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[*] Sitting by designation pursuant to 28 U.S.C. § 291(a) (1976).

Opinion for the court filed by Circuit Judge HARLINGTON WOOD, Jr.

[1] On November 6, 1979, Reclamation's name was changed to the Water and Power Resources Service. To maintain consistency with past references, the Service will be referred to as "Reclamation" in this opinion.

Colorado River Basin Arizona, California, Colorado, New Mexico, Nevada, Utah and Wyoming were granted leave to intervene as party defendants. [2]

**[**3]** EDF complains that EPA violated Sections 303(a)-(e) of the Clean Water Act, 33 U.S.C. §§ 1313(a)-(e) (1976 and Supp. III 1979); that both Reclamation and Interior violated Section 201 of the Colorado River Basin Salinity Control Act ("CRBSCA"), 43 U.S.C. § 1591 (1976 and Supp. III 1979); and that EPA, Interior, and Reclamation violated Section 102(2)(E) of the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4332(2)(E) (1976 and Supp. III 1979). EDF sought an order from the district court which would have required EPA to promulgate regulations setting forth water quality standards, implementation plans, and waste load allocations for salinity in the Colorado River Basin; **[*278]** and requiring EPA, Reclamation, and Interior to study, develop, and describe alternative methods for salinity control.

EDF alleged six distinct but related claims for relief against three federal defendants regarding salinity levels in the Colorado River. The district court, in an unpublished opinion dated October 3, 1979, entered judgment for the federal and state defendants on all six claims. Environmental Defense Fund, Inc. v. Costle, 13 Envir.Rep. (BNA) 1867 (D.D.C. Oct. 3, 1979).

**[**4]** The district court held: in Claim One, that EPA acted reasonably and neither arbitrarily nor capriciously in approving the water quality standards for salinity which were adopted by the seven basin states pursuant to Sections 303(a) and (b) of the Clean Water Act; [3] in Claim Two, that EPA had not acted unreasonably in failing to propose revised or new water quality standards under Section 303(c)(4)(B) for the seven states; in Claim Three, that EPA was not required to promulgate total maximum daily loads ("TMDL's") for salinity for the seven states, Section 303(d)(2); in Claim Four, that EDF's attack upon EPA's alleged failure to remedy inadequate implementation provisions and lack of compliance schedules in the respective states' plans was without merit, Section 303(e)(3)(F); and in Claims Five and Six, that EDF's argument that the federal defendants had violated Section 201 of the CRBSCA, 43 U.S.C. § 1591 and Section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E), by not studying and implementing alternative salinity controls, was without merit.

**[**5]** This appeal involves a challenge by EDF of the district court's entry of judgment on behalf of the federal and state defendants on all six claims. Also involved are two additional issues related to the proper scope of review for the court and the need for a statement of basis and purpose as required by Section 4(c) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(c) (1976 and Supp. III 1979). We affirm the district court's order and entry of judgment on all issues.

I. THE CLEAN WATER ACT

The Clean Water Act has evolved into its current form after more than thirty years of legislative recognition of technological advancements in the field of water pollution control. The history of the Act and its predecessors, including the Federal Water Pollution Control Act ("FWPCA") [4] and the

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[2] This court affirmed the district court's denial of certain intervention applications. EDF, Inc. v. Costle, 79 F.R.D. 235 (D.D.C.1978), aff'd, 12 ERC 1255, D.C. Cir. No's. 78-1471, 78-1515, 78-1566 (unpublished per curiam order and memorandum of July 31, 1978), cert. denied, 439 U.S. 1071, 99 S. Ct. 840, 59 L. Ed. 2d 36 (1979).

[3] Sections of the Clean Water Act are referred to in this opinion by their designations in the Statutes at Large. The parallel United States Code citations for the sections to which most frequent reference is made are as follows:

Section 208 33 U.S.C. § 1288 (1976 and Supp. III 1979)

Section 301 33 U.S.C. § 1311 (1976 and Supp. III 1979)

Section 303 33 U.S.C. § 1313 (1976 and Supp. III 1979)

Section 304 33 U.S.C. § 1314 (1976 and Supp. III 1979)

Section 307 33 U.S.C. § 1317 (1976 and Supp. III 1979)

Section 402 33 U.S.C. § 1342 (1976 and Supp. III 1979)

The parallel United States Code citation for Section 102(2)(E) of NEPA is 42 U.S.C. § 4332(2)(E) (1976 and Supp. III 1979). The parallel United States Code citation for Section 202(a) of the CRBSCA is 43 U.S.C. § 1591(a) (1976 and Supp. III 1979).

[4] Act of June 30, 1948, ch. 758, 62 Stat. 1155.

FWPCA Amendments of 1972, [5] **[**6]** has been detailed in prior opinions construing various portions of the statute. [6] Our summary, therefore, will be limited to the statutory provisions directly involved in this appeal.

**[*279]** A. Water Quality Standards Under the Clean Water Act

Water quality standards initially appeared in Section 5 of the Water Quality Act of 1965 [7] as the primary method of water pollution control. Under the 1965 Act, the standards consisted of three basic elements: (1) a "designated use" such as public water supply, recreational, fish propagation, agricultural, or industrial uses; (2) water quality "criteria" for various pollutants, which are expressed in numeric concentration limits or in narrative form and are sufficiently stringent to protect the designated use; [8] and (3) a plan for the implementation and enforcement **[**7]** of the water quality criteria. [9] The states were each required to adopt water quality standards for the waters within their boundaries, and if they failed to adopt complying standards, the federal government was required to promulgate standards in cooperation with state officials. [10]

The significant role of water quality standards in controlling water pollution was altered by the passage in 1972 of the FWPCA Amendments. [11] The Amendments were enacted, in part, from a recognition in Congress of the lack of efficacy of the existing water quality standards as the major vehicle **[**8]** for pollution control and abatement. [12] The Amendments assigned secondary priority to the standards and placed primary emphasis upon both a point source discharge permit program and federal technology-based effluent limitations (specified maximum levels of pollution allowed to be discharged by an individual source). Clean Water Act §§ 301, 302, 307 and 402. The standards, however, were retained in the newly enacted Section 303, and their use updated accordingly.

B. Section 303 Overview [13]

**[**9]** Section 303 of the Clean Water Act details the statutory provisions concerning water quality standards and implementation plans. Provisions regarding the maintenance of existing standards are included, as are Congressional mandates to EPA to promulgate regulations establishing standards for a state in the event of a failure to either submit or correct deficient standards. Sections 303(a) and (b). A mechanism for review, update, and revision of the standards is also enumerated. Section 303(c). In addition, the identification of state waters with insufficient controls is required, as is the establishment of maximum daily load limits for certain pollutants. Section 303(d). A continuing planning process must also be instituted. Section 303(e).

C. Section 208 Introduction

Section 208 of the Act contains provisions for area-wide waste treatment management. The Section requires the identification and designation of areas within the states which have substantial water

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[5] Pub.L.No.92-500, 86 Stat. 816. The 1972 Amendments were updated in the Clean Water Act of 1977. Pub.L.No.95-217, 91 Stat. 1566 (passed Dec. 27, 1977), as codified at 33 U.S.C. §§ 1251 et seq. (1976 and Supp. III 1979).

[6] See, e. g., E. I. DuPont de Nemours and Co. v. Train, 430 U.S. 112, 116-21, 97 S. Ct. 965, 969-71, 51 L. Ed. 2d 204 (1977); EPA v. California ex rel. State Water Resources Control Board, 426 U.S. 200, 202-09, 96 S. Ct. 2022, 2023-26, 48 L. Ed. 2d 578 (1976); American Meat Institute v. EPA, 526 F.2d 442, 444, 446 (7th Cir. 1975); Natural Resources Defense Council, Inc. v. Train, 166 U.S.App.D.C. 312, 510 F.2d 692 (1975), for a summary and explanation of the Act.

[7] Pub.L.No.89-234, 79 Stat. 903, amended, 84 Stat. 91, as codified at 33 U.S.C. §§ 1151 et seq. (1976 and Supp. III 1979).

[8] Section 10(c)(1), 79 Stat. 907, 33 U.S.C. § 1160(c)(1) (1965).

[9] Id.

[10] Sections 10(c)(1)-(4), 79 Stat. 907, 33 U.S.C. §§ 1160(c)(1)-(4) (1965). See EPA v. California ex rel. State Water Resources Control Board, 426 U.S. 200, 202 n.4, 96 S. Ct. 2022, 2023 n.4, 48 L. Ed. 2d 578 (1976).

[11] Pub.L.No.92-500, 86 Stat. 816 (1972).

[12] Senate Committee on Public Works, 93d Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972, at 246 (1973) (hereinafter Leg. Hist.).

[13] As construction of this section of the Clean Water Act comprises the gravamen of four of EDF's claims, the requisite statutory interpretation and background will appear in our discussion of the respective issues, infra.

quality problems. Section 208(a). A continuing area-wide planning process must be instituted which results in the formulation of a water quality management implementation plan. Section 208(b). [14] Regional operating **[**10]** agencies must be designated to effect the plan and revise it as necessary. Sections **[*280]** 208(c) and 208(d). [15] The regional agencies are primarily responsible for the control and abatement of salinity under the current statutory scheme, as salinity impacts often result from nonpoint sources.

## II. THE COLORADO RIVER SALINITY PROBLEM

### A. Background

The Colorado River flows over 1,400 miles from the Rocky Mountains to the Gulf of California, draining a basin of 244,000 square miles in the United States and an additional 2,000 square miles in Mexico. Portions of seven states lie within the River basin: Colorado, New Mexico, Utah, and Wyoming (chiefly comprising the "upper basin"), and Arizona, California, and Nevada (comprising the "lower basin" or the "lower main stem"). The **[**11]** basin itself has an estimated population of 2,250,000 in the United States portion and an additional 500,000 in Mexico. With the aid of trans-basin diversions, the Colorado provides full or supplemental water for agriculture, industry, and municipal uses for an additional 12,000,000 residents of non-basin population centers such as Denver, Salt Lake City, Cheyenne, Albuquerque, and Southern California.

From a basinwide perspective, salinity is the most significant pollutant in the River. [16] The record indicates that damages to the River and its populace from salinity in the United States portion of the Colorado River system are approximately $ 53 million annually. By the year 2000, these damages are estimated to reach $ 124 million annually if control measures are not applied. [17] Disregarding flow variances from year to year, the record also indicates that salinity concentrations will increase progressively if adequate salinity control measures are not effected. These salinity increases will occur due to increased agricultural and industrial use, and trans-basin diversions. Estimates of the present value of salinity damage, through the year 2000, range from $ 1 billion to $ **[**12]** 1.5 billion. [18]

It is obvious that salinity in the River is a very significant problem with not only serious impact in the basin, but also indirect consequences **[**13]** far outside the basin. It is deserving of the best efforts of all involved to reach a satisfactory solution.

### B. Salinity Control Efforts to Date

Federal and state salinity control efforts for the Colorado date back twenty years. In an effort to address the salinity problem, the basin states joined with EPA and its predecessor agencies, in enforcement conferences. Studies of the nature of the salinity problem as well as methods to alleviate its significant impact were undertaken. With the passage of the Water Quality Act of 1965, which mandated the states to adopt general water quality standards, the states and federal government began working together to evaluate the feasibility of and need for the development of water quality standards for salinity. [19] The record indicates that in 1971 EPA published a report which recommended that salinity criteria be established at several key locations throughout the River basin. In April 1972, **[*281]** EPA and representatives of the seven basin states unanimously recommended, inter alia, that:

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[14] Our construction of this subsection comprises a significant portion of EDF's Claim Four, infra.

[15] Section 208 also contains provisions which are not of import in this appeal, and are therefore not detailed herein.

[16] Salinity is a term which denotes the concentration of dissolved mineral salts and solids in the water. Salinity concentrations of the Colorado increase from the River's headwaters to its mouth. The increase is a result of two basic processes: salt loading (input of salts into the River's waters) and salt concentrating (removal of purer upstream water so that the same tonnage of salts is carried in a lesser quantity of water). Salt loading results from both natural conditions and from human activities. Salt concentrating occurs when water is lost through evaporation or transpiration, or when purer water is either diverted from the basin or is not returned to the River after in-basin use.

[17] U.S. Bureau of Reclamation, et al., Final Environmental Statement: Colorado River Water Quality Improvement Program I-12 (1977).

[18] Id. at I-21.

[19] It should be noted that the promulgation of specific salinity standards was not required by the Act.

(1) a salinity policy be adopted for the River system having as its objective the maintenance of salinity levels at or below concentrations found **[**14]** in 1972 in the River's lower main stem; (2) treatment of salinity be viewed as a basinwide problem; and (3) a high priority be assigned to certain water quality projects with the objective of achieving stabilization of salinity levels in the lower basin at the earliest possible date. [20]

After passage of the FWPCA Amendments in 1972, EPA, pursuant to Section 303(a) (1), began to review all current state water quality standards. As part of this review, EPA, in January 1973, notified six of the basin states that establishment of complying water quality standards for salinity would be required. [21] **[**16]** In June 1974, EPA proposed regulations **[**15]** establishing its "Salinity Control Policy Standards and Procedures," 39 Fed.Reg. 20703-20704 (June 13, 1974), and after completion of the requisite notice, comment, and hearing procedures, the agency promulgated final salinity regulations in December 1974. 39 Fed.Reg. 43721-43723 (Dec. 18, 1974), 40 C.F.R. §§ 120 et seq. (1974). [22] The salinity regulations included three major elements: (1) maintenance of salinity levels in the lower main stem at or below the average level during 1972, 40 C.F.R. § 120.5(b) (1974); (2) adoption by the states of numeric criteria for "appropriate points" on the River system, 40 C.F.R. § 120.5(c)(1) (1974); and (3) development by the states of a plan to implement the standards, 40 C.F.R. § 120.5(c)(2) (1974). The regulation, in addition, required each basin state to establish specific numeric criteria by October 18, 1975. 40 C.F.R. § 120.5(c) (1974).

In June 1975, prior to the EPA deadline, the Forum issued the "Proposed Water Quality Standards for Salinity Including Numeric Criteria and Plan of Implementation for Salinity Control." This report was modified in August 1975 and was subsequently adopted by each of the basin states as their water quality standards for salinity and related plans of implementation. After a public comment period, EPA, in November 1976, determined that the plans and water quality standards met the requirements of the Clean Water Act. Section 303(c) of the Act requires a review of these standards at least once every three years.

C. Elements of the State Water Quality Standards for Salinity

The states' water quality standards for salinity include both narrative and numeric criteria, a plan of implementation, and other factual information on salinity in the Colorado River. The numeric criteria were established at three key points on the lower main stem of the River employing **[**17]** the flow-weighted average annual salinity concentrations for the year 1972. [23] [24]

**[**18]** **[*282]** In addition, each basin state adopted a proposal for a water-quality monitoring and analysis program as an integral segment of the standards. The program's purpose is to provide information on a basinwide basis for plan

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[20] EPA, Proceedings of the Reconvened Seventh Session of the Conference in the Matter of Pollution of the Interstate Waters of the Colorado River and Its Tributaries Colorado, New Mexico, Arizona, California, Nevada, Wyoming, Utah, 215-218 (1972) (hereinafter Proceedings).

[21] Pursuant to EPA's determination that salinity standards would be mandated, the seven basin states organized the Colorado River Basin Salinity Control Forum ("Forum") in late 1973. The Forum was established as an interstate mechanism for cooperation among the basin states in the development of water quality standards for salinity.

[22] The record indicates that the Forum was instrumental in aiding EPA to propose and ultimately promulgate the 1974 salinity regulation.

[23] These values were determined by Reclamation from daily flow and salinity data collected by the U.S. Geological Survey and Reclamation itself. The River system is subject to a highly variable annual flow and these concentration values are calculated to present a standard for comparison based upon an average flow.

[24] The criteria are as follows:

Go to Table1

The lower main stem of the River is defined as that portion from Hoover Dam to Imperial Dam. These three points were selected, as the record shows, because of their significant locations. Nevada diverts the Colorado water from Lake Mead for use in the Las Vegas area, and the returns enter the Lake just upstream from Hoover Dam. The gaging station below Parker Dam is immediately downstream of the major Lake Havasu diversion for the Metropolitan Water District of Southern California. Large agricultural areas in the Imperial and Coachella Valleys in California, and the Yuma area in Arizona and California, are served by diversions at Imperial Dam.

evaluation. Seventeen points on the River were selected to aid in both the measurement of the effectiveness of salinity control projects and programs, and to serve as a continuous informational source of salinity levels throughout the entire basin. The monitoring points are not locations where numeric criteria are established, except at the three key points on the lower main stem. The majority of the points are, in fact, located in the upper-basin. The points are usually the lowest locations near statelines at which measurements are taken on the River's major tributaries.

The water quality standards also include narrative provisions which require salinity to be viewed as a basinwide problem. The provisions' purpose is to maintain salinity at or below 1972 levels found in the River's lowest reaches. Allowances are made, within the narrative provisions, for temporary increases above the 1972 levels, on the condition that control measures to offset **[**19]** such increases are included in the implementation plan.

The water quality standards for salinity also include a plan of implementation (hereinafter "1975 plan"). The plan details various federal and nonfederal projects and programs for the control of salinity; reviews possible future salinity control efforts; provides for review and revision, as needed, of the water quality salinity standards; and estimates model projections of future flow levels, water uses, and salinity levels. [25] The primary goal of the plan is to reduce the salt load of the River. The principal components of the 1975 plan are as follows: [26] (1) prompt construction and operation of four initial salinity control units authorized by Section 202 of the CRBSCA, 43 U.S.C. § 1592 (1976 and Supp. III 1979); (2) future construction of the twelve other units listed in Section 203 of the CRBSCA, 43 U.S.C. § 1593 or their equivalents after receipt of favorable planning reports; (3) the placing of effluent limitations, principally under the National Pollution Discharge Elimination System ("NPDES"), on industrial dischargers, Clean Water Act, Section 402; (4) the reformulation of previously authorized, but unconstructed, **[**20]** federal water projects to reduce the salt loading effect; (5) the use of saline water for industrial uses whenever practical; and (6) the institution of miscellaneous water user programs and the commencement of future possible salinity control programs. The 1975 plan is categorized into four separate components: (1) control of existing point sources; (2) diffuse source control; (3) irrigation source control; and (4) control of new point sources.

## III. JUDICIAL REVIEW UNDER THE APA

Before turning to the merits of EDF's challenges, we must briefly detail the appropriate scope and standard of review. We must also address the need for preparation of a statement of basis and purpose by EPA, as a prerequisite to approving the state water quality standards for salinity.

### A. Standard of Review

The **[**21]** standard of review when ruling upon a challenge to informal agency action is governed by Section 10(e)(2)(A) of the APA, 5 U.S.C. § 706(2)(A) (1976 and Supp. III 1979), which provides that the reviewing court shall:

**[*283]** (2) hold unlawful and set aside agency action, findings, and conclusions found to be

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.... [27]

This "arbitrary and capricious" standard of review is a highly deferential one, Ethyl Corp. v. EPA, 176 U.S.App.D.C. 373, 541 F.2d 1, 34 (en banc), cert. denied, 426 U.S. 941, 96 S. Ct. 2662, 49 L. Ed. 2d 394 (1976), which presumes the agency's action to be valid. [28] Citizens to Preserve Overton Park, Inc.

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[25] The streamflow estimates in the plan range from twelve to sixteen million acre-feet, and the depletion levels include water use estimates characterized as low, moderate, or high.

[26] The 1975 plan, at ii.

[27] See Weyerhaeuser Co. v. Costle, 191 U.S.App.D.C. 309, 590 F.2d 1011, 1024 (1978); Ethyl Corp. v. EPA, supra, 541 F.2d at 33-34; Sierra Club v. EPA, 176 U.S.App.D.C. 335, 540 F.2d 1114, 1123-24 (1976), vacated and remanded sub nom., Montana Power Co. v. U.S. E.P.A., 434 U.S. 809, 98 S. Ct. 40, 54 L. Ed. 2d 66 (1977).

[28] The burden of overcoming this presumption is upon the party challenging the agency action. Mt. Airy Refining Co. v. Schlesinger, 481 F. Supp. 257, 264 (D.D.C.1979), citing Udall v. Washington, Virginia & Maryland Coach Co., 130 U.S.App.D.C. 171, 398 F.2d 765 (1968), cert. denied, 393 U.S. 1017, 89 S. Ct. 620, 622, 21 L.

v. Volpe, 401 U.S. 402, 419, 91 S. Ct. 814, 825, 28 L. Ed. 2d [**22] 136 (1971); National Small Shipments Traffic Conference, Inc. v. C.A.B., 199 U.S.App.D.C. 335, 342, 618 F.2d 819, 826 (1980). This standard is viewed as a narrow one, which forbids a court from substituting its judgment for that of the agency. Citizens to Preserve Overton Park, Inc. v. Volpe, supra, 401 U.S. at 416, 91 S. Ct. at 823; Montana Power Co. v. EPA, 608 F.2d 334, 344 (9th Cir. 1979); Ethyl Corp. v. EPA, supra, 541 F.2d at 34. The standard mandates judicial affirmance if a rational basis for the agency's decision is presented, Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 290, 95 S. Ct. 438, 444, 42 L. Ed. 2d 447 (1974); Ethyl Corp. v. EPA, supra, 541 F.2d at 34; even though we might otherwise disagree, United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 749, 92 S. Ct. 1941, 1946, 32 L. Ed. 2d 453 (1972).

[**23]

While we are admonished from "rubber stamping" agency decisions as correct, Ethyl Corp. v. EPA, supra, 541 F.2d at 34, our task is complete when "we find that the agency has engaged in reasoned decisionmaking within the scope of its Congressional mandate," American Radio Relay League, Inc. v. F.C.C., 199 U.S.App.D.C. 293, 297, 617 F.2d 875, 879 (1980). Thus, we must be assured that the agency action was "based on a consideration of the relevant factors," Citizens to Preserve Overton Park, Inc. v. Volpe, supra, 401 U.S. at 416, 91 S. Ct. at 823; and that "the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent," Ethyl Corp. v. EPA, supra, 541 F.2d at 35-36, quoting Greater Boston Television Corp. v. F.C.C., 143 U.S.App.D.C. 383, 444 F.2d 841, 850 (1970), cert. denied, 403 U.S. 923, 91 S. Ct. 2233, 29 L. Ed. 2d 701 (1971). Our inquiry into the facts must also be searching and careful, Citizens to Preserve Overton Park, Inc. v. Volpe, supra, 401 U.S. at 415-16, [29] 91 S. Ct. at 823.

[**24]

Judicial review of agency inaction, on the other hand, is governed by a different standard. In reviewing EDF's Claims Two through Six, we must employ Section 10(e)(1) of the APA, 5 U.S.C. § 706(1) (1976 and Supp. III 1979). This standard provides that the reviewing court shall:

(1) compel agency action unlawfully withheld or unreasonably delayed….

Courts which have construed this standard have found it to consist of either of two issues: (1) whether the agency has violated its statutory mandate by failing to act, Association of American Railroads v. Costle, 183 U.S.App.D.C. 362, 373, 562 F.2d 1310, 1321 (1977), [30] [**25] or (2) whether the agency's [*284] delay in acting has been unreasonable, Nader v. F.C.C., 172 U.S.App.D.C. 1, 520 F.2d 182, 206 (1975) (ten year delay found to be unreasonable). [31] See also Costle v. Pacific Legal Foundation, 445 U.S. 198, 200 n.14, 100 S. Ct. 1095, 1108 n.14, 63 L. Ed. 2d 329 (1980); Estate of French v. F.E.R.C., 603 F.2d 1158, 1167 (5th Cir. 1979); E.D.F., Inc. v. Hardin, 138 U.S.App.D.C. 391, 428 F.2d 1093, 1099 n.29 (1970).

B. Scope of Review

The parties have not disputed the appropriate standards of review. They do disagree as to the proper scope of review, i. e., the extent of the district court's inquiry in its application of the respective standards. At issue is whether the district court properly struck, upon defendants'

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Ed. 2d 561 (1969).

[29] A searching and careful inquiry is especially important in highly technical cases such as this one. See American Paper Institute v. Train, 177 U.S.App.D.C. 181, 543 F.2d 328, cert. dismissed, 429 U.S. 967, 97 S. Ct. 398, 50 L. Ed. 2d 335 (1976); Ethyl Corp. v. EPA, supra, 541 F.2d at 35.

[30] See, e. g., Health Systems Agency of Oklahoma, Inc. v. Norman, 589 F.2d 486, 492 (10th Cir. 1978); E.E.O.C. v. Liberty Loan Corp., 584 F.2d 853, 856 (8th Cir. 1978); British Airways Board v. Port Authority of New York & New Jersey, 564 F.2d 1002, 1010 (2d Cir. 1977); Cockrum v. Califano, 475 F. Supp. 1222, 1239 (D.D.C.1979) (and the cases cited therein).

[31] See, e. g., Blankenship v. Sec'y of H.E.W., 587 F.2d 329, 333-36 (6th Cir. 1978); E.E.O.C. v. Bray Lumber Co., 478 F. Supp. 993, 996 (M.D.Ga.1979); Las Vegas Hawaiian Development Co. v. S.E.C., 466 F. Supp. 928, 932 (D. Hawaii 1979); E.E.O.C. v. Westinghouse Electric Corp., 450 F. Supp. 792, 795 (E.D.Mo.1978), modified, 592 F.2d 484 (8th Cir. 1979).

motion, four litigation affidavits submitted by EDF in support of its motion for summary judgment on Claim One (EPA's approval of the state water quality standards for salinity). [32]

**[**26]** It is well settled that judicial review of agency action is normally confined to the full administrative record before the agency at the time the decision was made. The focal point for judicial review should be the administrative record already in existence, not some new record completed initially in the reviewing court. Camp v. Pitts, 411 U.S. 138, 142, 93 S. Ct. 1241, 1244, 36 L. Ed. 2d 106 (1973); Citizens to Preserve Overton Park, Inc. v. Volpe, supra, 401 U.S. at 420, 91 S. Ct. at 825; Doraiswamy v. Secretary of Labor, 180 U.S.App.D.C. 360, 555 F.2d 832, 839-42 (1976). [33] In addition, de novo review **[*285]** is only allowed under this rule in two limited instances: where the agency action is adjudicatory in nature and the fact finding procedures are inadequate; or where issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action. Camp v. Pitts, supra, 411 U.S. at 142, 93 S. Ct. at 1244; Asarco, Inc. v. U.S.E.P.A., 616 F.2d 1153, 1158 (9th Cir. 1980); Doraiswamy v. Secretary of Labor, supra, 555 F.2d at 839 n.39.

**[**27]** In the time since Overton Park and Camp v. Pitts, several rules and exceptions governing the scope of informal agency action have emerged from subsequent decisions. See Asarco, Inc. v. U.S.E.P.A., supra, 616 F.2d at 1159. The most noted exception to the general rule occurs where "there was such a failure to explain administrative action as to frustrate effective judicial review." Camp v. Pitts, supra, 411 U.S. at 142-43, 93 S. Ct. at 1244. When the record is inadequate, a court may "obtain from the agency, either through affidavits or testimony, such additional explanations of the reasons for the agency decision as may prove necessary." Id., at 143, 93 S. Ct. at 1244; Doraiswamy v. Secretary of Labor, supra, 555 F.2d at 842-843. The new materials should be merely explanatory of the original record and should contain no new rationalizations. Bunker Hill Co. v. EPA, 572 F.2d 1286, 1292 (9th Cir. 1977). If the agency action, once explained by the proper agency official, is not sustainable on the record itself, the proper judicial approach has been to vacate the action and to remand the matter back to the agency for further consideration. Camp v. Pitts, supra, 411 U.S. at 143, 93 S. **[**28]** Ct. at 1244; Asarco, Inc. v. U.S.E.P.A., supra, 616 F.2d at

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[32] In addition, the state defendants moved to strike several papers submitted to this Court by EDF. The record on appeal should consist of the record before the district court, and should not include information made available subsequent to the date of the decision below. Fed.R.App.P. 10(a), 30(a). Accordingly, we grant the state defendants' motion to strike all papers, and related discussion, that were not before the district court, which are included in the Joint Appendix at 1041-1063, and which are referenced in EDF's reply brief at 22-23. See Commonwealth of Massachusetts v. U.S. Veterans Administration, 541 F.2d 119, 123 n.5 (1st Cir. 1976). Appellate review is ordinarily unaffected by matters not contained in the record, Goland v. C.I.A., 197 U.S.App.D.C. 25, 607 F.2d 339, 370 (1978), cert. denied, 445 U.S. 927, 100 S. Ct. 1312, 63 L. Ed. 2d 759 (1980) (per curiam on motion to vacate and petition for rehearing), unless one of the settled exceptions is invoked. Id. Since we find each of these exceptions to be inapplicable, including the judicial notice exception, we must grant the motion to strike. See Landy v. F.D.I.C., 486 F.2d 139, 151 (3d Cir. 1973), cert. denied, 416 U.S. 960, 94 S. Ct. 1979, 40 L. Ed. 2d 312 (1974).

The two other matters which state defendants moved to strike appeared in EDF's reply brief. One involved the argument in footnote 4 at 7-8, concerning prompt EPA promulgation of water quality standards for salinity. The other involved the discussion at 20-22 related to alleged state refusal to enforce water quality standards through the NPDES program. These must also be stricken because neither was raised in EDF's opening brief nor addressed by defendants in their briefs, and therefore are beyond the scope of argument permitted to be raised in a reply brief. Mississippi River Corp. v. F.T.C., 454 F.2d 1083, 1093 (8th Cir. 1972). See U.S. v. Bucchino, 606 F.2d 590, 591 (5th Cir. 1979), cert. denied, 446 U.S. 952, 100 S. Ct. 2917, 64 L. Ed. 2d 808 (1980); U.S. Steel Corp. v. Train, 556 F.2d 822, 839 n.23 (7th Cir. 1977). This is true in the absence of issues of grave public import, Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1266, 27 A.L.R.Fed. 925 (4th Cir. 1974), or where there would otherwise be a miscarriage of justice. U.S. v. Luther, 521 F.2d 408, 411 (9th Cir. 1975). Since we find neither, we must strike these matters as well. Were we to rule otherwise, the federal and state defendants would not have had a full and fair opportunity to adequately respond to EDF's later arguments. U.S. v. Haldeman, 181 U.S.App.D.C. 254, 559 F.2d 31, 78 n.113 (1976) (en banc, per curiam), cert. denied, 431 U.S. 933, 97 S. Ct. 2641, 53 L. Ed. 2d 250 (1977).

[33] See F.P.C. v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 331, 96 S. Ct. 579, 582, 46 L. Ed. 2d 533 (1976); Mt. Airy Refining Co. v. Schlesinger, supra, 481 F. Supp. at 264-70; Hospital Ass'n of N.Y. State, Inc. v. Toia, 473 F. Supp. 917, 926-27 (S.D.N.Y.1979); State of Maryland ex rel. Burch v. Costle, 452 F. Supp. 1154, 1157 (D.D.C.1978).

1159. [34]

The Ninth Circuit recently evaluated the "explanation" exception, in a similarly highly technical case, and found the need to look outside the record to determine whether the agency had considered all relevant factors. Asarco, Inc. v. U.S.E.P.A., 616 F.2d 1153 (9th Cir. 1980). The court, in review of an EPA action under the Clean Air Act, 42 U.S.C. §§ 7401 et seq. (Supp. III 1979), felt that it could not adequately discharge its duty to engage in a "substantial inquiry" if it were required to "take the agency's word that it considered all relevant **[**29]** matters" as mandated by Overton Park. Id. The court resolved its dilemma by stating:

If the reviewing court finds it necessary to go outside the administrative record, it should consider evidence relevant to the substantive merits of the agency action only for background information, as in Bunker Hill, or for the limited purposes of ascertaining whether the agency considered all the relevant factors or fully explicated its course of conduct or grounds for decision. See Association of Pacific Fisheries (v. EPA, 615 F.2d 794 (9th Cir. 1980)), supra. Consideration of the evidence to determine the correctness or wisdom of the agency's decision is not permitted, even when the court has also examined the administrative record. If the court determines that the agency's course of inquiry was insufficient or inadequate, it should remand the matter to the agency for further consideration and not compensate for the agency's dereliction by undertaking its own inquiry into the merits.

616 F.2d at 1160.

The district court found none of the four affiants to be employees of EPA, and that none had participated in the pertinent agency actions. Accordingly, the court declined to apply the **[**30]** exception which would have permitted it to look outside the record. EDF argues that this conclusion has no basis in the APA, its legislative history, or in Supreme Court decisions. We disagree, and find the motion to strike the four litigation **[*286]** affidavits to have been properly granted. [35]

EDF asserts that judicial preclusion of presentation of evidence in litigation seeking review of informal agency actions creates a per se exclusionary rule which is both unsound as a matter of public policy, and will lead to capricious and ill-founded results. Further, such a per se rule, EDF maintains, is inconsistent with Overton Park's mandate for review which is thorough and probing, as well as searching and careful. EDF, in essence, **[**31]** calls for the creation of an exception which would enable parties challenging the propriety of informal agency action to submit expert affidavits to the reviewing court to supplement the administrative record. Such affidavits would address the propriety of the agency action. [36]

EDF advocates the creation of an exception which would enable challenging parties to submit affidavits addressing the merits and propriety of the agency decision. The creation of such an exception would be contrary to decisions of the Supreme Court and of this **[**32]** court. There is no occasion for a judicial probe beyond the confines of a record which affords enough explanation to indicate whether the agency considered all relevant factors. Asarco, Inc. v. U.S.E.P.A., supra, 616 F.2d at 1160; Doraiswamy v. Secretary of Labor, supra, 555 F.2d at 842-43. If anything, a judicial venture outside the record can only serve either as background information, or to determine the presence of the requisite fullness of the reasons given; and it can never, under Camp v. Pitts,

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[34] See F.P.C. v. Transcontinental Gas Pipe Line Corp., supra, 423 U.S. at 331, 96 S. Ct. 579, 582, 46 L. Ed. 2d 533; Abbott Laboratories v. Harris, 481 F. Supp. 74, 78 (N.D.Ill.1979); Lukens Steel Co. v. Kreps, 477 F. Supp. 444, 451 (E.D.Pa.1979); Philadelphia Council of Neighborhood Organizations v. Coleman, 437 F. Supp. 1341, 1347-50 (E.D.Pa.1977), aff'd mem., 578 F.2d 1375 (3d Cir. 1978).

[35] Our determination that the district court took a hard look at the complex evidentiary record and properly concluded on the basis of that record that EPA's challenged actions as to Claim One were not unreasonable, will be detailed in our discussion of Claim One, infra.

[36] EDF disregards the basic reason for the exception to explain the record where a failure to do so might frustrate effective judicial review. As we indicate in our discussion of Claim One, infra, we find the record to be sufficient and therefore any further explanation by agency officials is unnecessary. We also find this appeal to not be properly subject to de novo review under either Camp v. Pitts exception. Camp v. Pitts, supra, 411 U.S. at 142, 93 S. Ct. at 1244.

examine the propriety of the decision itself. [37] Remand is not necessary, where, as here, we find no need for further explanation of the record.

**[**33]** C. Statement of Basis and Purpose

EDF also avers that EPA violated Section 4(c) of the APA, 5 U.S.C. § 553(c) (1976 and Supp. III 1979), by failing to prepare a statement of basis and purpose prior to approving the state salinity standards and plans of implementation. That failure, EDF alleges, requires both reversal of EPA's actions and remand to the agency. This argument, however, was not raised in EDF's complaint and was not, so far as we can determine, asserted or ruled upon in the district court. [38]

We are mindful of the settled rule that appeals courts should be very hesitant to review issues not addressed in the courts below. Regents of University of California v. Bakke, 438 U.S. 265, 283, 98 S. Ct. 2733, 2744, 57 L. Ed. 2d 750 (1978) (and the cases cited therein); Singleton v. Wulff, 428 U.S. 106, **[**34]** 120-21, 96 S. Ct. 2868, 2877, 49 L. Ed. 2d 826 (1976); Brown v. Collins, 131 U.S.App.D.C. 68, 402 F.2d 209, 213 (1968). Our choice to resolve this issue is discretionary, Singleton v. Wulff, supra, 428 U.S. at 121, 96 S. Ct. at 2877, and is only exercised in extraordinary circumstances not present **[*287]** here. See United States v. Aulet, 618 F.2d 182, 186 (2d Cir. 1980); Needleman v. Bohlen, 602 F.2d 1, 4 (1st Cir. 1979); United States v. Patrin, 575 F.2d 708, 712 (9th Cir. 1978). Hence, we decline to consider this issue on appeal.

IV. CLAIM ONE

In Claim One, EDF alleged that the approved water quality standards for salinity, including the implementation plans, failed to comply with the requirements of the Clean Water Act and the Water Quality Act of 1965. EDF also claimed that EPA's approval of the standards in November 1976 was arbitrary and capricious, as well as an abuse of discretion under Sections 303(a) and 303(b) of the Clean Water Act. 33 U.S.C. §§ 1313(a) and (b). EDF also challenged EPA's action on two related grounds. First, EDF asserted that establishment of specific numeric criteria was required for each basin state (including the four basin states within **[**35]** the upper basin). Second, EDF contended that the plan for the implementation of the standards, as adopted by each basin state, was based upon unrealistic assumptions, relied upon insufficient control methods, and contained "patently" ineffective provisions.

In its approval of the water quality standards, EPA was found by the district court to have acted in complete compliance with the Clean Water Act. The court correctly found EPA's actions to be sufficiently explained in the record, and determined that EPA had acted reasonably, and neither arbitrarily nor capriciously in approving the standards. EPA's actions, in approving the standards, had a rational basis in the administrative record and were not contrary to the provisions of the Clean Water Act.

A. Sufficiency of the Numeric Criteria

Pursuant to EPA regulation, each basin state adopted salinity standards which included: specific numeric criteria for three stations in the River's lower main stem, narrative provisions, and other factual information, with the goal of maintaining salinity concentrations below 1972 levels. Included also was a water quality monitoring and analysis program which was consistent with EPA's basinwide **[**36]** approach to the salinity problem. EPA, after a public comment period, approved the standards in 1976.

EPA's review of the standards must ensure that they were consistent with the applicable requirements of the FWPCA, as in effect immediately prior to the date of the enactment of the FWPCA Amendments of 1972. Clean Water Act §§ 303(a)(1), 303(a)(2),

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[37] EDF also argues that exclusion of the affidavits was improper under both Fed.R.Civ.P. 56 and the Federal Rules of Evidence. Rule 56 and Fed.R.Evid. 402 mandate that affidavits must be relevant to be admissible. As stated, arguments to the merits of an agency action are not relevant when reviewing informal agency action. E. g., Richards v. Immigration and Naturalization Service, 180 U.S.App.D.C. 314, 554 F.2d 1173 (1977).

We find EDF's other arguments concerning the propriety of the district court's grant of defendants' motion to strike the four affidavits to be without merit.

[38] We also note that EDF did not respond in either oral argument or in its reply brief (save mention in one footnote) to defendants' claim that this issue was not addressed in the district court.

and 303(a)(3)(B). See Montgomery Environmental Coalition v. Costle, 207 U.S. App. D.C. 233, 646 F.2d 568, at 592, 593 (D.C.Cir.1980). This reference back mandated that the state standards were to be evaluated, by EPA, under the provisions of the Water Quality Act of 1965. The test for the adequacy of the standards under the 1965 Act directed that the standards were "to protect the public health or welfare, enhance the quality of water, and serve the purposes of (the) Act." § 10(c)(3). [39]

**[**37]** EDF asserted below that separate numeric criteria were to be established in each basin state and that a failure to do so created a set of salinity standards with no accountability. [40] The district court found that "EDF has not pointed the court to any section of the Clean Water Act that would require the establishment of separate numerical criteria in any basin state." Environmental Defense Fund, Inc. v. Costle, 13 Envir.Rep. (BNA) 1867, 1871 (D.D.C. Oct. 3, 1979). EDF also fails to cite any persuasive authority to this court.

Here, EDF details several reasons which it argues necessitate judicial disapproval **[*288]** and corrective remand of the salinity standards. EDF first contends that the Clean Water Act and corresponding EPA regulations provide that numeric **[**38]** criteria are needed in each of the seven states. To the contrary, neither the Act itself nor the regulations require that any numeric criteria be established. Water quality criteria may be, and often are, totally narrative. EPA's 1974 salinity regulation directed that salinity should be viewed by the states as a basinwide problem, and that numeric criteria be adopted for "appropriate points" on the River, to aid in the maintenance of lower main stem salinity at pre-1972 levels. 40 C.F.R. §§ 120.5(b), 120.5(c)(1), and 120.5(c)(2) (1974). The regulation, with its requirement of numeric levels at "appropriate points," was promulgated after careful agency study and with complete cognizance of EPA's obligation to protect the public health or welfare, enhance the water quality, and serve the 1965 Act's relevant purposes. If the establishment of numeric criteria in each state became legally mandated after thorough EPA study and review of its statutory obligations, EPA would have been duty bound to promulgate appropriate regulations.

The district court found the narrative and three numeric criteria to be sufficient to meet the 1965 Act's test of adequacy. We agree. The selection of **[**39]** the three points for numeric standards to supplement the narrative provisions is consistent with the basinwide approach and is fully explained in the record.

EDF next assails EPA's alleged change of an official agency position related to the number and location of the "appropriate points" where numeric standards would be set throughout the basin. [41] EDF argues that EPA arbitrarily abandoned its earlier formal position that numeric standards in the upper basin were required by law, and essential in fact, if

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[39] The relevant purposes of the 1965 Act were "to enhance the quality and value of our water resources and to establish a national policy for the prevention, control, and abatement of water pollution." Pub.L.No.89-234, § 1(a), 79 Stat. 903.

[40] EDF did not challenge the adequacy of the three levels of salinity concentration, which were established and approved by EPA, nor did it contend that the designated uses would not be sufficiently protected if such levels were maintained.

[41] EDF also asserts two other minor collateral arguments in support of its claim that specific numeric criteria are required in the four upper basin states. First, EDF argues that upstream criteria are necessary to fully protect the attainment of the standards in downstream waters. The district court found establishment of upper basin numeric criteria to be unnecessary because it determined that salinity did not threaten designated uses of the River in the upper basin states. Since designated uses in the upper basin are not threatened by current downstream salinity levels and because the states and EPA are engaged in a basinwide approach to salinity control and abatement, specific numeric criteria are not needed so long as the basinwide approach is maintained. Salinity control downstream, as the record indicates, is more critical than corresponding upstream measures.

Second, the district court determined that the establishment of upstream criteria was technically infeasible, as it would be difficult to identify upstream impacts and to correlate them to downstream effects. EDF disagrees with the court's characterization of EPA's task as "technically difficult" because of its belief that upstream standard establishment had been completed ten years earlier by the U.S. Geological Survey and by EPA's own methodology. The district court found the technical difficulties to have been adequately explained in the record, and that EPA's response had been reasonable. We agree, and add that the record details sufficient data to show that the states fully enumerated their belief in both the technical impracticality of upstream criteria and the incompleteness of the EPA data. See the 1975 plan at 60-61.

downstream salinity levels were to be preserved. Such a turnabout, EDF avers, clearly demonstrates the arbitrariness and capriciousness of EPA's approval of the states' standards.

**[**40]** In the years prior to its approval of the state standards in 1976, EPA and the states were in disagreement concerning the proper number and efficacy of points along the River where numeric criteria would be necessary. Certain individuals within the agency were of the view that numeric standards would be required for several key points throughout the entire basin. As detailed earlier, the respective states, the Forum, and EPA combined efforts to develop an amenable solution, which eventually led to the first Federal Register notice of proposed rulemaking in June 1974. [42] The record indicates that a subsequent December 1974 memorandum from EPA's General Counsel stated the EPA "may" legally **[*289]** require each basin state to set "salinity standards" in order to comply with the Clean Water Act and that such standards "may" include numeric criteria. Joint Appendix at 383-384. The final regulation was promulgated, in late December 1974, prescribing numeric criteria at "appropriate points." [43]

**[**41]** EDF maintains that the memorandum from the EPA General Counsel represented a formal agency position, and that the promulgation of the salinity regulation with only three numeric points, and not for each state, was a complete and sudden reversal of EPA's alleged long-standing position. The district court determined that while certain EPA officials had initially advocated numeric criteria for each basin state, EPA took its first formal position upon its promulgation of the salinity regulation in December 1974. We agree. Accordingly, there was no reversal of an official position which would render EPA's actions in approving the standards either arbitrary, capricious, or an abuse of agency discretion.

EDF's argument misconstrues the record, including the General Counsel's opinion, and ignores the evidence which provides a reasonable as well as rational foundation for EPA's approval of the state salinity standards. [44] EDF misconstrues the General Counsel's opinion which stated that EPA may legally require the adoption of salinity standards which may include numeric criteria. EDF construes this opinion to mean that EPA must require establishment of numeric standards for each basin **[**42]** state. This is erroneous, in that the crux of the entire opinion indicates that EPA is empowered to require basinwide specific numeric criteria, but that it may decide that such criteria are not necessary. Further, the opinion calls for adoption of salinity standards, which may or may not include specific numeric criteria to supplement the various narrative provisions.

EPA's approval would survive scrutiny, under the arbitrary and capricious standard of review, even if this court were to construe EPA's early statements which favored implementation of numeric criteria in each state, as collectively representing formal EPA policy. It is well settled that an agency may alter or reverse its position if the change is supported by a reasoned explanation. See N.L.R.B. v. J. Weingarten, Inc., 420 **[**43]** U.S. 251, 264-68, 95 S. Ct. 959, 967-69, 43 L. Ed. 2d 171 (1975); Montana Power Co. v. EPA, 608 F.2d 334, 347-49 (9th Cir. 1979) (and the cases cited therein); N.L.R.B. v. International Union of Operating Engineers Local 925, AFL-CIO, 460 F.2d 589, 604 (5th Cir. 1972). Here, such a reasoned explanation is present in the record.

B. The Plan of Implementation

As a significant segment of the water quality standards for salinity, an implementation plan was also adopted by each state to supplement the requisite numerical criteria and narrative provisions. [45] **[**45]** EDF's primary challenge in

[42] See the text accompanying notes 19-22 supra.

[43] Id.

[44] We find EDF's other arguments concerning alleged concessions by state officials that numeric criteria for upstream locations were necessary, and its redefinition of a "formal" agency position to be without merit.

[45] We note parenthetically that the current role of a plan of implementation has been recently altered. The requirement for plan inclusion as an element of a water quality standard was deleted by the FWPCA Amendments in 1972. The 1972 Act enumerated separate planning and control procedures under Section 208 and 303(e), 33 U.S.C. §§ 1288 and 1313(e) (1976 and Supp. III 1979).

However, Sections 303(a) and 303(b) still require that a state's initial

Claim One is related to the alleged inadequacies and ineffectiveness of the states' plan, as approved by EPA. **[*290]** EDF assailed the plan for its erroneous assumptions, its ineffective provisions, and for its alleged focus upon legally insufficient methods of control. The district court examined the administrative record and found the existence of ample evidence supporting EPA's approval of the plan as satisfying the required statutory test "to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act." Section 10(c). For the reasons detailed below, we **[**44]** agree and note that there is sufficient record evidence to support the ruling that EPA's plan approval was not arbitrary and capricious. [46]

EDF first avers that the states' plan was based upon unrealistic assumptions as to streamflow, rates and development in the upper basin, and feasibility of federal funded salinity mitigation projects. EDF contends that the plan overestimates both River streamflow levels and the funding feasibility of federal salinity projects, while simultaneously underestimating development rates in the upper basin.

EDF asserts that the plan, in effect, overstates streamflow levels and understates development (new water depletions) with the end result being an underestimation of expected salinity increases. EDF also complains that the plan was expressly reliant upon an annual streamflow of 15 million acre-feet ("m.a.f."), while the correct figure actually ranged from 13.5 to 13.9 m.a.f. In addition, EDF states **[**46]** that the plan is at odds with recognized authorities as to upper basin development levels. Contrary to these assertions, the district court correctly found the existence of a rational basis in the record to support the states' streamflow estimates, as well as their projection of upper basin development levels.

In effort to meet the Act's requirements, the states formulated the plan to address a range of variable flow levels and development rates within the River basin. The plan itself contains streamflow estimates ranging from 12 to 16 m.a.f., with estimated levels of depletion due to development evaluated for low, moderate, and high degrees of water use. It must be recognized that streamflow estimates may vary among the experts, as may estimates of future levels of depletion. The record evidence indicates that the plan presented enough data to EPA so that their approval cannot be said to be unreasonable. There is also record evidence which demonstrates the existence of a rational basis for EPA to conclude that depletion resulting from development would be low to moderate; with the resultant projected salinity levels being properly maintained under the plan.

As mentioned, the **[**47]** sixteen federal salinity control projects play an integral part in the plan. EDF challenges EPA's plan approval due to the states' assumption that the sixteen federal projects would materialize and function to maintain 1972 levels in the lower main stem. EDF maintains that the assumption was grossly speculative in 1976 because Congress had only authorized and funded four projects, feasibility studies on the remaining twelve projects were problematic, and there was some agency opposition to Congressional project authorization. Through the enactment of the CRBSCA, 43 U.S.C. §§ 1592, 1593, Congress expressed a strong federal commitment to aid in the reduction of River salinity levels via authorizing the construction of the sixteen projects, or their equivalents, in 1974. [47] Such an assumption was not grossly speculative in 1976. The states acted reasonably in 1975 by including the projects as key components within the plan, especially given the fact that the sixteen were the major plan components directed at the control and abatement of natural salinity sources.

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standards (adopted upon enactment of the 1972 Act) are consistent with the provisions of the 1965 Act. Thus, an implementation plan was necessary as a segment of each basin state's initial water quality standards for salinity, as approved by EPA in 1976. Section 303(c) of the 1972 Act removed the plan as an element of the water quality standards. Accordingly, the states are no longer mandated to continue to include the plan as a segment of the standards, once the separate planning and control procedures of Sections 208 and 303(e) are instituted.

[46] Since we locate ample record evidence to support EPA's conclusion that the 1975 plan complied with the required statutory provisions, we need not decide whether the Clean Water Act authorizes EPA to either promulgate implementation plans for the states or to require modification of defective plans.

[47] See the text accompanying notes 14-15 and 26 supra.

**[**48]** Secondly, EDF attacks EPA's plan approval because the plan, "on its face," is allegedly ineffective and will not succeed in **[*291]** controlling salinity. EDF avers that the plan excuses violations of the criteria in advance and will not insure the maintenance of the salinity standards beyond 1990. [48]

EDF contends that the plan is short range and does not guarantee maintenance of the standards beyond 1990. EPA's approval of a plan with so short a useful life, EDF argues, is arbitrary and capricious. The district court noted that an entire chapter of the plan addressed future possible salinity controls and provided for review and appropriate modification of the plan every three years. The plan was not vague; and it adequately and reasonably projected salinity control measures through 1990. Thereafter, provisions within the plan **[**49]** itself address the incorporation of updates which may become necessary upon the development of future planning and control technology. We also note that no provision within the Clean Water Act requires that initial salinity standards be unalterable. In fact, the Act itself mandates appropriate revision of the water quality standards once every three years. Section 303(c). Hence, EPA's approval here cannot be considered to be arbitrary and capricious.

EDF also contests the plan's effectiveness because it allows for advance violations of the standards. Such violations are an actual narrative segment of the salinity standards. The violations are included to provide for temporary increases above the 1972 numeric levels on the condition that control measures to offset such increases are also contained within the plan itself. We find that provision for these temporary violations, as explained in the record, is proper, given the highly variable annual flow of the River, and the fact that the control projects may not come on line as soon as originally contemplated.

Third, EDF argues that the plan relied upon insufficient methods of control by ignoring non-structural on-farm approaches **[**50]** and other agricultural methods. EDF contends, in essence, that the plan erroneously excluded on-farm methods which are allegedly more effective than currently employed practices. [49] This allegation is contradicted by the record. The plan contained many non-structural projects. These projects utilize on-farm methods as a means of reducing salinity resulting from irrigation return flows as well as existing irrigation practices. The plan reasonably considers the requisite on-farm measures. [50]

**[**51]** EDF avers that the plan ignores what EDF believes are the most effective and economic control measures available. Such disregard, EDF argues, has no rational basis in the law or in sound planning. While the record is indicative that on-farm techniques offer significant potential for the control and abatement of salinity, it also reveals that such measures are not always the most plausible or cost-effective controls, and alone would be insufficient to maintain the numeric criteria at 1972 levels. Given our limited scope and standard of review, we cannot say that the propriety of the plan's use of on-farm techniques, as approved by EPA, has been unreasonable or irrational. See Ethyl Corp. v. EPA, supra, 541 F.2d at 34.

**[*292]** C. Discussion

Before turning to EDF's second claim, we make four brief observations. First, we are mindful that the scope and standard of review of the legal and practical need for specific basinwide numeric

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[48] EDF's argument here concerning the alleged omission of water quality criteria for the four basin states is without merit because such criteria are not legally required.

[49] On-farm techniques include irrigation scheduling and management, improved application methods, recycling irrigation runoff, re-orienting field topography, and seepage reduction.

[50] The plan considers such measures through: analysis of the efficacy of irrigation canal lining and field drainage systems; reformulation of previously authorized but unconstructed federal water projects aimed at reducing salt loading from irrigation return flows; the continued use of irrigation management services and water systems improvement programs; the institution of strict effluent limitations for certain irrigation point sources through the use of NPDES permits; the employment of the United States Department of Agriculture to research irrigation application rates and to evaluate the magnitude of various program inputs which are needed to provide definitive appraisals of possible contributions to the reduction of River salinity; incorporation of areawide waste management plans under Section 208; and through identification of other non-federal measures. As we noted earlier, the monitoring points are also a factor to be utilized to evaluate on-farm methods.

criteria and a related implementation plan is quite narrow as well as highly deferential. See generally Ethyl Corp. v. EPA, supra, 541 F.2d at 34. There is a presumption of validity to EPA's determination that the numeric criteria are not required **[**52]** in each basin state, and to the agency's ultimate approval of the state salinity standards and implementation plans. Id. EDF has not met its burden of overcoming this presumption. See Mt. Airy Refining Co. v. Schlesinger, supra, 481 F. Supp. at 264. A rational basis for EPA's actions is present in the record, and we conclude that the agency has engaged in reasoned decisionmaking which was based upon a consideration of all relevant factors. Citizens to Preserve Overton Park, Inc. v. Volpe, supra, 401 U.S. at 415-16, 91 S. Ct. 823. See Citizens to Save Spencer County v. U.S.E.P.A., 195 U.S.App.D.C. 30, 600 F.2d 844, 886 n.212 (1979).

Second, we note that deference must be accorded to EPA's interpretation of the Clean Water Act. Board of Governors of the Federal Reserve System v. First Lincolnwood Corp., 439 U.S. 234, 99 S. Ct. 505, 58 L. Ed. 2d 484 (1978); Udall v. Tallman, 380 U.S. 1, 16, 85 S. Ct. 792, 801, 13 L. Ed. 2d 616 (1965); N.R.D.C., Inc. v. S.E.C., 196 U.S.App.D.C. 124, 606 F.2d 1031, 1050 n.24 (1979). [51] And, when judicial construction of EPA's own regulation is in issue rather than a statute, our deference is even more clearly in order. Udall v. Tallman, supra, 380 **[**53]** U.S. at 16, 85 S. Ct. at 801. Thus, we are obliged to view EPA's statutory and regulatory interpretation, and subsequent response to the Colorado River's salinity problem, with deference. Since we find that EPA acted within the scope of its authority, our task here is complete.

Third, EDF would have us dissect the Act in an effort to find the need for basinwide criteria and a more efficacious implementation plan. This we decline to do. Courts have held that the Clean Water Act is to be given a reasonable interpretation which is not parsed and dissected with the meticulous technicality applied in testing other statutes and instruments. N.R.D.C., Inc. **[**54]** v. Costle, 184 U.S.App.D.C. 88, 564 F.2d 573, 579 (1977). See Consolidation Coal Co. v. Costle, 604 F.2d 239, 243 (4th Cir. 1979), rev'd on other grounds, 449 U.S. 64, 101 S. Ct. 295, 66 L. Ed. 2d 268 (1980). In addition, any ambiguities as to the EPA Administrator's powers under the Clean Water Act are to be resolved in his favor. E.I. DuPont de Nemours & Co. v. Train, 430 U.S. 112, 128-29, 97 S. Ct. 965, 975, 51 L. Ed. 2d 204 (1977); Inland Steel Corp. v. EPA, 574 F.2d 367, 373 (7th Cir. 1978).

Last, we confirm that the standards as approved by EPA were sufficient under the adequacy test espoused in the 1965 Act. [52] The salinity standards protect the public health and welfare, enhance water quality, and serve the relevant purposes of the Clean Water Act. The district court advanced a conclusion in its discussion of Claim One, with which we agree:

(EDF's) challenge to the states' plan of implementation amounts to a plea that there is a "better" way to control **[**55]** salinity than that followed by the states and approved by EPA. It is not the function of the court, however, to establish a preference between conflicting approaches to salinity control in the Colorado River. The court may not substitute its judgment for that of EPA so long as the agency's actions met "minimum standards of rationality," as they have here (citation omitted).

Environmental Defense Fund, Inc. v. Costle, 13 Envir.Rep. (BNA) 1867, 1873 (D.D.C. Oct. 3, 1979).

**[*293]** V. CLAIM TWO

In Claim Two, EDF argued that EPA's continued failure to promulgate revised or new salinity standards under the Clean Water Act, Section 303(c)(4)(B), 33 U.S.C. § 1313(c)(4)(B), was unreasonable as well as an abuse of discretion. [53]

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[51] See International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Daniel, 439 U.S. 551, 566 n.20, 99 S. Ct. 790, 800 n.20, 58 L. Ed. 2d 808 (1979) (and the cases cited therein); Weyerhaeuser Co. v. Costle, 191 U.S.App.D.C. 309, 590 F.2d 1011, 1025-28 (1978); Lukens Steel Co. v. Kreps, 477 F. Supp. 444, 448-51 (E.D.Pa.1979).

[52] See the text accompanying note 39 supra.

[53] EDF also argued below, as part of Claim Two, that EPA failed to

EDF prayed for the issuance of an order from the district court which would have directed EPA to promptly promulgate the revised or new standards. The district court properly determined that EPA had acted neither unreasonably nor with an abuse of discretion by failing to propose revised or new water quality standards for salinity.

**[**56]** EDF's Claim is based upon Section 303(c)(4)(B) which provides:

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

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

EDF avers that EPA has not promulgated revised or new standards, when such standards are in fact necessary to counteract the alleged deficiencies in the states' 1975 plan and current 1978 revision. Since we determined in Claim One that the 1975 plan was not deficient, this argument is without merit.

The gravamen of EDF's Claim below involved an argument that because "new information" had become available since 1976, which was allegedly indicative of the need for revised or new salinity standards, EPA's failure to act under Section 303(c)(4)(B) was unreasonable and an abuse of discretion. This information consists of evidence which arguably proved the inadequacy of the respective states' 1975 implementation plan. [54] However, alleged deficiencies within the plan do not render the current standards (now consisting of **[**57]** only numeric and narrative criteria and designated uses) inadequate, in that implementation plans are no longer to be included in the revised or new water quality standards. [55] Given that EDF's newly presented information does not include any evidence which would require the promulgation of either revised or new criteria or uses in order to meet the Act's requirements, EPA's inaction cannot be considered as improper.

The district court correctly enumerated three supplemental factors which it utilized in reaching its outcome. The first factor was that the 1972 numeric criteria for salinity had not been exceeded during 1975, 1976, or 1977. EDF assails the court's reliance upon this fact due to its belief that significant increases in salinity levels are imminent. Such potential increases, even if substantiated, **[**58]** cannot be considered to render the district court's reliance upon them erroneous. The only issue below was whether EPA acted unreasonably, or with an abuse of discretion, by not affecting a discretionary determination that revised or new salinity standards were necessary in or before 1977. Thus, post-1977 increases have no bearing upon the propriety of EPA's failure to act and can be adequately addressed, if in fact they do occur, in subsequent standard revisions under Section 303(c)(1).

The second factor is that unexpectedly slow development in the upper basin had tended to offset the phenomenon that the federal salinity control projects had not **[*294]** come on line as quickly as had been originally anticipated. The record indicates that the effects of these two facts logically tend to cancel each other, especially given the certainty that numeric criteria had not been exceeded during the three years preceding EDF's filing of its complaint.

The court noted, as its third factor, that to mandate EPA intercession at that time would breach the orderly state review process, as required by the Act itself. Section 303(c)(1). EDF argues that neither the Act nor the related regulations **[**59]** excuse EPA from its Section 303(c)(4)(B) duties, in light of the States' respective Section 303(c)(1) duties. While this is correct in principle, it is logical that EPA should refrain from acting until the states have

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act as allegedly required by Section 303(c)(4)(A) of the Clean Water Act. This Section mandates that EPA promulgate revised or new water quality standards if a revised or new standard submitted to the agency for its approval under Section 303(c) is determined to be inconsistent with the Act's requirements. Since the basin states have not yet submitted revised or new standards for EPA approval, the agency is under no duty to act under Section 303(c)(4)(A).

[54] Included was a presentation of evidence which addressed the plan's sixteen salinity control projects, as well as the plan's alleged lack of cognizance of on-farm methods.

[55] See note 45 supra.

completed an initial effort to update the standards as they deem appropriate. For EPA to intercede prior to the initial completion of the state review process would also disserve the mandate within Section 101(b) of the Clean Water Act, 33 U.S.C. § 1251(b) (1976 and Supp. III 1979). This section recognizes the Congressional policy of placing "primary" responsibility with the states "to prevent, reduce, and eliminate" water pollution. [56] EPA's task of determining the need for revised or new salinity standards to meet the Act's requirements would be greatly simplified by its temporary deference.

**[**60]** We note that EPA has not violated its statutory mandate by failing to act, nor has its delay in acting been unreasonable. Under this court's limited standard of review, [57] it cannot be said that the district court erred by not ordering agency action unlawfully withheld or unreasonably delayed, pursuant to Section 10(e)(1) of the APA, 5 U.S.C. § 706(1).

VI. CLAIM THREE

EDF asserted in Claim Three that EPA failed to promulgate total maximum daily loads ("TMDL's") for salinity, in violation of Section 303(d) of the Clean Water Act. [58] The district court correctly found the Claim to be without merit.

Section 303(d) involves a complex statutory scheme which requires the states to identify **[**61]** waters where point source controls alone will be insufficient to implement the water quality standards applicable to such waters. The Section obligates the states to establish the TMDL's in accordance with a priority ranking based upon both the severity of the pollution and the water's designated uses. The TMDL's set the maximum amount of a pollutant which can be contributed into a stream segment without causing a violation of the water quality standards. The TMDL's can then be allocated by insertion into NPDES permits, among the various point source dischargers upon the stream segment, taking into account nonpoint source impacts as well.

The states are to submit the respective TMDL calculations for EPA approval, Section 303(d)(2), within one hundred and eighty days of the date of the Administrator's publication of the initial Section 304 identification of the respective pollutants. EPA is to review the TMDL identification and levels, and either approve or disapprove them as appropriate. Id. EPA approval will then result in the incorporation of the TMDL's into the state water quality management plans under Section 303(e). [59] Disapproval, on the other hand, mandates the identification **[**62]** and establishment of TMDL's, by EPA, which are determined to be necessary to implement the applicable water quality standards.

**[*295]** EDF avers that the waters were not properly identified and the proper TMDL's were not correctly established. Thus EPA must be ordered to exercise its mandatory duties of identification of insufficient waters and TMDL establishment. The district court based its finding that this contention is without merit upon two reasons. First, the court ruled that the request for such an order was premature because EPA did not identify such pollutants until December 28, 1978, 43 Fed.Reg. 60662. [60] Therefore, the states' duty to submit TMDL calculations, as the court noted, did not arise until June 28, **[**63]** 1979. Section 303(d)(2). See Homestake Mining Co. v. U.S.E.P.A., 477 F. Supp. 1279 (D.S.D. 1979). Since EPA did not have the occasion to approve or disapprove the state TMDL submissions prior to the time of EDF's filing of its motion for summary

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[56] Notably, the legislative history indicates that Congress desired that "the Administrator (is) to work closely with the states to obtain approved standards before he promulgates standards for any waters." See Leg. Hist., supra note 12 at 792.

[57] See the text accompanying notes 30-31 supra.

[58] For an in depth discussion of Section 303(d), see 43 Fed.Reg. 60662, et seq. (Dec. 28, 1978).

[59] The record indicates that a water quality management plan is a nonstatutory term utilized by EPA in its regulations to reference to the state and areawide plans for the control and abatement of pollution from both point and nonpoint sources. See 40 C.F.R. § 35.1521-1 (1979).

[60] We note that EPA was ordered not to delay in its initial pollutant identification by Judge Sirica. Bd. of County Comm'rs of Calvert County v. Costle, No. 78-0572 (D.D.C. June 20, 1978) (unpublished order). This order resulted in the identification which appeared at 43 Fed.Reg. 60662 (Dec. 28, 1978).

judgment, we agree that this claim is premature. [61] Thus, it would be improper for us to review EPA's action or alleged inaction at this time. In addition, as the state defendants note, the court would be required to review the states' priority rankings before it could properly review EPA's decision not to establish TMDL's for a specific pollutant such as salinity.

**[**64]** The district court also relied upon the fact that the salinity standards are currently being met. EDF correctly argued below that TMDL's are occasionally employed to prevent anticipated violations of the water quality criteria. The court countered this observation, however, by finding that average salinity levels had been decreasing since 1972, and there was no likelihood of any anticipated violations in the immediate future. Hence, the court ruled that an order directing EPA to establish salinity TMDL's in the basin states would not be warranted. We agree. If salinity concentrations were to rise and future violations were anticipated, the states or EPA, in their respective review processes, could establish TMDL's as necessary to comply with Section 303(d).

Our affirmance of this Claim is further strengthened by the record evidence which indicates that under two percent of the salinity concentration is currently subject to the Section 402 NPDES permit program. Thus, the effect of placing TMDL's for salinity upon the specific numeric criteria is minimal at best. EPA and the states have acted reasonably and in compliance given our limited standard of review under Section 706(1) **[**65]** of the APA. However, we admonish EPA to approve or disapprove such identification, prioritization, and load limits within the requisite statutory framework and time limits. While review of EPA's action is now premature, we urge EPA to carefully heed the statutory deadlines in the future.

VIII. CLAIM FOUR

In Claim Four, EDF assailed EPA inaction as violative of Section 303(e) of the Clean Water Act. EDF alleged that EPA had unreasonably failed to either disapprove or remedy the basin states' continuing planning processes ("CPP's") under Section 303(e). The state CPP's, EDF asserts, have not resulted in water quality plans which have provided adequate implementation provisions and compliance schedules for salinity. Section 303(e)(3)(F). Thus, EPA would be duty bound to sanction states which had not submitted a complying CPP. Section 303(e)(2). The district court determined that EDF's reliance upon the cited statutory provision was clearly misplaced. We agree and find EPA's inaction has not been unlawfully withheld or unreasonably delayed. APA Section 10(e)(1), 5 U.S.C. § 706(1).

**[*296]** Section 303(e) obligates each state to prepare CPP's which are consistent with **[**66]** the Act's many requirements, and which establish strategies for the development of water quality management plans. [62] These plans are developed according to EPA regulations promulgated to implement Sections 106, 208, and 303 of the Act. 40 C.F.R. §§ 35.1500 et seq. (1979). The plans' primary purpose is to combat nonpoint sources of pollution. The statutory provisions for EPA review and approval of the CPP's and the implementation plans themselves are found in Sections 303(e)(2) and 208(b)(3) respectively. The CPP's are to include, inter alia: effluent limitations and standards, TMDL's for pollutants, revision procedures, adequate implementation procedures for revised or new water quality standards under Section 303(c), and the incorporation of all elements of any applicable areawide waste management plans. Section 303(e)(3). Thus, the water quality management plans and the CPP's are separate but complementary in effect, as the continuing planning process often results in the development and update of the management plans.

**[**67]** EDF claims that the basin states' CPP's are inadequate due to alleged deficiencies in the states' 1975 implementation plans. EDF argues that the salinity implementation plan, promulgated under Sections 303(a) and 303(b), is a part of the water

[61] EDF also alleges that salinity had previously been identified for TMDL calculation in EPA's earlier water quality documents. This position must fail, as it is meritless and inconsistent with EDF's complaint which details EPA's failure to identify salinity pollutants and to establish sufficient TMDL's.

[62] See note 59 supra.

quality management plans under both Sections 208 and 303(e) as well as under related EPA planning regulations, 40 C.F.R. §§ 35.1500, 35.1503(g), and 35.1509-3 (1979). To the contrary, our reading of the regulations and of Sections 208 and 303(e) indicates that the plan of implementation contained within the water quality standards is not a part of the water quality management plans. The implementation plan included in the water quality standards was adopted pursuant to Sections 303(a) and 303(b), as originally mandated by the 1965 Act, while the water quality management plans were adopted pursuant to Sections 208 and 303(b). Moreover, the plan referenced in the regulations refers to the implementation of the water quality management plan and continuing planning processes, while the plan required by Sections 303(a) and 303(b) goes to the implementation of the water quality standards. Hence, different implementation plans involving diverse **[**68]** statutory schemes are present.

Further, Section 303(e)(3)(F) mandates that water quality management plans should include adequate implementation provisions for "revised or new" water quality standards under Section 303(c). The district court noted that the basin states' salinity standards are not revised or new standards adopted pursuant to Section 303(c), but are in fact existing standards adopted and approved pursuant to Sections 303(a) and 303(b). Thus, EDF's reliance upon Section 303(e)(3)(F) is misplaced.

IX. CLAIMS FIVE AND SIX

EDF also presented two claims concerning statutory mandates requiring federal defendants to evaluate and develop alternatives to recommended courses of action. EDF argued, in Claim Five, that Interior and Reclamation failed in their duty to develop alternatives to current salinity control programs as required by Section 201 of the Colorado River Basin Salinity Control Act ("CRBSCA"), 43 U.S.C. § 1591. In Claim Six, EDF alleged that EPA, Interior, and Reclamation had violated Section 102(2)(E) of the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4332(2)(E) by failing to institute alternative salinity management measures.

Aside **[**69]** from the oft-litigated requirements of NEPA Section 102(2)(C), 42 U.S.C. § 4332(2)(C) involving the preparation and filing of an environmental impact statement ("EIS"), is Section 102(2)(E), 42 U.S.C. § 4332(2)(E), which requires the development and analysis of alternatives apart from those usually found in an EIS. Section 102(2)(E) requires all federal agencies to:

(E) study, develop, and describe appropriate alternatives to recommended courses **[*297]** of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.

Section 201(a) of the CRBSCA, 43 U.S.C. § 1591(a), contains similar requirements. The CRBSCA outlines specific duties which Interior and Reclamation must follow, and which are designed to implement the conclusions and recommendations reached at the April 1972 Water Pollution Conference of the seven basin states. CRBSCA § 201(a). [63] **[**70]** See also CRBSCA §§ 203(b) and 208, 43 U.S.C. §§ 1593(b) and 1598 (1976 and Supp. III 1979). The conclusions and recommendations state, inter alia, that efforts of both Reclamation and Interior: [64]

(s)hould be considered as an open-minded and flexible program. If alternatives not yet identified prove to be more feasible, they should be included as part of the program, and if elements now included prove not to be feasible, they should be dropped. In addition, it should be recognized that there may be other programs which could reduce the river's salinity. Since present levels are greater than desirable, an effort should be made to develop

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[63] Section 201(a) of the CRBSCA provides as follows:

§ 1591. Implementation of salinity control policy

(a) The Secretary of the Interior shall implement the salinity control policy adopted for the Colorado River in the "Conclusions and Recommendations" published in the Proceedings of the Reconvened Seventh Session of the Conference in the Matter of Pollution of the Interstate waters of the Colorado River and its Tributaries in the States of California, Colorado, Utah, Arizona, Nevada, New Mexico, and Wyoming, held in Denver, Colorado, on April 26-27, 1972, under the authority of section 1160 of Title 33, and approved by the Administrator of the Environmental Protection Agency on June 9, 1972.

[64] Proceedings, supra note 20 at 172-73.

additional programs that will obtain lower salinity levels.

The essence of EDF's two claims is its belief that "on-farm management practices" should be instituted as the alternative to control the salinity problems on the Colorado River. Accordingly, EDF believes that the federal defendants have not sufficiently developed and utilized on-farm methods such as irrigation scheduling and management, improved application methods, recycling irrigation runoff, reorienting field topography, and seepage reduction. This analysis and implementation of such on-farm techniques, EDF argues, is legally mandated by NEPA Section **[**71]** 102(2)(E) and by CRBSCA Section 201(a).

In Claim Five, the court correctly decided that on-farm management measures were not alternatives to Interior's and Reclamation's CRBSCA salinity control efforts, but comprised instead, an integral part of the program itself. There is evidence in the record which exhibits the defendants' interest in the development and use of on-farm measures. EDF has not established any facts which would activate the "study of alternatives" requirement within the CRBSCA. On-farm techniques comprise an integral segment of Interior's and Reclamation's existing salinity control program and do not, as EDF asserts, represent alternatives to such a program. The record details several instances where on-farm methods have been evaluated, including the final EIS of the program itself, [65] **[**72]** as well as a progress report issued subsequent to the filing of the EIS. [66] Further, Interior and Reclamation, as the record shows, have developed all alternative and supplemental methods currently mandated by the CRBSCA.

This same record evidence is supportive of the district court's resolution of Claim Six. Section 102(2)(E) of NEPA is inapplicable to Claim Six, because on-farm measures currently employed by EPA are not "alternatives" to the agency's salinity control program. Rather, the measures constitute an integral segment of the program. The district court found the existence of record evidence indicative of the fact that **[*298]** EPA had been studying, describing, and developing on-farm management measures for the control and abatement of salinity. In addition, EDF has failed to sufficiently identify to this court, any "recommended courses of action in any proposal" which would obligate EPA, Interior, or Reclamation to embark upon further study, development, or description of alternatives. EPA's approval of the basin states' salinity standards can hardly be classified as a proposal, nor can its possible disapproval and repromulgation of a deficient standard. Under the Clean Water Act, a standard **[**73]** proposed by EPA consists of a designated use and appropriate numeric and narrative criteria. Thus EPA would have no authority to consider on-farm alternatives. Moreover, the broad EPA salinity control program is not classifiable as a proposal for which separate alternatives would be required. We also note that Interior's and Reclamation's salinity control program cannot be classified as a proposal, even under a broad reading of Section 102(2)(E).

Because we find that on-farm techniques are integral segments of both programs, and we locate the existence of sufficient record evidence to indicate that significant attention to on-farm measures has been undertaken by the three defendants, we conclude that the district court's entry of judgment on these two claims was proper. [67] Our conclusion is further supported by our awareness that the applicable standard of review only permits a reviewing court to compel agency action unlawfully withheld by an agency's failure to act. APA Section 10(e)(1), 5 U.S.C. § 706(1). Since EDF has been unsuccessful in its effort to establish that either EPA, Interior, or Reclamation have failed to act, we must affirm the decision rendered below.

## **[**74]** X. CONCLUSION

For the foregoing reasons, the order and entry of

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[65] See U.S. Bureau of Reclamation, et al., Final Environmental Statement: Colorado River Water Quality Improvement Program (1977).

[66] U.S. Dep't of Interior, Quality of Water Colorado River Basin, Progress Report No. 9 (Jan. 9, 1979).

[67] Accordingly, we make no ruling on whether EPA is exempt from the specific requirements of NEPA Section 102(2)(E).

judgment of the district court are affirmed.

# American Wildlands v. Browner

United States District Court for the District of Colorado

April 27, 2000, Decided ; April 28, 2000, Filed

Civil Action No. 98-K-1621

**Reporter**
94 F. Supp. 2d 1150; 2000 U.S. Dist. LEXIS 6840; 30 ELR 20536; 50 ERC (BNA) 2039

AMERICAN WILDLANDS, PACIFIC RIVERS COUNCIL, MONTANA ENVIRONMENTAL INFORMATION CENTER, and NORTHERN PLAINS RESOURCE COUNCIL, INC., Plaintiffs, v. CAROL BROWNER, in her official capacity as the Administrator of the U.S. Environmental Protection Agency, BILL YELLOWTAIL, in his official capacity as the Regional Administrator of the U.S. Environmental Protection Agency, Region VIII; and U.S. ENVIRONMENTAL PROTECTION AGENCY, an agency of the United States Government, Defendants, WESTERN ENVIRONMENTAL TRADE ASSOCIATION, on behalf of its members; STATE OF MONTANA, Department of Environmental Quality, Intervenor-Defendants.

**Disposition:** **[**1]** EPA's actions affirmed. Relief sought by Plaintiffs DENIED and civil action DISMISSED WITH PREJUDICE.

## Core Terms

pollution, nonpoint, mixing, zone, water quality standards, sources, requirements, disapproved, antidegradation, regulation, waters, water quality, contends, revised, approve, exempting, promulgate, articulated, policies, interested person, aesthetic, narrative, abuse of discretion, agency's action, point source, recreational, capricious, arbitrary and capricious, Environmental, conservation

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For WESTERN **[**2]** ENVIRONMENTAL TRADE ASSOCIATION, intervenor-defendant: John Eric Bloomquist, Doney, Crowley & Bloomquist, PC, Helena, MT USA.

For MONTANA, STATE OF, intervenor-defendant: Claudia Leah Massman, Montana Dept. of Environmental Quality, Helena, MT USA.

**Judges:** JOHN L. KANE, JR., U.S. SENIOR DISTRICT COURT JUDGE.

**Opinion by:** JOHN L. KANE, JR.

## Opinion

**[*1152]** MEMORANDUM OPINION AND ORDER

KANE, J.

I. Introduction.

Plaintiffs, American Wildlands, Pacific Rivers Council, Montana Environmental Information Center, and Northern Plains Resource Council (collectively "American Wildlands") filed this action for declaratory and injunctive relief against Defendants, Carol Browner, in her official capacity as the Administrator of the U.S. Environmental Protection Agency; Bill Yellowtail, in his official capacity as the Regional Administrator of the U.S. Environmental Protection Agency; Region VIII; and the U.S. Environmental Protection Agency, an agency of the United States (collectively "EPA"). Additionally, there are two intervening parties on behalf of Defendants, State of Montana Department of Environmental Quality and Western Environmental Trade Association.

American Wildlands challenges EPA's failure **[**3]** to review and approve or disapprove Montana's new and revised water quality standards, its approval of several Montana water quality standards, and its **[*1153]** failure to promulgate standards that meet the requirements of the Clean Water Act, 33 U.S.C. § 1251 *et seq*. ("CWA"). They assert these failures violate the CWA and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq*. ("APA").

II. Summary of Issues.

American Wildlands raises five issues: (1) Whether EPA's approval of Montana's water quality standards exempting non-point source pollution from the state's antidegradation rules is arbitrary, capricious, an abuse of discretion, or in violation of the CWA; (2) whether EPA's approval of Montana's water quality standards exempting mixing zones from compliance with narrative water quality criteria and the State's antidegradation rules is arbitrary, capricious, an abuse of discretion or in violation of § 303(c)(3)-(4) of the CWA, 33 U.S.C. § 1313(c)(2)(A) and the APA; (3) whether EPA has violated, and continues to violate 33 U.S.C. § 1313(c)(3)-(4), and 40 C.F.R. § 131.22(a)(1999), **[**4]** by failing promptly to promulgate replacement standards for those water quality standards that it disapproved on December 24, 1998 and January 26, 1999; (4) whether EPA's failure to review and approve or disapprove Montana's definition of an "interested person" is arbitrary, capricious, an abuse of discretion in violation of 33 U.S.C. § 1313(c)(3), 40 C.F.R. § 131.21, and the APA; and (5) whether EPA's incorporation and use of Montana's numerous new and revised water quality standards without EPA's prior approval and EPA's continued incorporation and use of water quality standards that were disapproved by EPA on December 24, 1998 and January 26, 1999 is arbitrary, capricious, an abuse of discretion in violation of § 303(c)(3) of the CWA, 33 U.S.C. § 1313 and the APA.

III. Jurisdiction.

Jurisdiction exists under 33 U.S.C. § 1365(a)(2). "The district court shall have jurisdiction . . . to enforce such an effluent standard or limitation, or such an order, or to order the administrator to perform such act or duty." 33 U.S.C. § 1365(a)(2). "Where questions of due process and sufficiency **[**5]** of the evidence are raised on appeal from an agency's final decision, the district court must review the agency's decision making process and conduct a plenary review of the facts underlying the challenged action." Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1565 (10th Cir. 1994).

IV. Background.

A. Clean Water Act.

Congress passed the CWA in an effort to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In furtherance of these goals, § 1251(a)(7)

states, "it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution." 33 U.S.C. § 1251(a)(7). In short, Congress prohibited the discharge from a point source of any pollutant into waters of the United States unless that discharge complied with specific requirements of the CWA. 33 U.S.C. § 1311(a). Compliance with these requirements may be achieved by obtaining and abiding **[**6]** by the terms of a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to § 402 of the CWA. 33 U.S.C. § 1342.

When a state revises or adopts a new standard for water, such standards must be submitted to the Administrator of the EPA ("Administrator"), and shall be established taking into account their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, navigation, and other purposes. 33 U.S.C. § 1313(c)(2)(A). **[*1154]** The Administrator shall, within sixty days of submission, determine whether the standard offered meets the requirements of the CWA, in which case they become the water standard for the applicable waters of the state. 33 U.S.C. § 1313(c)(3). If the Administrator determines the standards do not meet CWA requirements, he shall notify the state within ninety days from the date of submission and specify the changes to meet such requirements. Id.

Water quality standards under the CWA are analyzed within three different areas. The first area is "designated uses of the water" such as public water supply or **[**7]** recreation. 33 U.S.C. § 1313(c)(2)(A). The second area is "criteria for all toxic pollutants" which articulates the amounts of various pollutants that may be present in the water without interfering with the designated uses. 33 U.S.C. § 1313(c)(2)(B). Such criteria shall be articulated either in the form of numeric concentration limits for specific pollutants or in a narrative form. 40 C.F.R. § 131.11(b)(1999). The final area is the antidegradation policy, which requires the state to adopt policies in this area. 33 U.S.C. § 1313(d)(4)(B). Under the CWA, states are expected to hold hearings at least once every three years to review applicable water quality standards and modify such standards if appropriate. 33 U.S.C. § 1313(c). [1]

B. Relevant Events.

**[**8]** From 1989 to 1998, Montana implemented a number of revisions to different components of its water quality standards. On March 5, 1998, pursuant to the CWA provisions regarding notice of "citizen suits" 33 U.S.C. § 1365(b)(2), American Wildlands, Pacific Rivers Council, and Montana Environmental Information Center filed a sixty days notice of violation by the EPA under the CWA for its alleged failure to perform the mandatory duty to review and approve or disapprove Montana's water quality standards. (Administrative Record Document (A.R. Doc.) 36.) [2] American Wildlands asserted the EPA had failed since 1994 to approve or disapprove Montana's revised water quality standards as required by the CWA. On September 24, 1998, Northern Plains Resource Council followed suit filing similar notice of violation against the EPA. (A.R. Doc. 44.)

**[**9]** In early December, 1998, American Wildlands wrote a letter to the EPA pointing out alleged legal and factual shortcomings of letters sent by Montana to the EPA regarding clarification which the EPA sought about certain aspects of Montana's water quality standards. (A.R. Doc 48.) The gist of this letter was to urge the EPA to disapprove the standards of water quality submitted by Montana. Shortly thereafter, American Wildlands sent a follow up letter detailing further concerns over the water quality standards submitted (A.R. Doc. 49.)

On July 27, 1998, American Wildlands filed the instant action alleging EPA violated the CWA and the APA by (1) failing to approve or disapprove Montana's new and revised water quality standards since 1989 and (2) failing promptly to prepare and

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[1] Contrary to the allegations stated in American Wildlands' Amended Complaint, (R. Doc. 46; P18), this does not mean the state must necessarily revise the standards.

[2] Because the record is so large, there are references to both the Administrative Record ("A.R.") and the Record ("R."), which include the parties' briefs.

promulgate proposed standards for those state standards that failed to meet the requirements of CWA. (R. Doc. 1.) On October 16, 1998, Western Environmental Trade Association moved to intervene as a Defendant. (R. Doc. 8.) On October 28, 1998, American Wildlands moved for Summary Judgment. (R. Doc. 20.) On October 19, 1998, the State of Montana moved to intervene on the side of EPA. On November **[*1155]** 4, 1998, I granted **[**10]** Western Environmental Trade Association's Motion to Intervene. (R. Doc. 27.) After denying Montana's first motion to intervene for failure to comply with this court's local rules, I granted its second motion to intervene, filed on November 9, 1998. (R. Doc. 32.) On February 26, 1999, American Wildlands' Motion for Summary Judgment was denied without prejudice. (R. Doc. 42.)

In December, 1998 and January, 1999, the EPA acted to approve and disapprove certain of Montana's revised water standards, (A.R. Doc. 55, 58) following which, American Wildlands amended its complaint, (R. Doc. 46). In addition to seeking declaratory relief, the amended complaint seeks a variety of forms of injunctive relief which would require the EPA to review the definition of "interested person;" to review all permits and other regulatory actions taken by Montana that relied on water quality standards that were either not approved or disapproved by the EPA; to disapprove Montana's categorical exemptions for nonpoint source pollution and its mixing zones; and to promulgate replacement standards for all disapproved standards. (Id.)

On September 23, 1999, EPA filed a motion for a limited voluntary remand of **[**11]** EPA's decision to approve Montana's mixing zone policy so that "EPA [could] reconsider that policy in light of EPA guidance regarding the application of certain narrative criteria within mixing zones." (R. Doc. 61.) On November 30, 1999, the EPA completed its review on remand, again approving Montana's mixing zone provisions. (R. Doc. 84.) Following the approval on remand, EPA and American Wildlands filed supplemental briefs. (R. Doc. 81, 84.)

V. Standing.

Defendants, Western Environmental Trade Association and EPA challenge American Wildlands standing to bring this action. In order to satisfy Article III standing requirements,

> a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be addressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992). Additionally, an association has standing to bring suit on behalf of its members **[**12]** when those members would have standing to sue on their own, the issue being addressed is related to the organization's purpose, and neither the claim asserted nor relief requested requires the participation of these individual members. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977). Thus, the relevant showing for Article III standing is injury to the plaintiff, not the environment. See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 145 L. Ed. 2d 610, 120 S. Ct. 693, 703-06 (2000).

Members of American Wildlands assert 'injuries in fact' through a number of affidavits. They claim aesthetic, conservation, and economic interests in preserving Montana's waters, referring to use of these waters in the form of drinking, fishing, swimming, and agricultural and household use.

For example, American Wildlands member, Eva Skidmore ("Skidmore") cites the receipt of a permit by the Big Sky Water and Sewer District to discharge sewage into the Gallatin River. (R. Doc. No. 77; Ex. 16.) Skidmore frequently canoes this stretch of river to fish and to experience one of the more pristine stretches **[**13]** of water in Montana. (Id.) In addition to the health risks that the sewage deployment arouses, **[*1156]** Skidmore also feels harmed by the severe impacts on her aesthetic interests. (Id.)

David Bayles ("Bayles"), conservation director of

Pacific Rivers Council, having spent a portion of nearly every year of his life in Montana, claims an interest in Montana's waters. (R. Doc. No. 77; Ex. 17, at 2.) Bayles has and will continue to fish, swim and go boating on Montana's waters. (Id.) He contends any lowering of standards designed to protect Montana's waters has a severe impact on his and other members aesthetic, conservation, and economic interests. (Id. at 3.)

James Jensen ("Jensen"), executive director of Montana Environmental Informational Center, contends his aesthetic, conservation, and recreational interests are being compromised. (R. Doc. No. 77; Ex. 18.) Jenson rafts, kayaks, fishes, and photographs many of Montana's rivers. (Id.) He contends more pollution and relaxed water standards have a severe impact on his and his members' aesthetic, conservation, and economic interests. (Id.)

Paul Hawkins ("Hawkins"), volunteer board member of Northern Plains Resource **[**14]** Council, owns and operates a hay and cattle ranch on Sweet Grass Creek. (R. Doc. No. 77; Ex. 19.) Hawkins uses this water for purposes of drinking water, household use, stock and crop irrigation, fishing, and other forms of recreation. (Id.) Hawkins contends relaxed protections of Montana's waters threaten his and his fellow members aesthetic, conservation, and economic interests in the waters. (Id.)

These affidavits of American Wildlands' members suffice to establish they have suffered an injury in fact to their aesthetic, conservation, and economic interests. The injuries are not hypothetical because they have already occurred and will continue to occur as American Wildlands members continue to participate in the activities listed above. Finally, American Wildlands, if successful in the action at hand, will have these injuries addressed, as the EPA essentially promulgates the rules for Montana's waters. Therefore, American Wildlands has standing.

VI. Standard of Review.

Section 701 of the APA provides agency action is subject to judicial review except where there is a statutory prohibition on review or where agency action is committed to agency discretion as a matter **[**15]** of law. 5 U.S.C. § 701(a)(1), (2), construed in Thomas Brooks Chartered v. Burnett, 920 F.2d 634, 641-42 (10th Cir. 1990). "The scope of judicial review of agency action under the APA is set forth in the Supreme Court's seminal opinion in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971)." Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1573 (10th Cir. 1994). A reviewing court may set aside agency findings that do not meet the six separate standards quoted below. Id. at 1574. An agency finding may be set aside if it is found to be:

> "(a) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of statutory jurisdiction, authority, or limitations or short of statutory right; (d) without observance of procedure required by law; (e) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (f) unwarranted by the **[**16]** facts to the extent that the facts are subject to trial de novo by the reviewing court."

Id. at 1574 (quoting 5 U.S.C. § 706).

"An agency's action is entitled to a presumption of regularity, 'but that presumption **[*1157]** is not to shield [the agency's] action from a thorough, probing, in-depth review.'" Id. (quoting Overton Park, 401 U.S. at 415). It is improper for a district court to use procedures designed for trial when that court is acting as a court of appeal. Substantial evidence is needed to affirm agency action which may only be affirmed on the grounds articulated by the agency itself. Id.

Olenhouse crystallized the essential function of judicial review as being "a determination of (1) whether the agency acted within the scope of its authority, (2) whether the agency complied with prescribed procedures, and (3) whether the action is otherwise arbitrary, capricious, or an abuse of discretion." Id. (citing CF & I Steel Corp. v. Economic Dev. Admin., 624 F.2d 136, 139 (10th

Cir. 1980)). While the first two of these legal principles are straightforward, the "arbitrary and capricious" principle **[**17]** is more difficult to apply.

In reviewing an action under the "arbitrary and capricious" standard, the court should ascertain whether the agency "examined relevant data and articulated a rational connection between the facts found and the decision made." Id. (citing Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Ins. Co., 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983)). "In reviewing the agency's explanation, the reviewing court must determine whether the agency considered all relevant factors and whether there has been a clear error of judgment." Motor Vehicle Mfrs., 463 U.S. at 43 (citing Overton Park, 401 U.S. 402 at 416). When the "arbitrary and capricious" standard is used to assure factual support, "'there is no substantive difference between what it requires and what would be required by the substantial evidence test, since it is impossible to conceive of a 'nonarbitrary' factual judgment supported only by evidence that is not substantial in the APA sense.'" Olenhouse, 42 F.3d at 1575 (quoting Association of Data Processing v. Bd. of Governors, 240 U.S. App. D.C. 301, 745 F.2d 677, 683 (D.C. Cir. 1984)). **[**18]** Finally, while the EPA is entitled to some deference, if its decision making was "arbitrary and capricious" it will be set aside. See id.

VII. Merits.

A. Exempting Nonpoint Source Pollution.

American Wildlands contends the EPA's approval of Montana's Water quality standards exempting non-point source pollution from the state's antidegradation rules is arbitrary, capricious, an abuse of discretion, or in violation of the CWA. Water quality standards "serve the dual purposes of establishing the water quality goals for a specific body of water and serve as the regulatory basis for the establishment of water-quality-based treatment controls and strategies . . ." 40 C.F.R. § 131.2 (1999). The EPA only has the authority to approve state water quality standards that are consistent with the CWA. 33 U.S.C. § 1313(c)(3).

"Point source" is defined as "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container . . . from which pollutants are or may be discharged. 33 U.S.C. § 1362(14). "The concept of a point source was designed to further **[**19]** the scheme to eliminate pollution of the nation's waters by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States." United States v. Earth Sciences Inc., 599 F.2d 368, 373 (10th Cir. 1979).

The legislative history of the CWA illustrates Congress was classifying "nonpoint source pollution" as "disparate runoff caused primarily by rainfall around activities that employ or cause pollutants." Id. **[*1158]** The Senate Report discussion of proposed legislation that led to the promulgation of 33 U.S.C. § 1314 contains the following statements about nonpoint source pollution:

> One of the common problems associated with pollution control is the dramatic increase in storm runoff when the earth's surface is made impermeable. Thus, highways, buildings, and parking lots all contribute substantially to accelerated runoff of rainwater into natural water systems. The greater volume and velocity produced cause high rates of erosion and siltation.

See Staff of Senate Comm. on Public Works, 93 Cong., 1st Sess., A Legislative History of the Water Pollution Control **[**20]** Act Amendments of 1972, 1470-71 (Comm. Print 1973). The Clean Water Act pertinently states, "it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution." 33 U.S.C. § 1251(a)(7). In short, Congress prohibited the discharge from a point source of any pollutant into waters of the United States unless that discharge complies with specific requirements of the CWA. See 33 U.S.C. § 1311(a).

Compliance with these requirements may be achieved by obtaining and abiding by the terms of a

National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to § 402, of the CWA. 33 U.S.C. § 1342. The Tenth Circuit has recognized:

> Whether a discharge is made through a point source is crucial for application of enforcement provisions of [the CWA] because pollutants discharged through point sources are regulated by effluent limitations and require a permit. Because nonpoint sources of pollution, such **[**21]** as oil and gas runoffs caused by rainfall on the highways, are virtually impossible to isolate to one polluter, no permit or regulatory system was established as to them.

Earth Sciences, 599 F.2d at 371.

Congress has left the regulation of nonpoint sources up to the states. See 33 U.S.C. § 1329. [3] **[**22]** Additionally, Congress has not required states to establish federally enforceable nonpoint source controls. Id. [4] On the other hand, water quality standards are applicable to nonpoint sources under the Total Maximum Daily Load ("TMDL") program because states must identify load allocations from nonpoint sources on state waters for which technology-based effluent limitations are not sufficient to achieve the applicable water quality standards. 33 U.S.C. § 1313(d); 40 C.F.R. § 130.7(b)(1999). A TMDL is "the sum of the individual wasteload allocations for point sources and load allocations for nonpoint sources and natural background . . . . The TMDL process provides for nonpoint source control tradeoffs." 40 C.F.R. § 130.2(i).

Antidegradation policies under the CWA are split into three tiers. "Tier I" requires EPA regulations to be consistent with the following: "(1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." 40 C.F.R. § 131.12(a)(1). "Tier II" water regulations provide:

> **[*1159]**
>
> (2) Where the quality of the waters exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development **[**23]** in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost effective and reasonable best management practices for nonpoint source control.

Id. (a)(2). "Tier III" water regulations provide: "(3) Where high water quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected." Id. (a)(3).

Montana's antidegradation policy regarding nonpoint sources exempts "existing activities that are nonpoint sources of pollution as of April 29, 1993" from antidegradation review. Mont. Code Ann. § 75-5-317(2)(a)(1999). Such an exemption occurs "when reasonable land, soil, and water conservation practices are applied and existing and anticipated beneficial uses will be fully protected." Id. (2)(b). [5]

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[3] "Section 131.12(a)(2) does not mandate that states establish controls on nonpoint sources." EPA: Water Quality Standards Handbook, (2nd ed. 1994) (citing 40 C.F.R. § 131.12(a)(2)) (A.R. Doc. 17.)

[4] "Section 319 does not require states to penalize nonpoint source polluters who fail to adopt best management practices; rather it provides for grants to encourage the adoption of such practices." Natural Resources Defense Council v. EPA, 915 F.2d 1314, 1318 (9th Cir. 1990).

[5] In response to a question from the EPA, Montana made clear: " § 75-5-317(2), Mont. Code Ann ("MCA"), only exempts nonpoint sources from Tier II review." (A.R. Doc. 56 at 01786.) Thus, the exemption does not apply to Tier I and Tier III reviews.

**[**24]**

EPA's regulations implementing the CWA require that state water quality standards include "a statewide antidegradation policy" to ensure that "existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." 40 C.F.R. § 131.12(a)(1) (1999). [6] At a minimum, state water quality standards must satisfy these conditions. PUD No.1 v. Washington Dep't of Ecology, 511 U.S. 700, 705, 128 L. Ed. 2d 716, 114 S. Ct. 1900(1994).

**[**25]** American Wildlands contends exempting nonpoint sources of pollution undermines the objectives of the CWA. EPA maintains it lacks authority under the CWA to require states to establish regulatory programs for nonpoint sources. Additionally, EPA argues, because there is no permit procedure for nonpoint source pollution, it would be unrealistic to regulate nonpoint source pollution through its antidegradation policy. [7] Furthermore, EPA argues, while nonpoint source pollution may be relevant to whether water quality standards **[*1160]** are being achieved, this does not mean EPA can require a state to implement nonpoint source control programs.

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[6]

> The rationale behind the antidegradation regulatory statement regarding achievement of statutory requirements for point sources and all cost effective and reasonable BMP's for nonpoint sources is to assure that, in high quality waters, where there are existing point or nonpoint source control compliance problems, proposed new or expanded point sources are not allowed to contribute additional pollutants that could result in degradation. Where such compliance problems exist, it would be inconsistent with the philosophy of the antidegradation policy to authorize the discharge of additional pollutants in the absence of adequate assurance that any existing compliance problems will be resolved . . . EPA believes that its antidegradation policy should be interpreted on a pollutant-by-pollutant and waterbody-by-waterbody basis.

EPA: Water Quality Standards Handbook, (2nd ed. 1994), (A.R. Doc. 17 at 00296.)

[7] "EPA Region VIII also does not believe that the Clean Water Act, as interpreted by EPA regulation at 40 C.F.R. 131, creates a federal requirement for states to regulate nonpoint sources such that water quality standards and antidegradation requirements are satisfied." (A.R. Doc. 10 at 00211.)

American Wildlands asserts EPA's approval of Montana's water quality standards exempting **[**26]** nonpoint source pollution from the state's antidegradation rules is arbitrary and capricious. "[The] essential function of judicial review is a determination of (1) whether the agency acted within the scope of its authority, (2) whether the agency complied with prescribed procedures, and (3) whether the action is otherwise arbitrary, capricious, or an abuse of discretion." Olenhouse, 42 F.3d at 1574. In reviewing an action under the "arbitrary and capricious" standard, I ascertain whether the agency "examined relevant data and articulated a rational connection between the facts found and the decision made." Id. (citing Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Ins. Co., 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983)). In reviewing the agency's explanation, I determine whether the EPA considered all relevant factors and whether there has been a clear error of judgment." See Motor Vehicle, 463 U.S. at 43 (citing Overton Park, 401 U.S. at 416).

"Determination of whether the agency acted within the scope of its authority requires a delineation of the scope of the agency's authority and discretion, **[**27]** and consideration of whether on the facts, the agency's action can reasonably be said to be within the range." Olenhouse 42 F.3d at 1574 (citing CF & I Steel, 624 F.2d 136 at 139). The Supreme Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations." Chevron v. Natural Resources Defense Council, 467 U.S. 837, 844, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). The CWA requires that states periodically review water quality standards and secure EPA's approval of any revision of those standards. EPA does not have the authority to approve state water quality standards that are inconsistent with the CWA. 33 U.S.C. § 1313(c)(3). Under the CWA, the only recognized means for enforcing water quality standards is through National Pollution Discharge Elimination Permits ("NPDES") for point source discharges. See 33 U.S.C. § 1311(e) and § 1342(a).

The CWA clearly makes a distinction between

point and nonpoint sources. Point sources **[**28]** are regulated by the NPDES and must comply with both effluent and water quality limitations. 33 U.S.C. § 1342. In contrast, "the discharge of pollutants from nonpoint sources -- for example, the runoff of pesticides from farmlands -- was not directly prohibited. Natural Resources Defense Council, 915 F.2d at 1316. "Section 319 does not require states to penalize nonpoint source polluters who fail to adopt best management practices; rather it provides for grants to encourage the adoption of such practices." Id. at 1318.

The maxim, *inclusio unius est exclusio alterius*, refers to the principle of interpretation that the inclusion of one is the exclusion of another. Where the law expressly describes a particular situation to which it shall apply, an irrefutable inference must be drawn that what is excluded was intended to be excluded. Kevin McC v. Mary A, 123 Misc. 2d 148, 473 N.Y.S.2d 116, 118 (N.Y. Fam. Ct. 1984). Applying the maxim here, the inclusion of law regarding point source pollution and the lack of law specifically regulating nonpoint source pollution implies Congress did not intend the CWA to regulate **[**29]** nonpoint source pollution.

"It is clear from the legislative history Congress would have regulated so-called nonpoint sources if a workable method could have been derived." Earth Sciences, **[*1161]** 599 F.2d at 372. "The [CWA] focused on point source polluters presumably because they could be identified and regulated more easily than nonpoint source polluters." Natural Resources Defense Council, 915 F.2d at 1316. Thus, given the specific wording of the CWA about point source pollution and the lack of wording about nonpoint pollution, EPA has acted within the range of authority and discretion Congress afforded it. The deference given to the state in implementing water quality standards is also persuasive EPA has acted within its range of authority.

"Determination of whether the agency complied with prescribed procedures requires a plenary review of the record and consideration of applicable law." Olenhouse, 42 F.3d at 1574. The EPA is guided in its application of regulations by the CWA. As required by the CWA, Montana reviewed its water quality standards which led to a change in the regulation of nonpoint sources. The change in regulation, **[**30]** which exempted nonpoint sources from regulation, must conform with CWA guidelines in order for the EPA to approve the change. In its Water Quality Standards Handbook ("Handbook"), the EPA states there is a distinction between "the applicability of water quality standards versus the enforceability of controls designed to implement standards." (A.R. Doc. 17 at 00297.) The Handbook adds: "Water quality standards are applicable to all waters in all situations, regardless of activity or source of degradation. Implementation may not be possible in all circumstances." (Id. at 00298.) [8] The administrative record clearly supports the EPA's determination that Montana does not have to regulate nonpoint sources for purposes of the EPA's regulation regarding antidegradation policies.

**[**31]** In making its determination, the EPA considered all of the relevant factors. In approving the nonpoint source exemption, it stated,

> our review of the categorical exclusions considered two basic questions: 1) is the activity regulated? and 2) is it reasonable to conclude discharge will be non-significant [sic]? Because water quality standards describe water quality goals for surface waters irrespective of the existing or potential pollution sources, it is our view that all regulated and non-regulated activities that contribute pollution to surface waters ideally should be subject to nondegradation (antidegradation) requirements. However, the federal statutory and regulatory antidegradation requirements have not, in our view, created any additional regulatory authority over otherwise unregulated activities. Therefore, although we expect states to apply antidegradation requirements to regulated activities, we encourage, but do not require, them to do so for non-regulated activities.

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[8] The "EPA Region VIII also does not believe that the CWA, as interpreted by EPA regulations at 40 C.F.R. 131, creates a federal requirement for states to regulate nonpoint sources such that water quality standards and antidegradation requirements are satisfied. (A.R. Doc. 10 at 00211.)

(A.R. Doc. 58 at 1813.)

The administrative record also illustrates Montana has an active program that addresses nonpoint source pollution through education and voluntary compliance rather **[**32]** than regulation. Additionally, the Tenth Circuit has stated, because nonpoint sources of pollution, such as oil and gas runoffs caused by rainfall on the highways, are virtually impossible to isolate to one polluter, no permit or regulatory system was established as to them. See Earth Sciences, 599 F.2d at 371. Finally, nothing in the CWA demands that a state adopt a regulatory system for nonpoint sources. Given this inability to isolate nonpoint source pollution to one identifiable source, and the silence of law regarding regulation of nonpoint sources, it cannot be said the EPA clearly erred in **[*1162]** exempting nonpoint source pollution from Tier II antidegradation review. Therefore, under the Olenhouse standard, the EPA has successfully examined the relevant data and articulated a rational connection between the facts found and the decision made. For these reasons the EPA decision is affirmed on this first issue.

B. Approval of Montana's Mixing Zone Policy.

American Wildlands contends the EPA's approval of Montana's water quality standards exempting mixing zones from compliance with narrative water quality criteria and the state's antidegradation rules is arbitrary **[**33]** and capricious or in violation of the CWA. "It is not always necessary to meet all water quality criteria within the discharge pipe to protect the integrity of the water body as a whole. Sometimes it is appropriate to allow for ambient concentrations above the criteria in small areas near outfalls. These areas are called mixing zones." EPA: Water Quality Standards Handbook, (2nd ed. 1994) (A.R. Doc. 17 at 00303.) Essentially, mixing zones are "limited areas or volumes 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." EPA Region VII Mixing Zones and Dilution Policy (1995) (A.R. Doc. 19 at 00304.)

"It is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited." 33 U.S.C. § 1251(a)(3). The decision to create mixing zones is left to the discretion of the state, but any decision to allow mixing zones must be consistent with the CWA. 33 U.S.C. § 1313(d)(4)(B). Under EPA review, state decisions regarding mixing zones are subject to the NPDES permit process.(A.R. Doc. 19 at 00364.)

To assist **[**34]** states in developing mixing zone procedures, EPA developed mixing zone guidance. That guidance identifies key issues such as the identification of "criteria to limit the size of the mixing zone, in-zone quality requirements, and dilution allowances." (A.R. Doc. 58.) "Allowable mixing zone characteristics should be established to ensure that (1) mixing zones do not impair the integrity of the water body as a whole; (2) there is no lethality to organisms passing through the mixing zone; and (3) there are no significant health risks, considering likely pathways of exposure." (A.R. Doc. 17 at 00303).

While certain numeric criteria for a certain substance may not apply, "all mixing zones shall be 'free from' substances that (i) settle to form objectionable deposits; (ii) float as debris, scum, oil, or other matter; (iii) produce objectionable color, odor, taste, or turbidity; (iv) are acutely toxic; (v) produce undesirable or nuisance aquatic life," (A.R. Doc. 19 at 00377). A limited exception is provided "where the discharge is to a river or stream, dilution is available at critical conditions, and available information is sufficient to reasonably conclude there is near instantaneous **[**35]** and complete mixing of the discharge with the receiving water (complete mixing), an appropriate dilution allowance may be provided." (Id.) Whether such a limited situation (complete mixing) occurs will be determined by the NPDES permit rationale. (Id.)

"Unfortunately, it is not possible to establish a wholly deterministic procedure (i.e., a "black box") with which to make all mixing-zone dilution decisions. Nor is it advisable to make all mixing-zone dilution decisions based on a simplistic approach which overlooks the mixing characteristics and water body uses (i.e., fish spawning, drinking water supply) particular to a site." (A.R. Doc. 19 at 00364.) "Accordingly, mixing zone dilution policies . . .should clearly set

forth the considerations, guidelines, and default assumptions **[*1163]** that will be utilized in making such case-by-case decisions." (Id.)

Montana's laws articulate the state shall "adopt rules governing the granting of mixing zones, requiring that mixing zones granted by the department be specifically identified and that they have: (a) the smallest practicable size; (b) a minimum practicable effect on water uses; and (c) definable boundaries. Mont. Code Ann. § **[**36]** 75-5-301(4)(a)-(c)(1999). American Wildlands contends Montana's water quality law does not provide any substantive restrictions on the size, shape, or location of the mixing zone. It also argues Montana has failed to require designated uses be protected through narrative or numeric water quality criteria within a mixing zone as long as the state has enacted "restrictions elsewhere which provide for the same environmental outcome" as the application of narrative criteria. American Wildlands further contends the inclusion of selected boilerplate narrative criteria placed in NPDES permits was arbitrary and capricious. Finally, American Wildlands contends Montana's mixing zone policy should be rejected because it does not comply with antidegradation review. EPA responds Montana's laws regarding mixing zones contain a number of restrictions which prohibit acute lethality within the mixing zone area, ensure a mixing zone does not extend to drinking water intakes, and ensure the passage of fish and aquatic life through the mixing zone area.

Analysis of the mixing zone issue requires a review under the Olenhouse standard. See Olenhouse, 42 F.3d at 1574. Although the EPA **[**37]** recommends a list of criteria which a mixing zone will be "free from," EPA leaves open the possibility of alternate protection, if adequate restrictions elsewhere provide for the same environmental outcome. (A.R. Doc 19 at 00377; EPA's Decision to Approve Section 17.30.507(1) of Montana's Mixing Zone Rule (A.R. Doc. 117 at 3181.)) Additionally, Montana has made efforts to protect water quality criteria of mixing zones by applying narrative criteria within mixing zones through the Montana Pollutant Discharge Elimination System ("MPDES"). (A.R. Doc. 114, 115, 116, & 117.) If such protections did not exist through the MPDES, the policy might be contrary to the EPA and the CWA guidelines. As discussed above, however, the protections are present and thus the Montana mixing zone law complies with the CWA.

American Wildlands contends EPA is inconsistent in stating it is acceptable to exempt mixing zones from numeric and narrative criteria if adequate restrictions provide for the same environmental outcome. "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency **[**38]** view." Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417, 124 L. Ed. 2d 368, 113 S. Ct. 2151 (1993). Here, however, EPA has not changed its position. It has consistently stated the suggested method of measuring minimum mixing zone quality by numeric and narrative criteria is a recommended, rather than a required, method. (A.R. Doc. 19 at 00371; A.R. Doc. 109 at 2897; A.R. Doc. 110 at 2890-1.) [9]

American Wildlands' contention that EPA's reliance on Montana's boilerplate language is arbitrary and capricious, is inapposite. The task at hand is to evaluate the validity of the Montana law approved by the EPA, rather than to evaluate how that law is executed. American Wildlands compares language of the Montana statute with language in MPDES permits, which do not contain all of the wording conceived in the statute. (A.R. Doc. 118 at 3184.) It is significant, however, to **[*1164]** note that the statute quoted, Mont. Admin. R. 17-30-637, is consistent **[**39]** with the CWA.

American Wildlands' argument that Montana's mixing zone policy does not comply with antidegradation review is also flawed. While mixing zone water quality is only a portion of the quality for a water body, antidegradation focuses on the quality of the water body as a whole. Concerning mixing zones, EPA guidance specifically provides: "It is not always necessary to meet all water quality criteria within the discharge pipe to protect the integrity of the water body as a whole. Sometimes it is appropriate to allow for ambient concentrations above the criteria in small

[9] EPA uses the words "recommend" and "should" interchangeably.

areas near outfalls. These areas are called mixing zones." (A.R. Doc. 17 at 00303.) Additionally, when a specific and a general law are present, the specific law prevails in authority. Here, the mixing zone guidance is more specific than antidegradation policy which focuses on the quality of a water body as a whole, and thus prevails.

A careful examination of the record reflects EPA has examined the relevant data and there is a rational connection between the facts found and the EPA's decision to approve Montana's mixing zone policy. The administrative record supports a finding that narrative and numeric **[**40]** criteria are recommended, rather than required, methods of measurement of water quality in mixing zones. Following Olenhouse, I find all three elements of judicial review have been satisfied. Specifically, the EPA has examined the relevant data and articulated a rational connection between the facts found and its decision. It cannot be said that the EPA clearly erred in this regard. Therefore, EPA's approval of Montana's mixing zone policy is affirmed.

C. Promulgating Replacement Standards.

American Wildlands asserts EPA has violated its duty promptly to promulgate replacements for Montana's disapproved standards in violation of 33 U.S.C. § 1313(c)(3)-(4).

> If the administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the state within ninety days after the date of notification, the Administrator shall promulgate such standard . . . .

33 U.S.C. § 1313 **[**41]** (c)(3). Thus, if EPA notifies a state of its disapproval of standards and changes are not made within ninety days, EPA shall promulgate such standards.

The CWA, however, provides an exception to this rule: "The administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter." 33 U.S.C. § 1313(c)(4)(B)(emphasis added). Therefore, the CWA does not require adherence to the ninety day requirement, when the state adopts a revised standard.

The Tenth Circuit has held when an agency fails to comply with a statutorily imposed absolute deadline it has withheld agency action and the court must compel agency action upon proper application. Forest Guardians v. Babbitt, 164 F.3d 1261, 1272 (10th Cir. 1998). "When an agency is required to act--either by organic statute or by the APA-- within an expeditious, prompt, or reasonable time, § 706 [of the APA] leaves in the courts the discretion to decide **[**42]** whether agency delay is unreasonable." Id. "Section 706 requires **[*1165]** that a reviewing court 'shall compel agency action . . . unreasonably delayed." Id.

American Wildlands contends, based on what it perceives as a history of inaction by EPA, "it would be inappropriate to sit back and trust that Montana and EPA will act swiftly and properly." (R. Doc. 77 at 21.) EPA contends Montana will address the issue by January or February of 2000.

Montana has amended all but two of the disapproved standards. (R. Doc. 62 at 46.) With reference to the remaining two standards, I must determine whether the delay has been unreasonable, bearing the standards of Olenhouse in mind. Montana informed the EPA it would amend these standards by the end of January or February, 2000. The post-ninety day response by the EPA is waived when the state adopts new standards. 33 U.S.C. § 1313(c)(4). In light of Montana's stated intentions, and the fact it had already successfully amended a number of other standards, it was not unreasonable for the EPA to wait until the end of February. Moreover, under the CWA, EPA's decision is within its scope of authority and it has articulated a **[**43]** rational connection between the facts found and the decision it made. Therefore, EPA is not in violation of the CWA.

The record does not reflect whether Montana has revised such standards. If it has the EPA is not

required to take further action; if it has not then EPA is required to promulgate new standards. Based on the record before me, however, I find the EPA is not in violation of 33 U.S.C. § 1313(c)(3)-(4).

D. Interested Person.

American Wildlands contends EPA's failure to review and approve or disapprove Montana's definition of an "interested person" is arbitrary, capricious, an abuse of discretion in violation of 33 U.S.C. § 1313(c)(3), 40 C.F.R. § 131.21, and the APA. The procedure for approving or disapproving standards under 33 U.S.C. § 1313(c)(3) is discussed above. CWA's "general policies" articulates: "States may, at their discretion, include in their standards, policies generally affecting their application and implementation, such as mixing zones, low flows and variances. Such policies are subject to EPA review and approval." 40 C.F.R. § 131.13 (1999).

Montana's code defines "interested **[**44]** person" as "a person who has a real property interest, a water right, or an economic interest that is or may be directly and adversely affected by the department's preliminary decision regarding degradation of state waters, pursuant to [MCA] § 75-5-303. This term includes a person who has requested an authorization to degrade high-quality waters." MCA § 75-5-303(5)(1999).

American Wildlands contends EPA must review the definition because the list of policies in the definition of "general policies" is not exhaustive. American Wildlands also asserts Montana's definition is inconsistent with federal standing requirements because it does not cover injuries to recreational, aesthetic, and conservational interests. EPA responds, while the "general policies" list is not exhaustive, it is representative of only substantive policies, whereas, the definition of "interested person" encompasses a procedural definition to which the "general policies" statement does not apply. In addition, EPA argues, because the definition of "interested person" applies only to degradation of waters and antidegradation review only applies to point source discharges, in practice, Montana may only authorize **[**45]** degradation of a Tier II water when issuing an MPDES permit. Therefore, EPA argues, the definition will only apply when Montana grants or denies an MPDES permit.

The issue is whether the definition of "interested person" is among the "policies" **[*1166]** that EPA is required to review. Because the issue is whether the EPA must review the definition, there is no need to reach the merits of the definition. The CWA does not specifically state that "interested person" shall be defined. Rather, it articulates general policies, including the encouragement of public participation. 33 U.S.C. § 1251(e).

While the CWA encourages public participation, the general policy makes no allusion to procedural policies. Notably, while the interests of those with recreational, aesthetic, and conservational interests may not be given a voice under this definition, the definition only applies to a state's final agency or department decision. Thus, the administrative process as a whole does not exclude participation of those wanting to be heard on recreational, aesthetic, and conservational issues. They are excluded only from appealing a final agency decision when their interest is solely **[**46]** limited to recreation, aesthetics, or conservation.

Here the specific policy trumps the general policy. The CWA and its regulations specifically state what policies must be reviewed by the EPA. This specific provision prevails over the general policy of encouraging public participation. Additionally, because the CWA has not hinted that procedural policies should be reviewed, and interested parties retain a voice in the administrative process, EPA's decision is within its scope of authority. EPA has articulated a rational connection between the facts found and the decision not to review the definition of "interested person." Therefore EPA is not in violation of 33 U.S.C. § 1313(c)(3),and 40 C.F.R. § 131.21.

E. Montana's Reliance on Disapproved Standards.

American Wildlands contends EPA's incorporation and use of Montana's numerous new and revised water quality standards without EPA's prior approval and EPA's continued incorporation and use of water quality standards that were disapproved by EPA on December 24, 1998 and

January 26, 1999 is arbitrary, capricious, an abuse of discretion in violation of § 303(c)(3) of the CWA, 33 U.S.C. § 1313 **[**47]** and the APA. American Wildlands asks me to order EPA promptly to "review any permit, decision, or other regulatory action that incorporated or otherwise relied upon the disapproved standard" and to revise the former actions as necessary. (Pls.' Opening Br., R. Doc. 57 at 48.)

The CWA states, "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. 40 C.F.R. § 131.21(c)(1999). [10] The CWA further states "review of the Administrator's action . . . . (F) in issuing or denying any permit under section 1342 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides. . . ." 33 U.S.C. § 1369(b)(1)(F). "If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State." 33 U.S.C. § 1313(c)(3).

**[**48]** American Wildlands seeks injunctive relief on this issue. The sole purpose of such relief is to prevent future acts or violations from occurring, not to punish past violations. United States v. Oregon State Medical Soc'y, 343 U.S. 326, 333, 96 L. Ed. 978, 72 S. Ct. 690 (1952). If, however, the activity causing the past violation has been abandoned and there is little probability that the violation will be resumed, **[*1167]** then issuance of an injunction is not warranted. Id.

American Wildlands poses two issues: (1) Whether Montana's disapproved standards should remain effective pending their revision and approval by EPA; and (2) whether EPA should re-visit past decisions that relied upon disapproved standards. American Wildlands contends standards disapproved by the EPA should not remain in effect and past decisions relying on disapproved standards should be revisited. EPA contends this court lacks jurisdiction over this cause of action; nearly all of the previously disapproved standards have been approved rendering the issue moot; and the standards which have yet to be approved are presumed to be approved as discussed above. EPA further contends, because injunctive relief **[**49]** is aimed at preventing future violations and the disapproved standards for the most part have been approved, such relief is not appropriate.

American Wildlands uses a TMDL as its sole example of EPA's reliance on a disapproved standard. 33 U.S.C. § 1369(b)(1)(F) applies. Approving a TMDL involves issuing a permit. Under the CWA, the review of the decision to issue or deny a permit may be had in the Circuit Court of Appeals. 33 U.S.C. § 1369(b)(1)(F). Thus, I do not have jurisdiction over this issue.

Even if I were to determine jurisdiction exists, the facts here are distinguishable from those in the two cases cited by the American Wildlands, Whitney v. Booker, 147 F.3d 1280, 1281 (10th Cir. 1998) and Snyder v. Shalala, 44 F.3d 896, 897 (10th Cir. 1995), both of which involved a contradiction between the substance of the interpretation of the statute and the regulations. Here, there is no such contradiction. Although the statute addresses the issue of when a state's proposed standard will become law, it does not address the status of the standard in the interim sixty days. Accordingly, for the rejected **[**50]** standard to remain in effect as the regulations provide, does not conflict with the statute. In essence, the state proposal becomes effective but does not become the law during the sixty day period when EPA is deciding whether to approve or disapprove the proposed standard. Finally, this issue is most likely moot since the majority of the disapproved standards have been approved and the remaining disapproved standards are presumed to be approved.

Because I do not have jurisdiction to review this issue, I do not rule on it.

VIII. Conclusion.

For the aforesaid reasons, to the extent I have

[10] Despite the fact EPA has proposed to change this rule (64 Fed. Reg. 37073 (July 9, 1999)) the rule has yet to be changed and EPA must follow the current regulation.

jurisdiction, I affirm EPA's actions. Accordingly,

IT IS ORDERED THAT the relief sought by Plaintiffs is DENIED and this civil action is DISMISSED WITH PREJUDICE, with the parties to pay their own costs.

Dated this 27 day of April, 2000, at Denver, Colorado.

JOHN L. KANE, JR.

U.S. SENIOR DISTRICT COURT JUDGE

**JUDGMENT**

Pursuant to and in accordance with the Memorandum Opinion and Order entered by Senior Judge John L. Kane on April 28, 2000, incorporated herein by reference, it is

ORDERED that, to the extent the Court has jurisdiction, the actions of the U.S. Environmental Protection **[**51]** Agency are affirmed. It is

FURTHER ORDERED that the relief sought by Plaintiffs American Wildlands, Pacific Rivers Council, Montana Environmental Information Center, and Northern Plains Resource Council, Inc., is denied. It is

FURTHER ORDERED that judgment is entered in favor of Defendants Carol Browner, in her official capacity as the Administrator of the U.S. Environmental Protection Agency, Bill Yellowtail, in his official capacity as the Regional Administrator of the U.S. Environmental Protection Agency, Region VIII, and U.S. Environmental Protection Agency, and Intervenor-Defendants Western Environmental Trade Association, on Behalf of its Members, and State of Montana, Department of Environmental Quality, and against Plaintiffs American Wildlands, Pacific Rivers Council. Montana Environmental Information Center, and Northern Plains Resource Council, Inc. It is

FURTHER ORDERED that the parties shall pay their own costs. It is

FURTHER ORDERED that the Complaint for Declaratory and Injunctive Relief and this civil action are dismissed with prejudice.

DATED at Denver, Colorado, this 2nd day of May, 2000.

FOR THE COURT:

James R. Manspeaker, Clerk

By:

Stephen P. Ehrlich

**[**52]** Chief Deputy

APPROVED:

John L. Kane, Jr., Senior Judge

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End of Document

# Save the Valley, Inc. v. United States EPA

United States District Court for the Southern District of Indiana, Indianapolis Division

September 17, 2002, Decided

CAUSE NO. IP 99-0058-C-B/ G

**Reporter**
223 F. Supp. 2d 997; 2002 U.S. Dist. LEXIS 17785; 55 ERC (BNA) 1171

SAVE THE VALLEY, INC., THOMAS BREITWEISER and L. JAE BREITWEISER, Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, CHRISTINE TODD WHITMAN, IN HER CAPACITY AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and DAVID A. ULLRICH, IN HIS CAPACITY AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 5, Defendants, INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, Intervenor Defendant.

**Disposition:** **[**1]** Defendants EPA's and IDEM's motions for summary judgment granted in part and denied in part. Plaintiffs' motion for summary judgment granted in part and denied in part. Judgment entered for plaintiffs concerning their claims under 33 U.S.C. § 1342(c)(3).

## Core Terms

EPA, NPDES, feeding, permits, Animal, operations, pollutants, requirements, regulations, confined, discharges, withdrawal, Concentrated, manure, notice, days, inspections, limitations, violations, revision, federal regulation, summary judgment, waters, summary judgment motion, issues, http, www, reasons, sources, notify

**Counsel:** For Plaintiffs: E Scott Treadway, Tabbert Hahn Earnest & Weddle LLP, Indianapolis, IN.

Sierr L Cutts, Office of the Attorney General, Indianapolis, IN.

Jon M Lipshultz, U S Department of Justice, Washington, DC.

**Judges:** SARAH EVANS BARKER, JUDGE, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF INDIANA.

**Opinion by:** SARAH EVANS BARKER

## Opinion

**[*999]** ***ENTRY ON CROSS-MOTIONS FOR SUMMARY JUDGMENT***

Plaintiffs, Save the Valley, Inc. ("Save the Valley"), Thomas Breitweiser and L. Jae Breitweiser, sue the United States Environmental Protection Agency, *et. al.* ("the EPA") under the Clean Water Act ("the Act"), originally known as the Federal Water Pollution Control Act, 86 Stat. 816, as **[**2]** amended, 33 U.S.C. § 1251 *et seq.*, and the Federal Mandamus Statute, 28 U.S.C. § 1361. Pursuant to the citizen suit provision of the Act, 33 U.S.C. § 1365(a), Plaintiffs seek injunctive relief and a writ of mandamus. Plaintiffs contend that the EPA possesses actual knowledge that the State of Indiana has failed to adopt and enforce adequate laws and regulations concerning the discharge of pollutants from concentrated animal feeding operations ("CAFOs"), particularly industrial hog farms, and has failed to require those operations to acquire National Pollutant Discharge Elimination System ("NPDES") permits. Thus, they seek to compel the EPA: (1) to reassume enforcement of Indiana's EPA-authorized NPDES permitting program pursuant to 33 U.S.C. § 1319(a)(2), and (2) to initiate proceedings under 33 U.S.C. § 1342(c)(3) to withdraw approval of

Indiana's NPDES program. The state agency responsible for the administration of Indiana's NPDES program, the Indiana Department of Environmental Management ("IDEM"), has intervened as a Defendant in this action.

The EPA, IDEM **[**3]** and Plaintiffs each filed motions for summary judgment on February 4, 2002. For the reasons stated below, the Court hereby GRANTS Plaintiffs' Motion for Summary Judgment with respect to their claim under 33 U.S.C. § 1342(c)(3), and DENIES the EPA's and IDEM's Motions for Summary Judgment on that issue. In addition, the Court GRANTS Defendants' Motion for Summary Judgment with respect to Plaintiffs' remaining claims, and DENIES Plaintiffs' Motion on those issues.

## *FACTUAL BACKGROUND*

Save the Valley, Inc. is a not-for-profit corporation dedicated to protecting the environment. Plaintiffs' Memorandum of Law in Support of Summary Judgment ("Pl. Mem.") at 3. Members of Save the Valley, Inc. live in Indiana near or adjacent to CAFOs. *Id*. Thomas Breitweiser and L. Jae Breitweiser are residents of **[*1000]** Indiana who own and live on property adjacent to a proposed CAFO. *Id*. Plaintiffs had become concerned that, due to what they perceived to be inadequate state regulation of CAFOs, Indiana was becoming a popular state in which to open hog farms. *See* Complaint, P 17. In a letter dated June 2, 1998, Plaintiffs notified EPA and IDEM officials of their belief **[**4]** that Indiana had failed to adequately regulate pollution from confined animal feeding operations. *See* Ex. A to Complaint at 2. On January 20, 1999, Plaintiffs filed their Complaint for Injunctive Relief and for Writ of Mandamus in this court.

## *SUBJECT MATTER JURISDICTION*

Before we can reach the merits of this action, we must address some jurisdictional issues. Section 1369(b)(1) of the Clean Water Act vests a very limited original jurisdiction in the Circuit Courts of Appeal. Based on that section, the EPA contends that this court does not have subject matter jurisdiction over Plaintiffs' section 1342(c)(3) claim. Rather, according to the EPA, Plaintiffs' claim requires judicial review of an action by the Administrator regarding a state permit program, which would place the claim within the scope of section 1369(b)(1).

Section 1369(b)(1) states, in pertinent part, as follows:

> Review of the Administrator's action … (D) in making any determination as to a State permit program submitted under section 1342(b) of this title … may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such **[**5]** person resides or transacts such business upon application by such person.

33 U.S.C. § 1369(b)(1). The citizen suit provision of the Clean Water Act, on the other hand, allows citizens to bring suit to force the Administrator to perform non-discretionary duties under the Act. 33 U.S.C. § 1365(a)(2). We think the difference between the two provisions is clear. While section 1369(b)(1) allows the Courts of Appeal to review actions actually taken by the Administrator, section 1365(a)(2) allows district courts to require the Administrator to act where she has failed to perform a mandatory duty. *See Armco, Inc. v. U.S. Envtl. Protection Agency,* 869 F.2d 975, 981-82 (6th Cir. 1989). Section 1369(b)(1) vests original jurisdiction in the Courts of Appeal only to *review the Administrator's action* in certain very limited categories. We must disagree with the reasoning of *American Canoe Ass'n v. U.S. Environmental Protection Agency,* 30 F. Supp. 2d 908, 924 (E. D. Vir. 1998), on which Defendants rely for the proposition that the section 1342(c)(3) claim belongs in the appellate court. As in this case, **[**6]** the plaintiffs in *American Canoe* brought a claim under the citizen suit provision of the Clean Water Act seeking to compel the Administrator to revoke a state's NPDES permitting program pursuant to section 1342(c)(3). That court recast the plaintiff's claim as a claim that the EPA improperly approved of the state's program, then concluded that this "review of … [a] determination as to a state permit program" fell within the purview of section 1369(b)(1) rather than the citizen suit provision. *Am. Canoe,* 30 F. Supp. 2d at 924. We

do not agree that Plaintiffs' claim should be recast in such a manner. The failure to revoke a state's NPDES program when required by law is *a failure to act,* whereas the inappropriate approval of a program is *an act*. [1] Furthermore, the approval of a **[*1001]** program may be appropriate based on the existence of a state's legal authority to administer that program, and yet years later it may become necessary to revoke a state's authority due to its failure to properly implement its authority. Plaintiff's section 1342(c)(3) claim is not within the ambit of the very limited jurisdiction contemplated by section 1369(b)(1). [2] **[**8]** Because it **[**7]** is claimed that the Administrator *has not acted,* Plaintiffs ask the Court to compel the EPA to perform duties outlined in section 1342(c)(3), which this court has previously determined to impose mandatory duties. Thus, pursuant to section 1365(a)(2), the case is properly before this court and would not have been properly filed with the Court of Appeals. [3]

Another possible hurdle to jurisdiction has already been cleared by Plaintiffs. The citizen suit provision requires that a party first give notice to the Administrator sixty days before a lawsuit is commenced. 33 U.S.C. § 1365(b)(2). The purpose of the notice period is to allow the EPA to avoid expensive and protracted judicial litigation by addressing citizen concerns at the administrative level. *See South Carolina Wildlife Fed'n v. Alexander,* 457 F. Supp. 118, 124 (D. S. C. 1978). What constitutes proper notice is prescribed by EPA regulation. **[**9]** *Id*. In our previous Entry, we rejected the EPA's argument that Plaintiffs were required to exhaust administrative remedies under 40 C.F.R. § 123.64(b) before filing suit. [4] Nonetheless, Plaintiffs did in fact meet the notice requirements found in that regulation as well as those imposed by 33 U.S.C. § 1365(b)(2). The regulation states that an interested party may petition the Administrator to withdraw approval of a state's program by setting out reasons from among those listed in 40 C.F.R. § 123.63. Under section 123.63, reasons for withdrawal deemed sufficient include the failure of the state to exercise control over activities to be regulated, including the failure to issue permits where required, and the failure of the state to inspect and monitor activities subject to regulation. 40 C.F.R. § 123.63(2)(i); 40 C.F.R. § 123.63(3)(iii). In their June 2, 1998 letter, Plaintiffs notified EPA and IDEM officials of their belief that Indiana had "failed to develop regulations controlling the permit process and point source discharge" **[*1002]** from "confined animal **[**10]** feeding operations." Ex. A to Pl.'s Complaint at 2. The letter also explicitly stated that IDEM had failed to issue permits to CAFOs. *Id*. at 3. Plaintiffs did not file this lawsuit until January 20, 1999; EPA and IDEM thus had more than seven months in which to have made some appropriate response, when Plaintiffs were required to wait only sixty days following their notification to file this action. *See* 33 U.S.C. § 1365(b)(2). To require them to wait until the EPA deemed it appropriate to make a response under 40 C.F.R § 123.64 (whenever that might be) would clearly frustrate performance under the citizen suit provision.

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[1] Furthermore, a failure to act cannot logically ever trigger a statute of limitations; if we were to construe this as a claim that the EPA inappropriately approved Indiana's program, it would in any event be time-barred by Section 1369(b)(1) as beyond the one hundred twenty day limitation for bringing a claim to challenge the EPA's approval of a state's program. Any such claim in any state with an approved program would likely meet the same fate.

[2] We must also address that Plaintiffs' Complaint does state an inexplicit, and apparently subsequently abandoned, request for relief under 33 U.S.C. § 1342(b). Plaintiffs have not developed a relevant claim under that section anywhere in the record, not even in response to Defendants' motions for full summary judgment. In any event, a claim in opposition to the EPA's initial approval of Indiana's program would have to have been filed with the United States Court of Appeals for the Seventh Circuit within the one hundred twenty day statute of limitations imposed by 33 U.S.C. § 1369(b)(1). *See* n. 1, *supra*. Therefore, any claim here asserted by Plaintiffs under section 1342(b) is both outside of our jurisdiction and barred by the statute of limitations.

[3] This interpretation finds further support in the federal mandamus statute, 28 U.S.C. § 1361, pursuant to which Plaintiffs also assert jurisdiction here. The federal mandamus statute states that "the district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. We view our jurisdictional footing as sure.

[4] Compare to the Administrative Procedure Act (APA), 5 U.S.C. § 704. A party must exhaust administrative remedies, at least to the extent of obtaining a final agency action, before filing suit under the APA. *See Darby v. Cisneros,* 509 U.S. 137, 153-54, 113 S. Ct. 2539, 2548, 125 L. Ed. 2d 113 (1993).

**[**11]** For these reasons, we deem our jurisdiction over Plaintiffs' claims to be proper.

## *SUMMARY JUDGMENT ANALYSIS*

[5]

### **[**12]** *Summary Judgment Standard*

Summary judgment is properly granted only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Vitug v. Multistate Tax Comm'n,* 88 F.3d 506, 511-512 (7th Cir. 1996). A genuine issue of material fact exists if there is sufficient evidence for a reasonable jury to return a verdict in favor of the non-moving party on the particular issue. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986); *Eiland v. Trinity Hosp.,* 150 F.3d 747, 750 (7th Cir. 1998). In making this determination, the Court must view all of the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *Schwartz v. State Farm Mut. Auto. Ins. Co.,* 174 F.3d 875, 878 (7th Cir. 1999); *NLFC, Inc. v. Devcom Mid-America, Inc.,* 45 F.3d 231, 234 (7th Cir. 1995).

The moving party bears **[**13]** the initial burden of production to establish "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Devcom Mid-America,* 45 F.3d at 234. The burden then shifts to the non-movant, who may not rest upon mere allegations, but by affidavits, depositions, or other evidence must "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Devcom Mid-America,* 45 F.3d at **[*1003]** 234. The Court must enter summary judgment when the non-moving party has failed to "come forward with evidence that would reasonably permit the finder of fact to find in her favor on a material question …". *Waldridge v. Am. Hoechst Corp.,* 24 F.3d 918, 920 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 585-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); *Celotex,* 477 U.S. at 322-24, 106 S. Ct. 2548; *Anderson,* 477 U.S. at 249-52, 106 S. Ct. 2505). However, if genuine doubts remain, and a reasonable fact-finder could find for the non-moving **[**14]** party, summary judgment is inappropriate. *See Shields Enters., Inc. v. First Chicago Corp.,* 975 F.2d 1290, 1294 (7th Cir. 1992).

## *Concentrated Animal Feeding Operations and Their Environmental Effects*

Animal feeding operations, or "AFOs," are industrial farms that congregate animals, feed, manure and urine, dead animals, and production operations into a small area of land. [6] *See* U.S. Dept. of Agric. & U.S. Envtl. Protection Agency, *Unified National Strategy for Animal Feeding Operations,* § 2.1 (March 9, 1999), available at

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[5] Pursuant to Federal Rule of Civil Procedure 37(c), the EPA moves to strike Exhibits A, F, and V to Plaintiffs' Motion for Summary Judgment. Rule 37(c) provides that "[a] party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence … on a motion any witness or information not so disclosed." As agreed upon in the Amended Case Management Plan entered by this court on July 13, 2001, Plaintiffs were to file disclosures in accordance with Rule 26, including preliminary witness and exhibit lists and preliminary contentions, no later than August 15, 2001. As of the date of this motion, March 4, 2002, Plaintiffs had not filed their disclosures. Thus, Defendants were not aware that the testimony of the witnesses in Exhibits A, F, and V would be relied upon by Plaintiffs in their summary judgment motion. Exhibit A is the affidavit of a Save the Valley official. Exhibits F and V consist of depositions of IDEM employees that were taken as part of state court proceedings to which the EPA was not a party. Thus, the failure to disclose the witnesses was not "harmless," because the EPA had no opportunity to question them.

Rule 37(c) calls for the automatic and mandatory exclusion of material not disclosed in accordance with Rule 26(a). Because Plaintiffs did not disclose the witnesses whose testimony is contained in Exhibits A, F, and V, and because Plaintiffs have offered no justification whatsoever for their failure, the EPA's Motion to Strike is GRANTED. Plaintiffs' Exhibits A, F, and V were not considered in the present decision on summary judgment.

[6] We note with some disgruntlement that when discussing factual information concerning CAFOs, Plaintiffs' counsel's citations were often incomplete, sometimes inaccurate, and occasionally even involved non-existent quotations. Needless to say, this imposed substantial additional burdens on the Court.

http://www.epa.gov/npdes/pubs/finafost.pdf. Not all AFOs are CAFOs. AFOs are classified as CAFOs based in part upon the number of animal units they contain. If an AFO contains more than 1000 animal units, it is considered a CAFO. [7] *See id*. at § 4.2; 40 C.F.R. § 122.23. An AFO also qualifies as a CAFO if it contains between 300 and 1000 animal units and discharges pollutants through a man-made structure or into any waters that run through the facility or come into direct contact with the confined animals. *See id*. AFOs with less than 300 animal units can be considered CAFOs if an on-site **[**15]** inspection leads the NPDES permitting agency to conclude that the facility "is a significant contributor of pollution to the waters of the United States." *Id*. However, an AFO is not a CAFO if it discharges only in the event of a 25-year, 24-hour storm event. [8]

**[**16]** Animals in CAFOs are usually kept in pens within larger buildings. Natural Resources Defense Council and Clean Water Network, *America's Animal Factories: How States Fail to Prevent Pollution From Livestock Waste,* Introduction and Executive Summary (December 1998), available at http://www.nrdc.org/water/pollution/factor/aafinx.asp. The floors of the pens are slatted so as to collect the waste excreted by the animals into a holding tank located below the floor. *Id*. The **[*1004]** waste is then usually piped into storage lagoons, uncovered pits that some have referred to, not unfairly, as "open air cesspools." *See* Marilyn Berlin Snell, *Downwind in Mississippi,* Sierra Magazine, March/ April 2002, available at http://www.sierraclub.org/sierra/200103/profile.asp. From the storage lagoon, waste is transported to be spread, sprayed, or injected onto croplands or pastures.

Manure is the primary source of AFO pollution. Pl. Ex. K: U.S. Envtl. Protection Agency, Office of Water Standards and Applied Sciences Division, *Environmental Impacts of Animal Feeding Operations,* § 1.2 (December 31, 1998). "Animal manure typically contains nutrients (i.e., nitrogen and phosphorus), pathogens, **[**17]** salts, and heavy metals (e.g., copper)." Pl. Ex. J, U.S. Envtl. Protection Agency, Office of Enforcement, *Compliance Assurance Implementation Plan for Concentrated Animal Feeding Operations,* 3 (March 5, 1998). AFO pollution can negatively impact surface water, groundwater, air and soil. *Id*. at § 1.3. Environmental damage due to CAFOs may occur due to lagoon breakage or spillage or to problems with land application of manure, among other things. One storage lagoon often holds millions of gallons of waste; in the event of a spill or break, thousands of those gallons may flow into creeks, drainage ditches, streams, rivers, or lakes. *See* Kyle Niederpruem, *Short Staffing Makes Policing Polluters Harder,* Indianapolis Star (April 21, 1998) (spill of 9600 gallons of hog manure caused fish kill in Indiana). Manure application fields often contain or are adjacent to such waterways, posing a less concentrated but more imminent threat. An EPA fact sheet describes in more detail how animal feeding operations contribute to pollution:

> Runoff from livestock operations enters water bodies when poor maintenance of waste lagoons, improper design of storage structures, improper **[**18]** storage of animal waste, and excessive rainfall result in spills and leaks of manure-laden water. Overapplication of manure to cropland is another source of animal waste runoff. When livestock manure and other animal waste spills or leaks into surface or ground water, it can create an immediate threat to public health and water resources. This runoff has nutrients, such as nitrogen and phosphorus, that in excess cause algae and

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[7] Animal "units" are calculated based upon a formula set out in EPA regulations at 40 C.F.R. § 122, Appendix B. The multiplication factor for swine weighing more than 55 pounds is 0.4, so that it actually takes 2500 swine for an AFO to be automatically categorized as a CAFO. *See also* 40 C.F.R. § 412.10 (feedlots point source category applicable to feedlots housing 2500 swine of 55 pounds or more).

[8] A 25-year, 24-hour storm event is defined as a "number of inches of rainfall in a 24 hour period that is expected to occur only once every 25 years." Kristen E. Mollnow, *Concerned Area Residents for the Environment v. Southview Farm: Just What Is A Concentrated Animal Feeding Operation Under the Clean Water Act?,* 5-FALL Alb. L. Envtl. Outlook 11, 16 (2000) (*quoting* U.S. Envtl. Protection Agency, Guidance Manual on NPDES Regulations for Concentrated Animal Feeding Operations, 24-29 (draft 1993). Maps published by the National Weather Service show the amount of rainfall that constitutes such an event for every location in the United States. *Id*. at n. 111.

> other microorganisms to reproduce in waterways, creating unsightly and possibly harmful algae blooms. Explosive algae populations can lower the level of dissolved oxygen, which can cause fish and other aquatic organisms to die. Spills from ruptured waste lagoons and other faulty storage facilities have killed tens of thousands of fish. Animal waste runoff can also be a threat to the health of people who come into contact with affected waters because some of the microbes (bacteria, protozoa and viruses) in animal waste can cause disease.

U.S. Envtl. Protection Agency, Office of Water, *Proposed Regulations to Address Water Pollution from Concentrated Animal Feeding Operations,* 1 (March 2001), EPA 833-F-00-016, available at http://www.epa.gov/npdes/pubs/CAFO-brochure3.pdf.

**[**19]** Public and government attention have focused increasingly on the environmental impact of animal feeding operations. [9] In **[*1005]** the past twenty years, the trend in the livestock industry has been toward fewer but larger operations. *See id*. A foreseeable result of this trend has been increased reports of large-scale discharges from these facilities, as well as continued runoff of nutrients. *See id*. Indeed, "states estimate that agriculture contributes to the impairment of at least 173,629 river miles, 3,183,159 lake acres, and 2,971 estuary square miles." Pl. Ex. K: U.S. Envtl. Protection Agency, Office of Water Standards and Applied Sciences Division, *Environmental Impacts of Animal Feeding Operations,* 1 (December 31, 1998). About twenty percent of that damage is attributable to intensive animal operations. *Id*.

**[**20]** In Indiana, the number of operating CAFOs is approximately 550. Memorandum in Support of the Indiana Department of Environmental Management's Motion for Summary Judgment ("IDEM Mem."), Ex. A at 1. IDEM reported that as of January 1, 2001, "there were 2,998 approved confined feeding operations in Indiana." [10] Pl. Ex. AA: *IDEM 2000 Annual Summary Confined Feeding Report*. In 1997, animal feedlots were responsible for 2,391 spills of manure in Indiana, including one single spill of approximately 9600 gallons of hog manure. *See* Niederpruem, *supra*. In the year 2000, a total of 1,120 sites, chosen because they had not sent in manure maintenance plans (MMPs) or had requested exemption from Indiana's MMP requirement, were inspected by IDEM, but 804 of those sites were identified as closed. *Id*. At the remaining 316 sites, fifty-one violations were detected, including 15 lagoon violations and 16 land application violations. *Id*.

**[**21]** In Indiana in 1998, 84% of surveyed river miles and 99% of surveyed lake acres had good water quality that could support aquatic life, though a mere 18% of surveyed river miles could support swimming due to high bacteria concentrations. U.S. Envtl. Protection Agency, *National Water Quality Inventory: 1998 Report to Congress,* 304-305, available at http://www.epa.gov/305b/98report/chap12hm.pdf. The pollutants most frequently identified in Indiana waters were bacteria, priority organic compounds, oxygen-depleting wastes, pesticides, and metals. *Id*.

***The Clean Water Act***

Congress enacted the Clean Water Act in 1972 in order "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). This marked a major transformation in the Nation's approach to water

[9] The EPA in particular has devoted significant attention to this issue in recent years. In March, 1999, as part of President Clinton's 1998 Clean Water Action Plan, the EPA and the USDA implemented a Unified National Strategy for Animal Feeding Operations. The Unified Strategy for AFOs recognizes the role played by AFOs in the pollution of national waterways, and is intended "to minimize the water quality and public health impacts of AFOs." U.S. Dept. of Agric. & U.S. Envtl. Protection Agency, *Unified National Strategy for Animal Feeding Operations,* § 1.1 (March 9, 1999), available at http://www.epa.gov/npdes/pubs/finafost.pdf. The Unified Strategy for AFOs is discussed below in more detail.

[10] Indiana's independent regulatory system for confined feeding operations, which will be discussed in more detail below, requires state approval for operations above and beyond those that constitute CAFOs under federal regulations.

pollution. *See Nat'l Wildlife Fed'n, et. al. v. Gorsuch,* 530 F. Supp. 1291, 1296 (D. D. C. 1982) (citing *A Legislative History of the Water Pollution Control Act Amendments of 1972* (Leg.Hist.) at 1254, 1271, 1280 and 1303), *rev'd on other grounds,* 224 U.S. App. D.C. 41, 693 F.2d 156 (D. C. Cir. 1982). **[**22]** "Prior to 1972, the program was based upon water quality standards promulgated and implemented by the states with some assistance and oversight from the federal government." *Gorsuch,* 530 F. Supp. at 1296. The method to control pollution was to work backwards from the desired water quality, and discharges were only violations if it could be shown they caused the water body to fail to meet water quality standards. *Id*. The system proved cumbersome and ineffectual. **[*1006]** *Id*. Today, the Act works by regulating all discharges of pollutants into waters of the United States. *See* 33 U.S.C. § 1311. It does so through the federally mandated and supervised NPDES permit program. Compliance with the Clean Water Act is determined through compliance with NPDES permits. 33 U.S.C. § 1342(h). NPDES permits "impose limitations on the discharge of pollutants, and establish related monitoring requirements …". *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 174, 120 S. Ct. 693, 700, 145 L. Ed. 2d 610 (2000). All discharges of pollutants into the Nation's waters are regulated by the NPDES **[**23]** permit program. *See* 33 U.S.C. § 1342.

The Clean Water Act "anticipates a partnership between the States and the Federal Government …". *Arkansas v. Oklahoma,* 503 U.S. 91, 101, 112 S. Ct. 1046, 1054, 117 L. Ed. 2d 239 (1992). This relationship has also been aptly characterized as a "distinctive variety of cooperative federalism." *U. S. Dept. of Energy v. Ohio,* 503 U.S. 607, 633, 112 S. Ct. 1627, 1642, 118 L. Ed. 2d 255 (1992) (White, J., *concurring in part and dissenting in part*). The Act authorizes the EPA to issue NPDES permits, but States may apply for and receive EPA approval to administer their own permit programs, provided they comply with detailed statutory and regulatory requirements. 33 U.S.C. § 1342(b); 40 C.F.R. §§ 123.1-123.64. The EPA retains a high level of involvement and authority when a State administers its own NPDES permit program. For instance, the EPA continues to review state water quality standards, § 1313(c), retains authority to object to the issuance of particular permits, § 1342(d)(2), monitors state programs for continuing compliance **[**24]** with federal directives, § 1342(c), and enforces the terms of individual NPDES permits when a State has failed to institute enforcement proceedings, § 1319(a)(1). *See also U.S. Dept. of Energy v. Ohio,* 503 U.S. at 634, 112 S. Ct. at 1643.

At issue in the present action are sections 1319(a)(2) and 1342(c)(3). In a previous Entry denying Defendants' Rule 12(b)(1) and Rule 12(b)(6) motions to dismiss, we held that those sections of the Clean Water Act impose mandatory duties upon the Administrator of the EPA. *See Save the Valley, Inc. v. U.S. Envtl. Protection Agency,* 99 F. Supp. 2d 981 (S. D. Ind. 2000). Section 1319(a)(2) states that the EPA Administrator shall assume enforcement of a State's permit program when "the Administrator finds that violations of permit conditions or limitations … are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively …". 33 U.S.C. § 1319(a)(2). Section 1342(c)(3) states that the Administrator shall withdraw approval of a State's NPDES program when a State fails to take appropriate corrective action even after **[**25]** being notified by the Administrator that its program is noncompliant. *See* 33 U.S.C. § 1342(c)(3). In the previous Entry, we specifically held that the Act requires the Administrator "to make a 'finding' under § 1319(a)(2) or a 'determination' under § 1342(c)(3) … when she becomes aware of such violations as articulated in § 1319(a)(2)." *Save the Valley,* 99 F. Supp. 2d at 985. If she finds that such widespread violations are occurring in a State, she is then required by § 1319(a)(2) to issue a compliance order to so notify the State. *Id*. at 984. If after thirty days the State has not corrected the problem, the Administrator is to give public notice of his findings. 33 U.S.C. § 1319(a)(2). "Once public notice is given, the Administrator must enforce the permit conditions until the State remedies its problems." *Save the Valley,* 99 F. Supp. 2d at 984; 33 U.S.C. § 1319(a)(2). "The procedures outlined in § 1342(c)(3) call for a public hearing to **[*1007]** take place if the State continues to fail in its enforcement of the NPDES program."

*Id*. at 985. If **[**26]** after ninety days following the hearing, the State has failed to take "appropriate corrective action," the Administrator must withdraw approval of the State's program and make public the reasons for the withdrawal. 33 U.S.C. § 1342(c)(3); *Save the Valley,* 99 F. Supp. 2d at 985.

Again, the citizen suit provision of the Clean Water Act permits citizens to bring suit to force the Administrator to perform non-discretionary duties under the Act. 33 U.S.C. § 1365(a)(2). An interpretation of the Administrator's duties under sections 1319(a)(2) and 1342(c)(3) other than that settled upon in our previous Entry "would allow the Administrator to frustrate citizen enforcement of the (Act) … merely by refusing to make a finding or determination." *Save the Valley,* 99 F. Supp. 2d at 985; *see also* William L. Andreen, *Beyond Words of Exhortation: The Congressional Prescription for Vigorous Federal Enforcement of the Clean Water Act,* 55 Geo. Wash. L.Rev. 202, 242-53 (1987).

***Clean Water Act's Regulation of Concentrated Animal Feeding Operations***

The Clean Water Act prohibits point sources **[**27]** from discharging pollutants into waters of the United States unless in conformance with a valid NPDES permit obtained prior to the discharge. 33 U.S.C. §§ 1311, 1342. A point source is defined as "any discernible, confined and discrete conveyance … from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The term "does not include agricultural stormwater discharges and return flows from irrigated agriculture." *Id*. Under federal law and regulations, CAFOs, though not AFOs, are point sources subject to NPDES permitting requirements. 33 U.S.C. § 1362(14); 40 C.F.R. § 412.10, *et. seq.;* 40 C.F.R. § 122.23. Any point source, including a CAFO, that discharges or proposes to discharge must obtain an NPDES permit. *See* 40 C.F.R. § 122.21(a). Further, any CAFO that discharges without an NPDES permit remains in a continuing state of violation of the Act until it either obtains an NPDES permit or no longer meets the definition of a point source. *See Carr v. Alta Verde Indus., Inc.,* 931 F.2d 1055 (5th Cir. 1991). **[**28]**

States with authorized NPDES permitting programs may issue either general permits or individual permits in order to address point sources within their boundaries. An individual permit is issued to a specific operation and tailored to its pollution issues. A general permit is written to cover a category of point sources with similar characteristics for a defined area. *See* U.S. Envtl. Protection Agency, *Guidance Manual and Example NPDES Permit for Concentrated Animal Feeding Operations, Review Draft* § 4.2 (August 6, 1999). Every individual discharger expected to be covered by a particular general permit is required to submit a written "notice of intent," which serves as a permit application. *Id*. at § 4.2.2. The EPA approves of the use of general permits for CAFOs. *See id*. at §§ 4.1, 4.2 (remarking that general permits are a "cost-effective" and "expedient" approach to ensuring permitting of CAFOs). CAFOs are particularly suited to coverage by general permits because they "involve similar types of operations, require the same kinds of effluent limitations and operating conditions, and can discharge the same types of pollutants." *Id*. at § 4.2. If a state decides **[**29]** to utilize a general permit, it may still issue individual permits to some operations in the category that are exceptionally large, have a history of compliance problems, or are marked by other exceptional characteristics. *Id*. at § 4.3; *see also* 40 C.F.R. 122.28(b)(3).

**[*1008]** The EPA is in the process of implementing additional regulations pertaining to CAFOs. [11] One goal of the Unified National Strategy for AFOs is that all "AFOs should develop and implement technically sound, economically feasible, and site-specific comprehensive nutrient management plans (CNMPs) to minimize impact on water quality and public health." U.S. Dept. of Agric. & U.S. Envtl. Protection Agency, *Unified National Strategy for Animal Feeding Operations,* § 1.1 (March 9, 1999), available at http://www.epa.gov/npdes/pubs/finafost.pdf. The

[11] The EPA plans to take final action on these regulations by December 15, 2002. *See* U.S. Envtl. Protection Agency, Office of Water, *Proposed Regulations to Address Water Pollution from Concentrated Animal Feeding Operations,* 3 (March 2001), EPA 833-F-00-016, available at http://www.epa.gov/npdes/pubs/CAFO-brochure3.pdf.

proposed regulations would also slightly expand the definition of a CAFO, impose additional permit requirements, and impose stricter effluent guidelines. *See* U.S. Envtl. Protection Agency, Office of Water, *Proposed Regulations to Address Water Pollution from Concentrated Animal Feeding Operations,* 3 (March 2001), EPA 833-F-00-016, available **[**30]** at http://www.epa.gov/npdes/pubs/CAFO-brochure3.pdf. As part of its goal of enhancing water quality by ensuring CAFO compliance with the Clean Water Act, the EPA also began to focus on improving compliance of state permitting programs with federal requirements. *See* Pl. Ex. J, U.S. Envtl. Protection Agency, Office of Enforcement, *Compliance Assurance Implementation Plan for Concentrated Animal Feeding Operations,* 3 (March 5, 1998).

***Regulation of CAFOs in Indiana***

In January 1975, the EPA approved Indiana's proposed NPDES program. Declaration of Stephen Jann ("Jann Decl."), P 4. To obtain approval, Indiana was required to show that it had established sufficient **[**31]** legal authority to enable it to administer the program in accordance with federal law. *See* 33 U.S.C. § 1342(b); 327 Ind. Admin. Code, Art. 16. In April 1991, the EPA approved Indiana's program for the issuance and administration of general NPDES permits. *Id*. IDEM is the state agency responsible for administering Indiana's NPDES program. *Id*. As required by the Act and federal regulations, Indiana regulations prohibit point sources from discharging pollutants into waters of the state unless in conformance with a valid NPDES permit obtained from IDEM prior to the discharge. *See* 327 Ind. Admin. Code 5-2-2. However, as of January 2002, IDEM had never issued an NPDES permit to a CAFO.

The State of Indiana has an ongoing obligation to administer its NPDES program in accordance with federal statutes and regulations. The EPA has explained Indiana's obligation as follows:

> As a condition of maintaining its EPA-approved NPDES program, the Clean Water Act, Section 402, requires the IDEM to administer its NPDES program for point sources, including CAFOs, in accordance with the guidelines EPA established at Title 40 of the Code of Federal Regulations, part 123, **[**32]** at all times. Among other things, these guidelines establish requirements approved States must meet in issuing NPDES permits to and evaluating compliance by point sources, including CAFOs. They also establish requirements relative to State authority to enforce compliance with NPDES requirements.

Pl. Ex. O at 3 (EPA notice of meeting to receive public comments on the NPDES program for CAFOs in Indiana).

Historically, Indiana has chosen to deal with CAFOs through a system distinct from their NPDES permitting program. In 1971, the state first enacted legislation **[*1009]** pertaining to the construction and operation of confined feeding operations, the present version of which is known as the Confined Feeding Control Act, codified at Indiana Code §§ 13-18-10, *et. seq*. IDEM Mem. at 2. Under Indiana's confined feeding program, IDEM issues approval permits to persons or entities wishing to construct and operate confined feeding operations. The Confined Feeding Control Act defines a confined feeding operation as any operation with confined feeding of more than 300 cattle, 600 swine or sheep, or 30,000 fowl, or any operation with a history of pollution problems. Ind. Code § 13-11-2-40. Thus **[**33]** it covers operations beyond those within the scope of the federal definition of a CAFO. *Compare* 40 C.F.R. § 122, App. B, *with* Ind. Code § 13-11-2-40. Approval for a permit is based upon factors outlined in Indiana statutes and regulations. *See* Ind. Code § 13-18-10-2(c). In the past, IDEM also utilized an Indiana Water Pollution Control Board guidance document known as the Animal Waste 1, or AW-1. The AW-1 specified the supplemental information IDEM required for permit approval. The preamble to AW-1 indicated that it was only a recommendation, so IDEM at times took the position that its requirements were not mandatory. *See In Re Matter of: Objections to the Issuance of Permit Approval No. 4245, Top Sow, LLC, Flora, Indiana,* Indiana Office of Environmental Adjudication, Cause No. 97-W-J-1693 (May 9,

1997). There is some evidence they viewed their approval permits as no more than recommendations for prudent actions. Pl. Ex. H at 1.

While Indiana's program requires approval based upon Indiana statutes and regulations, prior to approximately 2001, Indiana did not require any confined feeding operations, including federally-defined CAFOs, to apply for or to obtain NPDES **[**34]** permits. The state approval permits issued constituted approvals of "the construction and operation of the manure management system[s]" of the proposed operations. *See* Ind. Code § 13-18-10-2(c). While apparently designed and intended to prevent discharge of manure into waters of the state, it is not clear that the permits actually implemented any effluent limitations. Thus it is not clear that they were "equivalent" to NPDES permits. Not only did IDEM fail to issue NPDES permits to CAFOs, it appears that IDEM did not inspect CAFOs until 1999. Before 1999, Indiana had never pursued an enforcement action against any CAFO. Jann Dep. at 56.

In 1997, Indiana began to formulate new rules for confined feeding operations, to be codified at Article 16 of Title 327 of the Indiana Administrative Code. IDEM Mem., Ex. B at 1-2. On November 14, 2001, the state's Water Pollution Control Board adopted the new rules. [12] IDEM claims that the new rules contain standards "analogous to those contained in [an EPA] Comprehensive Nutrient Management Plan." *Id*. at 1. In addition, between sometime in 1999 and January 2002, IDEM completed over 3300 inspections of confined feeding operations, including **[**35]** inspections of all federally-defined CAFOs. *Id*. at 2. As of February 2002, Indiana had pursued 32 enforcement actions against CAFOs, and had required 18 facilities to apply for individual NPDES permits. IDEM Mem., Ex. A, P 8. The first individual permit for a CAFO in Indiana was publicly noticed in January 2002. However, it bears repeating that as of January 28, 2002, no CAFO in Indiana had ever actually been issued an NPDES permit. [13] **[*1010]** Pl. Exs. W, X; Jann Dep. at 55. While Indiana finally appears to be requiring CAFOs that have been found to discharge pollutants to apply for NPDES permits, it is unclear why IDEM requires only that limited group of CAFOs to obtain permits. Indiana and federal regulations require NPDES permits for point sources that discharge or *propose to discharge*. *See* 327 Ind. Admin. Code § 5-2-2; 40 C.F.R. § 122.21(a).

**[**36]** ***EPA Knowledge of Indiana's NPDES and Confined Feeding Programs***

Throughout the time that Indiana has been in the process of revising its confined feeding rules, the EPA has been following the state's progress and offering guidance. Early in the process, in March 1999, the EPA expressed concern that Indiana's new rules did "not establish a clear link to the Indiana NPDES requirements for CAFOS …". Pl. Ex. L at 2. At that time, the EPA pointed out to IDEM that the original Memorandum of Agreement between the two agencies, which is the document under which IDEM is authorized to administer the NPDES program in Indiana, requires IDEM to administer the program in accordance with Section 402 of the Clean Water Act, applicable state regulations, and applicable federal policies and regulations. *Id*. The EPA was obviously concerned that Indiana's confined feeding rules, even as revised, would not satisfy federal requirements for CAFOs. *See id*.

In November 1999, the EPA's Region Five office and IDEM entered into an Environmental Partnership Performance Agreement (EPPA). Under the EPPA, IDEM agreed that the forthcoming adoption of Article 16 of the Indiana Administrative Code **[**37]** would ensure that all CAFOs in Indiana would have a permit equivalent to an NPDES permit. *See* Pl. Ex. M at 1. This was

[12] Final adoption of the rules occurred in March 2002, and Article 16 is now officially part of the Indiana Administrative Code. *See* 327 Ind. Admin. Code art. 16.

[13] In fact, as recently as January 2002, Indiana expressed its opinion that a better approach to federal regulation of CAFOs would be for EPA to remove CAFOs from the NPDES program, and instead establish a mechanism similar to the Clean Water Act's biosolids program. *See* Jann Dep., Ex. 13 at 1-2.

to be accomplished through one of two methods. For an Indiana permit to be equivalent to an NPDES permit, "the confined feeding rule either: (1) must establish an NPDES general permit, as authorized by Indiana Administrative Code title 327, article 15, and the revision to the Indiana NPDES program that EPA approved in 1991, or (2) must itself be submitted to and approved by the [EPA] as a revision to the Indiana NPDES program under 40 C.F.R. § 123.62." Pl. Ex. N at 2. In August 2000, the EPA informed IDEM that by September 30, 2001, it would determine the "recommended course of action regarding Indiana's approved NPDES program." Pl. Ex. N at 3. The EPA stated that at that time, if it concluded that Indiana's confined feeding operation had not been adopted in a timely fashion or did not satisfy NPDES requirements, or that Indiana's compliance monitoring and enforcement program did not conform with both 40 C.F.R. § 123.26 and Indiana's NPDES enforcement management system, it would notify Indiana in writing and **[**38]** recommend to the Administrator of the EPA that she review Indiana's program and commence withdrawal proceedings under 33 U.S.C. § 1342(c)(3). *Id*.

In approximately September 2000, the EPA announced that it would hold a meeting on October 12, 2000 in Lafayette, Indiana to obtain public comments on implementation of the NPDES program for CAFOs by IDEM. Pl. Ex. O at 1, 2. In the announcement, the EPA explained the Clean Water Act and its applicability to CAFOs. Pl. Ex. O at 2-3. It also explained the workings of 33 U.S.C. § 1342(c)(3) and noted that it pertained to a situation in which the "EPA determines, **[*1011]** after public hearing" that a state is not administering its NPDES program in accordance with the Clean Water Act. Pl. Ex. O at 3. However, in a subsequent paragraph, the announcement pointedly stated that the meeting would not be a public hearing. *Id*.

In November 2000, IDEM requested that the EPA review and comment on the proposed Article 16. Pl. Ex. P at 1. The EPA explained that it currently viewed the proposed rule as a draft general permit, and that after a public comment period, it would consider the rule a proposed general **[**39]** permit. The EPA informed IDEM that the rule did "not yet meet the requirements for a general NPDES permit." *Id*. Specifically, the EPA stated that the rule did not meet the requirements in 40 C.F.R. § 122.28 pertaining to general permits, in § 122.41 pertaining to all NPDES permits, and in § 122.44 containing requirements for the establishment of limitations, standards, and other conditions in all permits. *Id*. The EPA had not yet determined whether the rule complied with § 122.46, which provides that NPDES permits are to be issued for a term not to exceed five years. Pl. Ex. P at 2. The EPA expressed other concerns regarding IDEM's intentions in situations where phosphorus in soils may represent a water threat. Pl. Ex. P at 2-3.

In February 2001, IDEM announced it would publish a First Notice of Rulemaking for the proposed Article 16 on March 1, 2001. Pl. Ex. Q at 1. IDEM also noted that it did not believe the EPA's comments could be resolved before that date, but stated it hoped to address them "in as timely [a] manner as possible." *Id*. In September 2000, IDEM had stated in a letter to the EPA that it was not yet possible to determine whether **[**40]** the draft rules satisfied the EPA's "preferences" for a state program. Jann Dep., Ex. 12 at 2. However, IDEM also stated in that letter its hope that a final Indiana rule would ultimately be approved by the EPA as environmentally equivalent to the federal program under one of the approaches outlined in the EPA's letters. *Id*.

In a letter dated July 20, 2001, the EPA told IDEM, "it is important for you to understand the need for IDEM to aggressively implement the NPDES program for CAFOs that are subject to the existing, 25-year old federal regulations." Pl. Ex. S at 1. The EPA went on to remind IDEM that "under the Clean Water Act and EPA's 1975 approval of the Indiana NPDES program, IDEM is required to issue NPDES permits to CAFOs, evaluate compliance with NPDES program requirements by CAFOs, and, when violations are discovered, enforce compliance in accordance with Indiana's

NPDES enforcement management system." *Id*. The EPA reiterated IDEM's choices for satisfying its obligation to issue NPDES permits to CAFOs, which included issuing all federally-required individual permits, issuing one or more general permits, or submitting the amended rule to EPA as an approvable revision **[**41]** to the Indiana NPDES program. Pl. Ex. S. at 2. The EPA "strongly urged" IDEM to select one of the available choices "as expeditiously as possible." *Id*. The letter gave deadlines for the different courses of action available to IDEM. If IDEM chose to issue individual permits, it was to submit to the EPA a proposed plan, with a schedule and milestones, by November 2001. *Id*. If IDEM chose the general permit route, it was to issue a proposed general permit or permits to the EPA by December 2001. *Id*. If it chose to submit the rule to IDEM as a revision to the program under 40 C.F.R. 123.62, it was to do so by June 2002. *Id*. The EPA requested that IDEM respond to its letter by August 20, 2001 and confirm that it had met or would very soon meet the EPA's expectations for compliance evaluation and **[*1012]** enforcement. *Id*. The EPA delayed until September 2002 the deadline for the determination of its "recommended course of action" regarding withdrawal proceedings under 33 U.S.C. § 1342(c)(3). *Id*.

IDEM responded to the EPA's letter in a letter dated September 11, 2001. Pl. Ex. T at 1. IDEM pointed out that it had passed "first-ever **[**42]** rules governing confined feeding operations in Indiana, implementing [the] state statute which has been in place since 1972." *Id*. IDEM also noted that it had published a first notice of rulemaking to develop a specific rule governing CAFOs for the purpose of NPDES, in the event such a rule was needed. Pl. Ex. T at 2. IDEM directly asked the EPA to provide the criteria used to determine whether a state's NPDES permit program will be proposed for withdrawal. [14] *Id*. The letter went on to point out that the 1999 U.S. EPA/USDA *Unified National Strategy* contemplated functionally equivalent state programs. *Id*. IDEM stated its belief that its revised program would "yield a comparable level of environmental protection to the strategy outlined by U.S. EPA and U.S. Department of Agriculture." *Id*. Then, incredibly, IDEM posed the following question to the EPA: "Can you please describe the circumstances in which a state may operate a confined feeding approval program without specifically requiring an NPDES individual permit, NPDES general permit, or NPDES permit-by-rule for CAFOs?" *Id*.

**[**43]** ***Findings Under Section 1342(c)(3)***

The most generous interpretation of IDEM's final question to the EPA is that it wanted to know the procedure for submission of the confined feeding rule to the EPA for approval as a revision to Indiana's NPDES program, pursuant to 40 C.F.R. § 123.62. Of course, the procedure is outlined in 40 C.F.R. § 123.62. Another, and we think more likely, interpretation of IDEM's question is that it believed its program to be sufficiently "comparable" so that, despite being directly and repeatedly informed otherwise by the EPA, circumstances might exist under which it need not develop any rules relating to NPDES permitting for CAFOs. It is unclear why IDEM thought it might not need a rule for the NPDES program as it relates to CAFOs. *See* Pl. Ex. T at 2. No evidence before us on these motions indicates whether IDEM met the deadlines in November and December 2001 that were imposed by the EPA in the event IDEM chose to issue permits in order to meet its obligations regarding CAFOs. The deadline for IDEM to submit the confined feeding rule to the EPA as an approvable revision to its program was set **[**44]** for June 2002. Pl. Ex. S at 2. Again, there is no evidence before us concerning which, if any, approach IDEM chose, or whether it met the relevant deadline if in fact it did choose one of the allowable options.

In any case, it is clear that Indiana's Water Pollution Control Board adopted the new confined feeding rules in November 2001 even though they still did not completely comply with the Clean Water Act and federal regulations concerning CAFOs. At this point, the EPA had been informing

[14] The criteria are readily available at 40 C.F.R. § 123.63.

IDEM for two years of the requirements for CAFOs that needed to be included in the new rules. Indiana's program had apparently *never* been in compliance with respect to CAFOs: in the past, IDEM did not have an inspection program or require CAFOs to obtain NPDES or NPDES-equivalent permits. As of the September 11, 2001, letter, IDEM appears still not to even understand what was required to bring the program into compliance. In addition, Indiana appears to believe that its confined feeding program is **[*1013]** at least as effective or more effective than the use of NPDES permits. *See* Pl. Ex. T at 2. Whether or not that is true, Indiana's EPA-authorized NPDES program must nonetheless comply with federal **[**45]** laws and regulations.

The EPA stated in its July 20, 2001 letter to IDEM that by September 2002, it would determine the recommended course of action with regard to withdrawal of the Indiana NPDES program. To its credit, EPA has engaged in significant efforts to assure the compliance of the Indiana NPDES program with federal law regarding CAFOs, working for at least three years with IDEM to help them develop appropriate rules. IDEM has nonetheless failed to do so.

We agree with Plaintiffs that Indiana's program is not in compliance, and that the evidence shows EPA has known that to be true for some time. Nonetheless, we decline to take the drastic action for which Plaintiffs pray; that is, we decline to compel the EPA to act immediately to withdraw approval of Indiana's NPDES program. IDEM, as a party to this action by choice, is also within the reach of our ruling here, and we think it is that agency who must first be compelled to act. [15] **[**47]** Thus, we shall order in our Judgment that IDEM, if it has not already done so, act forthwith to bring its program into compliance with the Clean Water Act and with federal regulations by adopting one of the options outlined in the EPA's July 20, 2001 letter **[**46]** to IDEM; IDEM is to take this action within 120 days of the date of this Entry. [16] We note that IDEM has already initiated the rulemaking process for a specific rule governing CAFOs for the purposes of NPDES. Of course, when and if the EPA takes final action on the proposed new federal regulations regarding CAFOs, IDEM would need to ensure that Indiana's programs comply with the federal requirements. We think it would be prudent for IDEM to address any such changes to its NPDES program at the same time it undertakes the actions ordered herein.

Should IDEM fail to act as herein ordered, under 33 U.S.C. § 1342(c)(3) and 40 C.F.R. §§ 123.63 and 123.64, **[**48]** the EPA shall be ordered in the accompanying Judgment to undertake and process withdrawal proceedings for Indiana's program by scheduling and conducting a public hearing within 150 days of the date of this Entry, and, within 30 days after the date of such hearing, to make and announce its determination regarding whether Indiana **[*1014]** is administering its program in accordance with Section 402 of the Clean Water Act. Under 40 C.F.R. § 123.63, withdrawal will be appropriate if Indiana continues to fail to issue NPDES or NPDES-equivalent permits as required by the Act to all CAFOs that discharge, have discharged in the past, or propose to discharge, and if Indiana's program continues to fail to comply with the terms of the Memorandum of Agreement between IDEM and the EPA.

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[15] By the very act of intervening, an intervenor renders itself "vulnerable to complete adjudication by the federal court of the issues in litigation between the intervenor and the adverse party." *United States v. Oregon,* 657 F.2d 1009, 1014 (8th Cir. 1981) (quoting 3B Moore's Federal Practice P 24.16[6] (2d ed. 1981)). The intervenor assumes the risk that its position will not prevail and that an order adverse to its interests will be entered. *Schneider v. Dumbarton Developers, Inc.,* 247 U.S. App. D.C. 217, 767 F.2d 1007, 1017 (D. C. Cir. 1985) (citing 7A Wright & Miller, Federal Practice & Procedure § 1920, at 611 (1972)).

[16] Federal courts are empowered to order state officials to comply with federal law. "When a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance," and it is no objection that such an order might be sought in the federal courts against a state officer. *Puerto Rico v. Branstad,* 483 U.S. 219, 227-28, 107 S. Ct. 2802, 2808, 97 L. Ed. 2d 187 (1987) (quoting *Bd. of Liquidation v. McComb,* 92 U.S. 531, 541, 23 L. Ed. 623 (1876)). "Moreover, the Supremacy Clause makes federal law paramount over the contrary positions of state officials; the power of federal courts to enforce federal law thus presupposes some authority to order state officials to comply." *New York v. U.S.,* 505 U.S. 144, 179, 112 S. Ct. 2408, 2430, 120 L. Ed. 2d 120 (1992).

We are acutely aware of the harmful effects that could result from the immediate withdrawal of Indiana's NPDES program. The program regulates municipal wastewater dischargers, wastewater treatment plants, industrial wastewater dischargers, stormwater activities, construction activities, aquaculture and silviculture activities, and more. *See* IDEM Mem. at 7. Withdrawal of the program would impose **[**49]** significant administrative burdens on the EPA. For those very reasons, we have allowed IDEM what we believe is more than adequate time to bring its program into compliance, and we have conditioned the requirements placed upon the EPA on IDEM's noncompliance with our Order.

***Findings Under Section 1319(a)(2)***

With respect to Plaintiffs' Section 1319(a)(2) claim, we believe that the present situation does not yet warrant an EPA take over of enforcement of Indiana's NPDES program. Section 1319(a)(2) states, in part, that "whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations … are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, she shall so notify the State." The section further states that the Administrator will take over enforcement of the State's program if the State's failure extends beyond the thirtieth day after notice was given. The listed methods by which the Administrator is to enforce the program are through issuing compliance orders to permit holders or by bringing civil actions to enforce permit **[**50]** conditions or limitations. There are at least two reasons why application of this section to the present situation is problematic. First, one of the deficiencies in Indiana's approach has been that the State did not issue NPDES permits to CAFOs. Thus, there have been no CAFO permits over which the Administrator could have assumed enforcement. Second, Indiana's program was marked by a lack of compliance inspections and enforcement, which failure appears to have now been remedied. Before 1999, based on the lack of inspections a federal takeover under Section 1319(a)(2) might have been warranted, but between 1999 and 2002 apparently every CAFO in the state has been inspected. IDEM Mem., Ex. B at 2. In any event, we remain uncertain about whether the lack of inspections alone could trigger this provision, given its focus on issued permits. Thus, for both of these reasons, we do not believe that an order to the EPA to take over enforcement of Indiana's NPDES program is appropriate at this time. We opt instead for what we regard as the more appropriate remedy, found in section 1342(c)(3), which is premised on whether a state is administering its program in accordance with the requirements **[**51]** of the Clean Water Act and federal regulations.

***CONCLUSION***

For the reasons explained in the preceding sections, with respect to Plaintiffs' claims under 33 U.S.C. § 1319(a)(2) and 1342(b), the EPA's and IDEM's Motions for Summary Judgment are GRANTED, while Plaintiffs' Motion for Summary Judgment is DENIED. With respect to 33 U.S.C. § 1342(c)(3), Plaintiffs' Motion for Summary Judgment is GRANTED, while the EPA's and IDEM's Motions are **[*1015]** accordingly DENIED. Pursuant to 33 U.S.C. § 1365(a), a judgment will be entered for Plaintiffs concerning their claims under 33 U.S.C. § 1342(c)(3).

It is so ORDERED this 17 day of September, 2002.

SARAH EVANS BARKER, JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

***FINAL JUDGMENT***

Pursuant to the Court's entry of this date, Judgment is hereby entered in favor of the Plaintiffs, Save the Valley, Incorporated and Thomas and L. Jae Breitweiser, with respect to their claim arising under 33 U.S.C. § 1342(c)(3), and against the Defendants, United States Environmental Protection Agency, et **[**52]** al., and Indiana Department of Environmental Management. With respect to Plaintiffs' claims under 33 U.S.C. § 1319(a)(2) and 33 U.S.C. § 1342(b), Judgment is hereby entered in favor of Defendants and against Plaintiffs.

Having ruled in favor of Plaintiffs on their claim under 33 U.S.C. § 1342(c)(3), now therefore,

It is hereby ORDERED that, within one hundred twenty (120) days of the date of this Judgment, the Indiana Department of Environmental Management ("IDEM") shall bring its National Pollutant Discharge Elimination System ("NPDES") program into compliance with section 402 of the Clean Water Act, 33 U.S.C. § 1342;

FURTHER, it is Ordered that, within one hundred twenty (120) days of the date of this Judgment, IDEM shall either: (1) establish an NPDES general permit for federally-defined concentrated animal feeding operations ("CAFOs"), as authorized by Indiana Administrative Code title 327, article 15, and the revision to the Indiana NPDES program that the United States Environmental Protection Agency ("the EPA") approved in 1991, or (2) require every CAFO in the State of **[**53]** Indiana who has discharged pollutants in the past without an NPDES permit or proposes to discharge pollutants sometime in the future to apply for and obtain by a date certain an individual NPDES permit, if it has not already done so, or (3) submit an appropriate confined feeding rule to the EPA for approval by the EPA as a revision to the Indiana NPDES program under 40 C.F.R. § 123.62.

FURTHER, it is Ordered that, within one hundred fifty (150) days of the date of this Judgment, should IDEM continue in its failure to fulfill its obligations under this Order, the EPA shall conduct a public hearing pursuant to 33 U.S.C. § 1342(c)(3) concerning whether the State of Indiana is administering its program in accordance with Section 402 of the Clean Water Act.

FURTHER, it is Ordered that, within thirty (30) days of such public hearing, should IDEM continue in its failure to fulfill its obligations under this Order, the Administrator of the EPA shall notify the State of Indiana, through IDEM, that absent immediate, appropriate corrective action, she will withdraw approval of Indiana's NPDES program pursuant to 33 U.S.C. § 1342(c)(3).

**[**54]** FURTHER, it is Ordered that, within ninety (90) days after the Administrator so notifies the State of Indiana, should IDEM continue in its failure to take appropriate corrective action, the Administrator of the EPA shall withdraw approval of the State of Indiana's NPDES program, pursuant to 33 U.S.C. § 1342(c)(3).

It is so ORDERED this 17 day of September, 2002.

SARAH EVANS BARKER, JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

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