8-1-1997

Moving Violations: Violations of the Clean water Act and Implications for CERCLA’s Federally Permitted Release Exception

Amy A. Fortenberry

Follow this and additional works at: http://lawdigitalcommons.bc.edu/ealr

Part of the Environmental Law Commons, and the Water Law Commons

Recommended Citation
http://lawdigitalcommons.bc.edu/ealr/vol24/iss4/4

This Comments is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Environmental Affairs Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydlowski@bc.edu.
MOVING VIOLATIONS: VIOLATIONS OF THE CLEAN WATER ACT AND IMPLICATIONS FOR CERCLA'S FEDERALLY PERMITTED RELEASE EXCEPTION

Amy E. Fortenberry*

I. INTRODUCTION

Operation of the canon *expressio unius est exclusio alterius* (the inclusion of one is the exclusion of the other) indicates that if a permit allows the discharge of pollutants A, B, and C, then the discharge by the same point source of pollutant D is a violation of the permit conditions.¹ Recently, however, defendants with National Pollutant Discharge Elimination System (NPDES)² permits have argued that the Clean Water Act ³ should be interpreted to mean that their permit to discharge pollutants A, B, and C from a certain point source includes implicit authorization to discharge pollutant D from the same point source.⁴ Accordingly, defendants could declare all their discharges,

* Managing Editor, 1996-1997, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW. I owe a special thanks to Chip and Elizabeth Fortenberry, Marya Rose, Pete Brassard, Professor Zygmunt J. B. Plater, John Gordon, and friends at Keller & Heckman for their support and patience.

¹ See United States Steel Corp. v. Train, 556 F.2d 822, 852-53 (7th Cir. 1977) (applying canon to prove that where definition of pollutant excludes water, gas, or other materials injected into wells for oil or gas production, the materials are pollutants if injected into wells under any other circumstances).


and the resulting environmental harm, to be federally permitted releases immune from action under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).\(^5\)

The United States Department of the Interior posed the above scenario to the Boston College Environmental Affairs Law Review. In order to pursue natural resource damages claims under CERCLA for damages to a body of water, the Department of the Interior needed proof that such a claim was possible. The recent decision of the United States Court of Appeals for the Second Circuit in *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co. (Kodak)*, although specific to Clean Water Act violations, had made questionable what degree of compliance with a NPDES permit would immunize a discharge as a federally permitted release under CERCLA.\(^6\) This Comment addresses those questions.

Section II reviews the statutory background and legislative history of the Clean Water Act, specifically the NPDES permitting process. Section III reviews the common law to determine the elements requisite to a Clean Water Act violation. Section IV presents the decision in *Kodak*. Section V renders an analysis of the proscriptions of the Clean Water Act and NPDES. Section VI analyzes the *Kodak* decision in light of the statutory and common law, and, in particular, the preceding analysis. Section VII analyzes the relationship between CERCLA and the Clean Water Act in order to determine whether they may be used in conjunction with each other. Section VIII lays out the relevant statutory and common law background of CERCLA. Section IX concludes with an analysis of whether CERCLA recovery may be obtained where the harm is the result of a Clean Water Act violation.

II. STATUTORY BACKGROUND OF THE CLEAN WATER ACT

The Federal Water Pollution Control Act Amendments of 1972\(^7\) (Clean Water Act) established the National Pollutant Discharge Elimi-
nation System (NPDES). This system is founded on a regulatory approach that combines a limit on industrial discharges with water quality standards for receiving waters. The cornerstone of the Clean Water Act, NPDES is a system of permitting and enforcement that balances the waste disposal needs of an industrialized nation with a need for fishable, swimmable, clean waters. The self-proclaimed objective of the Clean Water Act was “To restore and maintain the chemical, physical and biological integrity of the Nation's waters,” and NPDES was viewed as the most effective tool to do so. The "integrity" of water protected by the Act has been defined as the state in which a water body is able to maintain ecological diversity as well as to support human life, which includes the needs of an industrialized, urban society. Paradoxically, however, the needs of an industrialized society appear to be in conflict with the original goals of the Clean Water Act, which had aimed for “zero discharge” by 1985. Although it is over a decade since the goal has gone unmet, NPDES remains ambitious to restore, or at least maintain, the Nation’s waters.

The goal of zero discharge has not been abandoned wholly. It is reflected in effluent limitations and technology requirements geared toward the phasing out, and ultimately, the elimination of the discharge of all pollutants. Clean water is an issue that is fraught with controversy. The needs of an industrialized nation are not necessarily in concert with the people’s aesthetic preferences for fishable, swimmable waters. The Clean Water Act, passed on a wave of Congressional idealism, asserts that waste disposal, no matter how incidental

---


12 See Goldfarb, supra note 10, at 143.


14 See Goldfarb, supra note 10, at 143.


16 See Goldfarb, supra note 10, at 143.
to industrialized progress, is a right that may allocated only by government—and that favor is a temporary one:

This legislation would clearly establish that no one has the right to pollute—that pollution continues because of technological limits, not because of any inherent rights to use the nation’s waterways for the purpose of disposing of wastes.\(^{17}\)

A. NPDES

1. The Iron Grip of Section 1311

Under NPDES, the Environmental Protection Agency (EPA) regulates the discharge of pollutants into the navigable waters\(^ {18}\) of the United States by issuing discharge permits.\(^ {19}\) EPA’s issuance of a NPDES permit is contingent upon the prospective discharger’s compliance with several provisions of the Clean Water Act.\(^ {20}\)

The primary hurdle for any NPDES permit is § 1311 of the Clean Water Act, which addresses standards and enforcement of effluent limitations.\(^ {21}\) Section 1311 was promulgated with the “national goal of eliminating the discharge of all pollutants.”\(^ {22}\) The mandate of § 1311 is that “the discharge of any pollutant by any person shall be unlawful,” except where the discharger discharges in compliance with a § 1342 permit.\(^ {23}\) The Clean Water Act defines “discharge of a pollutant” as “any addition of any pollutant\(^ {24}\) to navigable waters from any


\(^{18}\) The term “navigable waters” means the waters of the United States, including the territorial seas. See 33 U.S.C. § 1362(7). The term “navigable waters” has been interpreted consistently in the case law to encompass virtually all bodies of water in the United States, including those streams not technically “navigable.” See Section III.A.4. infra.


\(^{20}\) See 33 U.S.C. § 1342(a)(1). A discharge authorized by a NPDES permit must meet “all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this chapter” or such conditions the EPA “determines are necessary to carry out the provisions of this chapter.” Id.

\(^{21}\) See 33 U.S.C. § 1311.

\(^{22}\) Id. § 1311(b)(2)(A).

\(^{23}\) Id. § 1311(a) (emphasis added).

\(^{24}\) “The term ‘pollutant’ means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rocks, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water.” 33 U.S.C. § 1362(6).
point source,\textsuperscript{25} where a point source is "any conveyance ... from which pollutants are or may be discharged."\textsuperscript{26}

It may appear circular to declare that § 1342 NPDES permits must comply with § 1311 and that § 1311 only allows discharges under the guise of § 1342.\textsuperscript{27} However, the intertwining of § 1342 and § 1311 lays out that discharge of pollutants is expressly prohibited unless the type and quantity of the pollutants, as well as the source of the discharge, are authorized by a NPDES permit.\textsuperscript{28}

2. Exempt Activities

All pollutants discharged from point sources are governed by NPDES.\textsuperscript{29} States are charged with regulating discharges emanating from non-point sources, which are "defined by exclusion and include all water quality problems not subject to § 1342."\textsuperscript{30} Generally, activities that do not involve point source discharge and that are adequately controlled by management practices are excluded from NPDES coverage.\textsuperscript{31} Discharges stemming from agriculture,\textsuperscript{32} sylvaculture, and

\begin{footnotes}
\item[25] "The term 'discharge of a pollutant' means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." \textit{Id.} § 1362(12).
\item[26] "The term 'point source' means any discernible, confined and discrete conveyance, \textit{including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged}. This term does not include return flows from irrigated agriculture." \textit{Id.} § 1362(14) \textit{(emphasis added)}.
\item[27] See 33 U.S.C. §§ 1311, 1342.
\item[28] See 33 U.S.C. §§ 1311, 1342. "All discharges are presumed to be violations of the public's right to clean water where ever attainable unless Congress allows a temporary right to discharge because of the unavailability of feasible control technology, or a more permanent discharge right based on receiving water quality or overriding economic factors." Goldfarb, \textit{supra} note 10, at 143.
\end{footnotes}
certain types of storm water runoff are examples of excluded discharges. However, if an otherwise exempt activity introduces toxic materials into navigable waters, the discharger must obtain a NPDES permit. This check on otherwise exempt activities highlights the seriousness of the Act. Exceptions to NPDES coverage are narrowly defined in order to safeguard the integrity of the Nation’s waters. While the narrow exceptions to coverage further the purposes of the Act, the most substantial checks for restoring and maintaining the Nation’s waters are water quality standards and effluent limitations as imposed under NPDES.

3. Water Quality Standards

The regulatory approach of the Clean Water Act combines the Act’s considerations of receiving water quality with restrictions on discharges at their source. Water quality standards are criteria allowing for the presence of pollutants. The criteria may be either quantitative or descriptive and are specific to a defined water segment. Quantitative standards restrict pollutants to certain parts per million per X milliliters of water. Descriptive standards refer to the appearance of the water. For example, descriptive standards may require the water to be a certain hue or to be free from floating scum.

States are required by the Clean Water Act to promulgate intra-state water quality standards that meet the approval of EPA. If a state fails to produce such standards or fails to revise its draft stand-

---

33 See id. §§ 1314(f), 1342(d)(2).
35 See S. Rep. No. 95–370, at 52 (1977); Senate Debate, Dec. 15, 1977, LEGISLATIVE HISTORY 3, supra note 31; President’s Statement on Signing H.R. 3199 into Law, Dec. 28, 1977, reprinted in LEGISLATIVE HISTORY 3, supra note 31; see also National Wildlife Fed’n v. Gorsuch, 693 F.2d 156, 165 n.25 (D.C. Cir. 1982) (stating that if the release of entrained fish by a dam was found to constitute a “discharge” of a pollutant, then EPA would be required to regulate dams because the EPA may not issue a categorical exemption from NPDES permit requirements).
37 See Goldfarb, supra note 10, at 145.
38 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW, 252–54, 259–62 (2d ed. 1994) cited in Keene, supra note 9, at 719 (discussing the origins of the philosophical conflict between the absolutist effluent limitations approach and the relativist water quality standards approach).
39 See RODGERS, supra note 38, at 343.
40 See id.
41 See id.
ards in accordance with EPA recommendations, EPA must promul­
gate water quality standards for that state. 43 State water quality
standards are commonly in the form of narrative criteria. 44 Most re­
quire a state’s waters to be free from:

(1) substances that will cause the formation of putrescent or oth­
erwise objectionable bottom deposits; (2) oil, scum, and floating
debris in amounts that are unsightly or deleterious; (3) materials
that cause odor, color, or other conditions in such a degree as to
cause a nuisance; (4) substances in concentrations or combinations
harmful or toxic to humans or aquatic life. 45

Additionally, the Clean Water Act requires states to designate planned
uses of the state’s waters and to have such designations approved by
EPA. 46 Designated uses are typically designations of waters as suit­
able for recreation, propagation of fish, and transportation of sewage
and industrial wastes “without nuisance.” 47 Ultimately, the water seg­
ment must be able to support and ensure propagation of a balanced
population of shellfish, fish, and wildlife. 48

States must identify areas where effluent limitations do not pro­
duce the desired water quality standard for a water’s use designa­
tion. 49 For example, where a river designated for recreation trans­
ports sewage waste or toxic pollutants and is not fishable or swimmable,
the state must design segment-specific control strategies to reduce
concentrations of toxic pollutants to the level that will sustain the
water quality standards for the receiving waters. 50 For each contami­
nated water segment, the state must also make a determination of
which point sources prevented the segment from meeting its desig­
nated use and must ascertain the amount of each toxic pollutant
discharged at each point source. 51

The state’s control strategies may include a combination of strict
effluent limitations and water quality standards imposed upon each

43 See id.
44 See RODGERS, supra note 38, at 344.
45 RODGERS, supra note 38, at 344 (citing EPA, Criteria and Standards Division, Standards
v. Costle, 657 F.2d 275, 288 (D.C. Cir. 1981) (water quality criteria “may be, and often are, wholly
narrative”).
47 Keene, supra note 9, at 721 (citing RODGERS, supra note 38, at 344 n.7).
49 See id. § 1314(1)(A)–(C).
50 See id. § 1314(1)(D).
51 See id. § 1314(1)(C).
offending point source. One control strategy allows states to designate total maximum daily loads for certain water segments when it is apparent that existing effluent limitations are inadequate to enable the water segment to meet state water quality standards. The result of designating total maximum daily loads, however, may be to assign pollution rights to individual dischargers, in contradiction to the long-term goals of the Clean Water Act.

The use of water quality standards as a regulatory mechanism has traditionally been supported by those who believe "the solution to pollution is dilution," i.e., water is both capable of digesting and is the appropriate receptacle for the disposal of waste. Congress may have instituted the water quality provisions of the Clean Water Act as contingent planning in the event that the no discharge objective had to be "abandoned in favor of basin level allocations of assimilative capacity." Nonetheless, water quality standards may, in practice, be more stringent than their counterpart of effluent limitations, which directly prohibit or restrict discharges.

4. Effluent Limitations

The United States Court of Appeals for the District of Columbia Circuit, in Natural Resources Defense Council (NRDC) v. Costle, a ruling contemporaneous with the Act, noted that a primary purpose of effluent limitations is to ensure uniformity among federal and state jurisdictions enforcing NPDES. Otherwise, the nation might be faced with a "Tragedy of the Commons" scenario if jurisdictions could compete among themselves for industry and development by offering

52 See id. § 1314(d)(1)(D).
53 See 33 U.S.C. § 1313(d)(1)(A). Maximum daily loads are commonly expressed in terms of pounds per day of certain pollutants, such as suspended solids or nitrogen. See William H. Rodgers, Jr., Environmental Law 421 (1st ed. 1977) [hereinafter Rodgers, 1st ed.]. The Act requires that a determination of maximum loads reflect a "margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." 33 U.S.C. § 1313(d)(1)(C). This may be read as requiring an administrative prediction that particular load reductions will yield the desired water quality. See Rodgers, 1st ed., supra, at 422.
55 Rodgers, supra note 38, at 261; Lecture of Professor Zygmunt J.B. Plater, Professor of Environmental Law, Boston College Law School (Feb. 8, 1996).
57 See 33 U.S.C. §§ 1311, 1312; Rodgers, supra note 38, at 261.
more lenient discharge requirements\textsuperscript{59} in a "race of laxity."\textsuperscript{60} Because NPDES permits must comply with § 1311, and because § 1311 mandates compliance with § 1312, which provides for water quality standards, NPDES effluent limitations permits go hand-in-hand with state water quality standards.\textsuperscript{61} "A permit thus transforms 'generally applicable effluent limitations and other standards, including those based on water quality—into obligations . . . of the individual discharger.'\textsuperscript{62}

a. Standard of Regulation

The NPDES standard of regulation requires dischargers to apply "the best available technology economically achievable . . . which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants."\textsuperscript{63} EPA bases effluent limitations upon industry-categorized guidelines and standards.\textsuperscript{64} EPA asserts that "[a]n effluent limitation must be a precise number in order for it to be an effective regulatory tool; both the discharger and the regulatory agency need to have an identifiable standard upon which to determine whether the facility is in compliance."\textsuperscript{65}

\textsuperscript{59} See id. (quoting Stewart, Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy, 86 YALE L.J. 1196, 1211 (1977)).

The Tragedy of the Commons arises in noncentralized decisionmaking under conditions in which the rational but independent pursuit by each decisionmaker of its own self-interest leads to results that leave all decisionmakers worse off than they would have been had they been able to agree collectively on a different set of policies. \textit{Id.} at 1378 n.19.

\textsuperscript{60} See ZYGUMT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 726–27 (1992) [hereinafter PLATER, NLS]. The Clean Water Act was one of the environmental statutes implemented to curb the "race of laxity," manifested as industrial flight (or threats of) from those states that sought to strenuously enforce environmental protection laws to those states that sought to bolster their local economies by permissiveness in waste disposal. The Clean Water Act halted the race of laxity by imposing uniform national pollutant standards which all states must either meet or, at their discretion, exceed. See id.

\textsuperscript{61} See 33 U.S.C. § 1311(a), (b)(1)(C); NRDC v. Costle, 568 F.2d at 1380 n.21. "The term 'effluent limitations' means any restriction established by a State or the Administrator [of EPA] on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 U.S.C. § 1362(11).

\textsuperscript{62} United States Steel Corp. v. Train, 556 F.2d 822, 830 (7th Cir. 1977) (citing EPA v. California ex rel. State Water Resources Control Bd., 426 U.S. 200, 205 (1976)).

\textsuperscript{63} 33 U.S.C. § 1311(b)(2)(A)–(C), (F).

\textsuperscript{64} See 40 C.F.R. § 122 (1994).

\textsuperscript{65} \textit{NRDC v. Costle}, 568 F.2d at 1378. While the District of Columbia Circuit stated that there need not be uniform effluent limitations prior to EPA's issuance of a permit, that aspect of the decision must be viewed in its historical context: EPA had not finished promulgating national
EPA effluent limitations must "assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water." If a permit holder's discharge fails to allow for fishable, swimmable waters, EPA must apply more stringent effluent limitations to the permit. A NPDES permit holder must also comply with the state's water quality standards even if compliance would require more stringent controls than application of the best available technology.

b. Criteria for Regulation

A NPDES permit prohibits the discharge of all pollutants from a point source that are technologically and economically feasible to eliminate. When establishing effluent limitations, including prohibitions on the discharge of certain toxic pollutants, EPA must consider:

the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organisms, and the extent to which effective control is being or may be achieved under other regulatory authority.

Effluent limitations are evidence that all discharges are presumed to be violations of the public's right to clean water. The only excep-
tion is where Congress allows a temporary right to discharge because of unavailability of feasible control technology, or a more permanent right to discharge based upon receiving water quality or economic pressures.²²

B. SPDES

While EPA administers the NPDES program, EPA certifies states to administer State Pollutant Discharge Elimination System (SPDES) programs under the umbrella of NPDES.⁷³ EPA administers the NPDES permitting program in each state unless and until the state assumes the responsibility by creating its own SPDES.⁷⁴

A SPDES permit incorporates the requirements of and has the same effect as a federally issued NPDES permit.⁷⁵ State permits, however, may contain stricter effluent limitations than a NPDES permit, such as limitations based on state water quality standards.⁷⁶ Under SPDES, however, a state may not grant permits with standards that are less stringent or that deviate from those imposed by NPDES.⁷⁷

A state may apply to EPA for authorization of its SPDES program by submitting an application detailing the state’s proposed program.⁷⁸ For EPA to authorize the SPDES program, the state must demonstrate that it has the authority to issue permits that comply with the Clean Water Act.⁷⁹ The state must pledge to enforce permit conditions and to punish violations of the permit program with civil and/or criminal penalties.⁸⁰

---

²² See id.
²⁴ See id. § 1342(b); United States Steel Corp. v. Train, 556 F.2d 822, 830 (7th Cir. 1977).
²⁵ See 33 U.S.C. § 1342(a)(3), (b), (k); Ohio v. United States Dep't of Energy, 689 F. Supp. 760, 767 (S.D. Ohio 1988). For the purpose of this Comment and except where otherwise noted, “NPDES permit” or “permit” refers to both NPDES and SPDES permits.
²⁶ See Atlantic States Legal Found. v. Eastman Kodak Co., 12 F.3d 353, 358 (2d Cir. 1993); U.S. Steel, 556 F.2d at 838–39; Keene, supra note 9, at 725 n.69 (citing 33 U.S.C. § 1370 and stating that because the statute precludes any state effluent standard or control or abatement requirement which is less stringent than the federal requirements, by implication, a state may set standards more stringent than federal standards).
²⁷ See Crown Simpson Pulp Co. v. Costle, 642 F.2d 323, 324, 328 (9th Cir. 1981) (upholding EPA’s refusal to certify SPDES permits where the state granted permit terms less stringent than those required by EPA).
²⁸ See 33 U.S.C. § 1342(b). For a thorough description EPA’s authorization of SPDES programs and a state’s subsequent role under NPDES, see Keene, supra note 9, at 715–29.
³⁰ See id. § 1342(b)(7).
Moreover, the state must assure EPA that it will fulfill federal requirements for administration of the SPDES program. An applicant state must convince EPA that the state can fulfill the inspection, monitoring, and record-keeping requirements of the Act. Also, the state must provide notice and comment periods as well as an opportunity for a public hearing to the public and affected states prior to making final decisions on permit applications. The state is required to notify EPA of any proposed permit and to provide EPA with copies of the same. Within ninety days after being notified of a proposed SPDES permit, EPA may object to the state’s issuance of the permit, thereby denying the permit. However, in its authorization of a SPDES program, EPA may elect to waive all or a portion of its right to be notified.

C. Permitting

A discharger may obtain a permit by applying to the appropriate SPDES or NPDES program, which may then hold a review of the application at a public hearing. A permit is point source specific. It sets out the conditions that the permittee must meet in order to comply with the law and the terms by which its discharge is allowable.

A permit may be modified or terminated “for cause” if the permittee violates a permit condition or presents false or misleading information in the permit application process. A permit may also be modified or terminated due to any change that necessitates either a temporary or permanent reduction or elimination of the permitted discharge.

\[81\text{ See id. }\S\ 1342(c).\]
\[82\text{ See id. }\S\ 1342(b)(2)(A)–(B).\]
\[83\text{ See id. }\S\ 1342(b)(3)–(5).\]
\[84\text{ See }33\text{ U.S.C. }\S\ 1342(b)(4).\]
\[85\text{ See id. }\S\ 1342(d)(2).\]
\[86\text{ See id. }\S\ 1342(d)(e).\]
\[87\text{ See National Wildlife Fed’n v. Gorsuch, 693 F.2d 156, 164–65 (D.C. Cir. 1982); United States Steel Corp. v. Train, 556 F.2d 822, 830 (7th Cir. 1977). For a description of NPDES procedures for notice, comment, and public hearings, see 40 C.F.R. }\S\s\ 124.10–74 (1994).\text{ For summaries and comparisons of NPDES and SPDES permit application and review procedures, see Keene, supra note 9, at 722–24.}\]
\[88\text{ NRDC v. Costle, 568 F.2d 1369, 1381 (D.C. Cir. 1977).}\]
\[89\text{ See Keene, supra note 9, at 722. “The discharger must satisfy the effluent limitations, water quality related effluent limitations, water quality standards, national standards of performance for new sources, toxic and pretreatment effluent standards, and ocean discharge criteria.” Id.}\]
\[90\text{ See }33\text{ U.S.C. }\S\ 1342(b)(1)(C).\]
\[91\text{ See id.}\]
D. Permit Modification and Anti-Backsliding

The NPDES provisions of the Act place a general prohibition on the modification or reissuance of any NPDES permit with less stringent effluent limitations than those contained in the original permit.92 The only exceptions to this “anti-backsliding” provision are where: (1) material alterations are made to the discharging facility, thereby requiring less stringent limitations; (2) information, other than revised regulations, is made available which would have justified less stringent limitations at the time of issuance; (3) events over which the permittee has no control and for which there is no remedy so mandate; or (4) the permittee receives a permit modification pursuant to §§ 1311 or 1326.93 In § 1311, the Act sets out requirements for obtaining a modification of an existing permit or waivers for certain pollutants.94 Section 1311(1) expressly forbids EPA to modify any permit requirements pertaining to those toxic pollutants specified in the Act.95

Section 1342's prohibition against the issuance of less stringent permits reflects Congress's intent to reduce and control the discharge of pollutants, without the risk of undermining by EPA action.96 This backstop on EPA is also reflected in the anti-backsliding provision that provides that permits may not be revised and made less stringent simply on the basis of regulations revised and promulgated subsequent to the issuance of the permits.97 Revised regulations may impact existing permits, however, if the administering agency (the state or EPA) concludes that the designated use of a water segment is not being met. Regulations revised and made more stringent in order to attain a water's designated use may be imposed upon existing permits.98 The anti-backsliding provisions of the Act also allow for revision of an effluent limitation, water quality standard, or a permit standard if the designated use of a water segment is being met or exceeded such that the revision would still allow the water body to meet its designated use.99 In no case, however, may EPA revise regulations so as to allow a discharger or dischargers to hamper attainment of a water segment's designated use.100

---

92 See id. § 1342(o).
93 See id. § 1342(o)(2).
94 See id. § 1311.
95 See 33 U.S.C. § 1311(1) (referring to toxic pollutant list under § 1317(a)(1)).
96 See id. §§ 1311(b)(2)(A); 1342(o)(2)(B)(I).
97 See id. § 1342(o)(2).
98 See id. § 1313(d)(4).
99 See id.
100 See 33 U.S.C. §§ 1313(d)(4); 1342(o)(2)(B) (anti-backsliding).
E. Reporting Requirements

EPA has discretion to prescribe those conditions that will be imposed upon each individual discharger through each NPDES permit.\(^{101}\) The standard permit consists of a combination of effluent limitations and water quality standards in addition to reporting requirements.\(^{102}\) Nonetheless, it is within EPA's discretion to issue a permit for which the sole requirements are data collection and reporting.\(^{103}\)

F. Civil and Criminal Penalties

NPDES permits are strictly construed and enforced.\(^{104}\) Under the Act, EPA or a state may bring a civil action\(^{105}\) seeking relief and/or civil penalties against any person in violation of any permit condition or limitation under the Act.\(^{106}\) The "appropriate relief" EPA may seek in a civil action includes a permanent or temporary injunction.\(^{107}\)

Willful or negligent violation of any permit condition or limitation is a felony, subject to criminal penalties.\(^{108}\) The polluter's knowing violation of the Clean Water Act need not meet the traditional common law test for knowledge of wrongdoing; rather, the discharger need only knowingly have engaged in conduct that led to a Clean Water Act violation.\(^{109}\)

Criminal penalties include a fine of not less than $2,500 nor more than $25,000 per day per violation and/or imprisonment for not more

\(^{101}\) See id. § 1342(a)(2).
\(^{102}\) See id. §§ 1318, 1342.
\(^{103}\) See id. § 1342(a)(2); NRDC v. Costle, 568 F.2d 1369, 1380 (D.C. Cir. 1977) ("It may be appropriate in certain circumstances for the EPA to require a permittee simply to monitor and report effluent levels; EPA manifestly has this authority.").
\(^{104}\) See 33 U.S.C. § 1319.
\(^{105}\) The citizen suit provisions of the Clean Water Act involve complexities which are beyond the scope of this Comment. For the citizen suit provisions of the Act, see 33 U.S.C. § 1365.
\(^{106}\) See 33 U.S.C. § 1319(a)(1), (3), (d).
\(^{107}\) See id. § 1319(b).
\(^{108}\) See id. § 1319(c); see, e.g., United States v. Law, 979 F.2d 977, 978 (4th Cir. 1992) (affirming felony conviction of Lewis Law and Mine Management, Inc., for knowingly discharging polluted water into certain creeks in the absence of a NPDES permit), denial of Habeas Corpus aff'd, 16 F.3d 410 (4th Cir. 1994).
\(^{109}\) See United States v. Weitzenhoff, 1 F.3d 1523, 1530 (9th Cir. 1993). The United States Court of Appeals for the Ninth Circuit is one of the few courts to have reviewed the issue. In Weitzenhoff, regarding publicly owned treatment works (POTWs), the Ninth Circuit further found that it is irrelevant that defendants mistakenly believed their conduct to be authorized under a § 1342 permit. See id. For a further discussion of this issue, including contradictory case law, see Susan F. Mandiberg, The Dilemma of Mental State in Federal Regulatory Crimes: The Environmental Example, 25 ENVTL. L. 1165 (1995).
than one year. Repeat offenders are subject to a fine up to $50,000 per day of violation and the threat of imprisonment for up to two years. For example, the United States District Court for the Southern District of New York has held that the unpermitted discharge of pollutants constitutes a violation of the Clean Water Act for every day that the pollutants remain in the waterway.

Violations of reporting or data collection requirements are equally serious violations of the Act:

Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

Like the compromise between industry and environmentalists over water quality standards and effluent limitations, the largely self-policing nature of reporting requirements is a nod to industry that nonetheless serves as teeth in NPDES. The steep fines, and particularly the threat to executives of imprisonment for a white-collar crime, are designed to make the permitting program more than a nominal exercise for industry.

III. VIOLATIONS OF THE CLEAN WATER ACT

A. Lack of a Permit

The case law has established that a discharger who discharges pollutants into navigable waters from a point source in the absence of

---

110 See 33 U.S.C. § 1319(c)(1); Weitzenhoff, 1 F.3d at 1529.
112 See Hudson River Fishermen's Ass'n v. Arcuri, 862 F. Supp. 73, 76 (S.D.N.Y. 1994).
113 33 U.S.C. § 1319(c)(2).
114 See id. § 1319; RODGERS, supra note 38, at 261.
115 See Steven Ferrey, Hard Time: Criminal Prosecution for Polluters, in PLATER, NLS, supra note 60, at 330, 332-33. “Despite practical problems, criminal prosecution has assumed center stage in environmental enforcement. For an executive, the prospect of incarceration with violent felons focuses the attention like few other sanctions. . . . [While] the economics of waste disposal tempts many to ignore the laws governing proper waste handling and disposal, . . . until the corporation also can serve time, criminal prosecution of individual corporate executives will remain the most potent weapon in the expanding arsenal of environmental enforcement.” Id. at 333.
a NPDES permit is liable for a violation of the Clean Water Act.\textsuperscript{116} Whether a violation has occurred depends upon four elements: (1) Whether the discharge is a pollutant; (2) Whether the pollutant was added to the waters by the discharger; (3) Whether the discharge emanated from a point source; and (4) Whether the receiving waters are part of the Nation's navigable waters.\textsuperscript{117} With few exceptions, NPDES has been broadly construed to embrace the fullest construction possible of the terms "pollutant," "addition of a pollutant," "point source," and "navigable waters."\textsuperscript{118}

1. Pollutant

Even where defendants have assumed that their activities did not require permits, courts have imputed liability for defendants' failure to obtain a permit to discharge the specific pollutant complained of.\textsuperscript{119} The reach of NPDES liability is illustrated by its extension to the discharge of gasoline.\textsuperscript{120} In the landmark case of \textit{United States v. Hamel}, the United States Court of Appeals for the Sixth Circuit deemed gasoline a pollutant in spite of gasoline's absence from the Clean Water Act's definition of pollutant.\textsuperscript{121} The defendants put forth a strong argument that their discharge did not subject them to NPDES liability, arguing that the Oil Pollution Act of 1990, a corollary of the Clean Water Act, has exclusive jurisdiction over the issue.\textsuperscript{122} The

\textsuperscript{116} See, e.g., United States v. Law, 979 F.2d 977, 978 (4th Cir. 1992); \textit{Hudson River Fishermen's Ass'n}, 862 F. Supp. at 76.

\textsuperscript{117} See \textit{National Wildlife Fed'n v. Gorsuch}, 693 F.2d 156, 165 (D.C. Cir. 1982) (reasoning that a discharger must have a permit if the following five elements are present: (1) a pollutant is (2) added (3) to navigable waters (4) from (5) a point source). For clarity, this Comment treats the test as requiring only four elements because "addition of a pollutant" and "from" a point source are answered by the same evaluation. The United States Court of Appeals for the Sixth Circuit, in \textit{National Wildlife Federation v. Consumers Power Co.}, declined to address whether all point sources necessarily add pollution, but, while acknowledging the above five elements, called the \textit{National Wildlife Federation v. Gorsuch} court's reasoning "circular" for assuming that "point source" may not be defined independently of "addition." See \textit{National Wildlife Fed'n v. Consumers Power Co.}, 862 F.2d 580, 584 (6th Cir. 1988).


\textsuperscript{119} See \textit{Consumers Power}, 862 F.2d at 583, 585 (finding that entrained fish discharged by dam are pollutants under Clean Water Act because they are "biological materials"); \textit{National Wildlife Fed'n v. Gorsuch}, 693 F.2d at 174 n.56 (declaring that sediment discharged by dam is a pollutant under Clean Water Act, although not clearly listed by EPA as such); \textit{Hamel}, 551 F.2d at 110–11 (holding that gasoline is a pollutant under Clean Water Act even though not expressly covered under Act).

\textsuperscript{120} See \textit{Hamel}, 551 F.2d at 110–11.

\textsuperscript{121} See id.

\textsuperscript{122} See id.
court reasoned, however, that gasoline could be classified under the pollutant category of "biologic materials" within the Clean Water Act:

We do not read [Congress's] failure to [list gasoline as a specific pollutant under the Clean Water Act] as an intent to exclude [petroleum-based] materials from the Act. On the contrary, we conceive the employment of the broad generic terms [of the Clean Water Act] as an expression of Congressional intent to encompass at the minimum what was covered under the Refuse Act of 1899 [33 U.S.C. § 407].

As evidence that Clean Water Act sanctions may be used in conjunction with other equally applicable environmental statutes, the text and history of the Oil Pollution Act state that it is not preemptive of other federal remedies, not even of its counterpart, NPDES.

The breadth of the term "pollutant" was made definitive by the Supreme Court in Weinberger v. Romero-Barcelo. There, the Court held that an ordnance dropped during naval exercises was a pollutant even though it caused no harm to the receiving waters.

Similarly, while cases involving hydroelectric facilities and dams have carved a separate regulatory niche for these entities, the case law illustrates the seemingly limitless scope of the term "pollutant." "Pollutant" has come to mean almost any material introduced into the water, regardless of whether quantities of the alleged pollutant already existed in the water prior to the discharge. For example, sediment discharged by a dam has been deemed a "pollutant" even though sediment is not expressly listed as such in the Act. Similarly, seafood processors must have NPDES permits to dispose of seafood processing waste even where the discharges are comprised of fish removed from local waters. Likewise, entrained fish are considered "pollutants" because they fall within the realm of "biological materials," a category of pollutants under the Clean Water Act. Since the Clean Water Act does not distinguish between live and dead "biologi-

---

123 See id. at 112.
124 RODGERS, supra note 38, at 382–83.
126 Id. at 309.
128 See, e.g., Consumers Power, 862 F.2d at 585; National Wildlife Fed'n v. Gorsuch, 693 F.2d at 174 n.56.
129 See National Wildlife Fed'n v. Gorsuch, 693 F.2d at 174 n.56.
130 See Consumers Power, 862 F.2d at 585.
131 See id. at 583.
cal materials,” even the addition of live fish to a waterway could constitute addition of a pollutant. 132

In preserving the separate niche of dams and hydroelectric facilities, the United States Court of Appeals for the District of Columbia Circuit, in National Wildlife Federation v. Gorsuch, distinguished between the term “pollutant” and water quality changes induced by a dam, such as the conditions of low dissolved oxygen, cold, and supersaturation. 133 In so holding, the court acknowledged that this decision conflicted with that of the United States District Court for the District of South Carolina in South Carolina Wildlife Federation v. Alexander. 134 In South Carolina Wildlife Federation, the district court had found that low dissolved oxygen constituted a “chemical waste,” thereby constituting a “pollutant” under the Clean Water Act. 135 The court reasoned that “no reasonable purpose would be served by admitting pollution while denying the existence of a pollutant.” 136

The dam and hydroelectric facilities cases particularly illustrate that the prohibition on the addition of any material to the Nation’s waters, even if the material already exists in the waters, serves the goal of restoring the Nation’s waters. 137 Without this prohibition, dischargers could continue to discharge unchecked into polluted waterways on the premise that the pollutants already existed in the waterway. 138 The prohibition also reflects the Act’s objective in maintaining the integrity of the Nation’s waters. 139 It is a recognition of the fragile balance of aquatic life. 140

2. Addition of a Pollutant

a. Definition of “Addition of a Pollutant”

EPA defines the term “addition of a pollutant” to mean that which occurs when a source “physically introduces a pollutant into water from the outside world,” 141 including surface water runoff collected or

132 See id. at 585.
133 National Wildlife Fed’n v. Gorsuch, 693 F.2d at 171.
134 See id. at 171 n.47, 172 n.50 (citing South Carolina Wildlife Federation v. Alexander, No. 76–2167–2, slip op. at 24 (D.S.C. 1982)).
135 See id.
137 See 33 U.S.C. § 1251(a).
138 See id.
139 See id. §§ 1251(a), 1311(a).
140 See id. § 1251(a).
channeled by man.\textsuperscript{142} The United States Court of Appeals for the Sixth Circuit in \textit{National Wildlife Federation v. Consumers Power} nodded to the District of Columbia Circuit’s decision in \textit{National Wildlife Federation v. Gorsuch}, and reaffirmed EPA’s construction of the term.\textsuperscript{143} Both courts found that Congress had given EPA discretion to define “addition” and EPA’s construction of the term “addition of a pollutant” was reasonable.\textsuperscript{144}

b. \textit{The Dam/Hydroelectric Facilities Cases}\textsuperscript{145}

While the courts have prohibited EPA from maintaining a categorical exclusion for turbine-generating water from hydroelectric facilities, EPA’s ability to define “addition of a pollutant” operates as a categorical exclusion for many of the activities of hydroelectric facilities and dams.\textsuperscript{146} Discharge of operational waste water from hydroelectric facilities, since such water contains pollutants from the outside world, still subjects the facilities to NPDES requirements.\textsuperscript{147}

The dam and hydroelectric facilities cases have made clear that movement of pollutants already in the water does not constitute an addition of pollutants to navigable waters of the United States.\textsuperscript{148} In cases where operators of power plants and dams diverted and then released navigable waters, appellate courts have held that the mere diversion of flow did not constitute an “addition of pollutant” where the pollutants existed in the waters prior to the diversion.\textsuperscript{149}

3. Point Source

a. Definition of “Point Source”

Whether a specific body of water constitutes a point source or navigable waters is a matter of law for the courts.\textsuperscript{150} While an indu-

\textsuperscript{142} See Committee to Save Mokelumne River v. East Bay Utility District, 13 F.3d 305, 308 (9th Cir. 1993) (finding that acid drainage from an abandoned mine as surface runoff into river constituted “discharge of a pollutant” under the Act).

\textsuperscript{143} See \textit{Consumers Power}, 862 F.2d at 584.

\textsuperscript{144} See \textit{National Wildlife Fed’n v. Gorsuch}, 693 F.2d 156, 166, 170, 173, 175 (D.C. Cir. 1982); \textit{Consumers Power}, 862 F.2d at 584.

\textsuperscript{145} See \textit{Consumers Power}, 862 F.2d at 584 (equating dams with hydroelectric facilities).

\textsuperscript{146} See \textit{id}.

\textsuperscript{147} See \textit{id}.

\textsuperscript{148} See \textit{id}. at 581, 584.


\textsuperscript{150} See \textit{id}. at 980.
trial pipe overhanging a waterway is the prototypical image of a point source, the definition is far broader. For example, the act of dumping into a navigable waterway from something other than a discrete conveyance may also trigger liability, even where the dumping occurs as a result of inadequate runoff control.\textsuperscript{151} Waste treatment ponds and lagoons, including water treatment systems collecting runoff and leachate, are not waters of the United States, and, as such, have been found to constitute point sources when they discharge into navigable waters.\textsuperscript{152} A comparison of the definitions of point source\textsuperscript{153} and discharge of a pollutant\textsuperscript{154} indicates that any discernible conveyance, including a vessel on internal waterways, will be considered a point source if pollutants \textit{are or may be discharged} from the site.\textsuperscript{155}

b. Exemptions

Congress has mandated that all point sources have permits.\textsuperscript{156} While the power to define point and nonpoint sources is vested in EPA and reviewable by the courts, EPA may not categorically exempt point sources from NPDES requirements.\textsuperscript{157} Exemptions from the NPDES framework may only be made by Congress.\textsuperscript{158}

Exemptions are viewed as anathema by the courts because they undermine the purpose of the Act.\textsuperscript{159} Exemptions could allow certain industries to lapse into inertia and to escape technology forcing.\textsuperscript{160} Further, exemptions might allow EPA and/or special interest groups to circumvent the legislative process.\textsuperscript{161} In support of such policies,

\textsuperscript{151} See Hudson River Fishermen's Ass'n v. Arcuri, 862 F. Supp. 73, 76 (dumping solid waste, wrecked or discarded equipment, garbage, rock, sand and dirt from a construction site into a creek triggers the definition of point source even where dumping occurs inadvertently as a result of inadequate runoff controls on the creek bank).

\textsuperscript{152} See Law, 979 F.2d at 979 (citing 40 C.F.R. § 122.2 (g)) ("Waste treatment systems, including treatment ponds and lagoons designed to meet the requirements of [the Clean Water Act] . . . are not waters of the United States").

\textsuperscript{153} See 33 U.S.C. § 1362(14).

\textsuperscript{154} See id. § 1362(12).

\textsuperscript{155} See id. § 1362(12), (14). Vessels or floating craft discharging into the waters of the contiguous zone or the ocean are excluded from the definition of "discharge of a pollutant." See id. § 1362(12).

\textsuperscript{156} See NRDC v. Costle, 568 F.2d 1369, 1382 (D.C. Cir. 1977).

\textsuperscript{157} See id.

\textsuperscript{158} See id.

\textsuperscript{159} See id. at 1376 n.17, 1381, 1382.

\textsuperscript{160} See id. "An exemption tends to become indefinite: the problem drops out of sight, into a pool of inertia, unlikely to be recalled in the absence of crisis or a strong political protagonist." Id. at 1382.

\textsuperscript{161} See NRDC v. Costle, 568 F.2d at 1382.
the United States Court of Appeals for the Tenth Circuit declared that it contravenes the intent of the Clean Water Act and the structure of the statute itself "to exempt from regulation any activity that emits pollution from an identifiable point." 162

4. Navigable Waters

Navigability in fact is not required for a body of water to constitute "navigable waters of the United States" under the Act. 163 Reviewing courts considering whether a body of water constitutes "navigable waters" consistently have held that the Act envelops the Nation's waters under federal jurisdiction to the maximum extent possible under the Commerce Clause of the United States Constitution. 164 Any agency interpretation narrowing the definition is in derogation of the Act and exceptions provided by a narrower definition are unlawful. 165

The definition of "navigable waters" is so broad that it encompasses wetlands, 166 because the definition is not limited to only those waters that may convey interstate or foreign commerce. 167 Further, agency jurisdiction over water may not be denied where the water has been separated from navigable waters by dikes or other structures, nor is jurisdiction limited to the historic tidal water line. 168 In sum, courts have adhered to Congress's mandate that the term "navigable waters" be viewed in broad terms of U.S. geography and not be construed by interpretations of law. 169 Courts have construed the term "navigable waters" in light of the Act's overriding purpose of facilitating protection of water quality. 170

Upon a judicial determination that a discharger has added a pollutant to navigable waters from a point source in the absence of a


163 See 33 U.S.C. § 1362(7); National Wildlife Fed'n v. Gorsuch, 693 F.2d at 165 & n.23. "All courts considering the issue have held that navigability in fact is not required." National Wildlife Fed'n v. Gorsuch, 693 F.2d at 165 n.23.

164 See, e.g., United States v. Byrd, 609 F.2d 1204, 1209 (7th Cir. 1979); Leslie Salt Co. v. Froehlke, 578 F.2d 742, 754-55 (9th Cir. 1978); NRDC v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975).


166 See Byrd, 609 F.2d at 1204.


168 See Leslie Salt, 578 F.2d at 756.

169 See id. at 754-55 & n.15.

170 See, e.g., id. at 755 n.15.
NPDES permit for that point source, i.e., that the previous four elements have been satisfied, then the discharger is liable for a violation of the Clean Water Act.\textsuperscript{171} In many instances, it is a simple determination.\textsuperscript{172} Whether the addition of the pollutant actually caused harm is irrelevant.\textsuperscript{173} Whether the discharger did not know that a permit was required for the activity is also irrelevant.\textsuperscript{174} The discharger need only have engaged in the conduct that led to the Clean Water Act violation.\textsuperscript{175}

B. \textit{Where the Discharger Has a Permit, But Harm Results}

Unlike the situation where a discharger altogether lacks a permit, a more difficult question is presented to the courts where a discharger has a permit of some kind but the discharge nonetheless results in environmental harm. Understandably, if a discharger has obtained and complied fully with a NPDES permit, the discharger may not be charged with a violation of NPDES.\textsuperscript{176} The difficult determination, then, is whether a discharger has complied fully with the terms of the permit.\textsuperscript{177} A claim that a permit holder has not complied with the terms of the permit generally arises where the permit holder has discharged pollutants not authorized by the permit and/or where the permit holder has discharged pollutants in excess of the amounts authorized by the permit.

1. Discharge of Pollutants Not Authorized by Permit Terms

As set out in the previous subsection, courts have imputed liability to dischargers for failing to obtain a permit specific to the pollutant complained of.\textsuperscript{178} For example, hydroelectric facility operators with permits for discharges specific to their hydroelectric activities must obtain additional or modified NPDES permits to discharge any sub-

\textsuperscript{171} See, e.g., Committee to Save Mokelumne River v. East Bay Municipal Utility District, 13 F.3d 305, 309 (9th Cir. 1993).
\textsuperscript{172} See id.
\textsuperscript{173} See id.
\textsuperscript{174} See United States v. Weitzenhoff, 1 F.3d 1523, 1530 (9th Cir. 1993).
\textsuperscript{175} See id.
\textsuperscript{176} See, e.g., Inland Steel Co. v. EPA, 574 F.2d 367, 369–70 (7th Cir. 1978) (stating that the permit holder is entitled to an absolute defense upon a demonstration of compliance with the permit).
\textsuperscript{177} See id. at 370.
\textsuperscript{178} See supra Section III.A.
stances not expressly listed in the permit. Courts have stated that even discharge of substances not specifically listed by EPA as pollutants may invoke liability under the Clean Water Act if the discharger does not have a NPDES permit for the substances discharged. Even a permit holder's mistaken interpretation of a permit will not absolve the permit holder from liability for an unauthorized discharge. Because it is irrelevant to an assessment of a Clean Water Act violation whether an unauthorized discharge caused harm, the assignment of liability for those discharges not expressly allowed by a permit has generally been equal to that found for discharges that occurred in the complete absence of a permit.

2. Exceedances: Discharges in Excess of Quantities Authorized by Permit Terms

There is little case law on the issue of what degree of liability may be triggered under the Clean Water Act by a permit holder's discharge of pollutants of the type covered by the permit but in excess of the limits prescribed by the permit, i.e., exceedances. One of the most elucidating decisions on the matter is the United States District Court for the District of New Jersey's 1991 opinion in Public Interest Research Group of New Jersey (NJPIRG) v. Yates Industries.

NJPIRG brought suit against Yates Industries (Yates) for several thousand alleged violations of the Clean Water Act. In particular, NJPIRG alleged that Yates had discharged in excess of its permit terms and failed to monitor and report discharges in accordance with the permit terms. The court dealt brusquely with the charges of exceedances and other unpermitted discharges:

[T]he fact remains that defendant's permit contains parameter restrictions [for the point source at issue], and that defendant has violated those parameters. Defendant is responsible for the terms

---

180 See Consumers Power, 862 F.2d at 581–82 (entrained fish); National Wildlife Fed'n v. Gorsuch, 693 F.2d at 165 n.25 (sediment).
181 See United States v. Weitzenhoff, 1 F.3d 1523, 1529 (9th Cir. 1993).
182 See id. at 1530.
183 See id. at 1529–30.
185 See id.
186 See id.
of its permit, . . . and violations of that permit are unlawful. 33 U.S.C. § 1311(a). Unless modified, the permit as originally filed remains in effect.187

According to the court, all excess discharges violate the Clean Water Act.188 This conclusion is reinforced by “the fact that excess discharges during the same period for both ‘average’ and ‘maximum’ readings for a single substance leads to two separate violations.”189 Yates did not dispute the factual evidence of its discharges, but defended on the grounds that the New Jersey Department of Environmental Protection (DEP), which administered the SPDES program, had advised the New Jersey Builders’ Association that permits were not required for certain discharges, including the types of discharges for which Yates was charged.190 Unmoved, the court noted that DEP’s letters to a third party do not enable the court to modify defendant’s permit parameters when the defendant is charged with a violation of those parameters.191 The court maintained that the DEP letters must have provided express instructions specific to defendant’s permit in order for them to provide a defense to compliance.192 Express modification of the permit is required, stated the court, “particularly where the advice [given by the agency] runs directly counter to the clear terms of the permit.”193 The court concluded that Yates’ reliance on the DEP letters after the fact of its unpermitted discharges was unreasonable.194

Yates next sought to defend by arguing that its exceedances would not violate the permit terms if the actual discharge rates were rounded off to the nearest significant digit.195 The court found this approach to be an absurd manipulation of the permitting mandate.196 In addition to noting that Yates was unable to cite authority for its position, the court declared:

Regardless of how defendant attempts to couch the issue, . . . a permit defines outer limits, not approximate tolerances. If this

---

187 Id. at 445.
188 See id. at 445–52.
189 See id. at 452 n.8.
190 See Yates, 757 F. Supp. at 446.
191 See id.
192 See id.
193 Id.
194 See id.
196 See id. at 447.
court were to follow defendant's logic, a reading of .249 on a substance limited to .2 units would not violate the permit, even though the reading exceeded the limit by nearly twenty-five percent. This position is unsupported . . . . Any amount over the discharge limit is in violation of the permit, and dischargers have a responsibility to report all excess effluents. Permit holders may not purposely avoid the intent of the parameters by rounding off figures to the nearest significant digit. 197

In order to ensure that its ruling would not be evaded, the court further admonished that it is impermissible for laboratory analysts to report discharge rates at rates rounded off to permit terms. 198

In awarding NJPIRG injunctive relief against Yates, the district court concluded that a defendant's violation of a permit's terms is sufficient to establish that harm has occurred, necessitating injunctive relief. 199

[V]iolation of an effluent standard under the Act presents strong evidence of irreparable harm, because permit parameters are "precisely that part of the [Act] which is foremost concerned with the 'underlying substantive policy' of the environmental law: the preservation of the environment and the protection of mankind and wildlife from harmful chemicals." 200

The district court treated defendant's exceedance of the permit's parameters as a grave violation, and warned that dischargers are fully responsible for all exceedances at each point source. 201

EPA sets NPDES effluent limitation standards with the knowledge that exceedances cause harm. 202 The Supreme Court has stated that Congress intended the standards set by EPA to be absolute prohibitions on any non-conforming discharges, with the preferred standard as one prohibiting the discharge of pollutants. 203 A discharge in compliance with a permit, unless EPA erred in issuing the permit or in

---

197 Id. at 447 & n.3.
198 See id.
199 See id. at 453–54.
201 See id.
203 See E.I. du Pont de Nemours, 430 U.S. at 137.
setting a limitation, is assumed not to cause damage. Discharges beyond the bounds of a permit, whether exceedances or release of a pollutant not expressly listed in the permit, invoke liability for the resulting damage.

IV. Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.: A Contrary View of Unauthorized Discharges

Recently, the United States Court of Appeals for the Second Circuit has held that while exceedances are impermissible violations of the Act, the discharge of pollutants not authorized in a NPDES permit is lawful. In Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co. (hereinafter Kodak), the Second Circuit viewed as illogical the contention that NPDES permits establish limited permission for the discharge of pollutants listed in the permit and a prohibition on the discharge of any pollutant not listed.

Plaintiff Atlantic States Legal Foundation (Atlantic States) had brought suit against Eastman Kodak Company (Kodak) charging Kodak with violating the Clean Water Act by discharging pollutants which it was not authorized to discharge under its SPDES permit. Kodak defended by stating that "discharges of pollutants not specifically limited in the SPDES Permit by an effluent limitation for the specified chemical does not violate either the Act or the SPDES Permit." The United States District Court for the Western District of New York acknowledged that exceedances of permit conditions are violations of the permit and of the Act, but cast the issue in the terms of Kodak's affirmative defense:

Whether a permit prohibits only discharges of pollutants which it expressly restricts and only when they are discharged in excess of levels permitted in the permit, or whether a permit prohibits every single discharge except those in express compliance with the limits imposed by the permit.

204 See id. at 135–37; Chem-Dyne, 572 F. Supp. at 810–11.
207 See Kodak, 12 F.3d at 357.
209 See id. at 1043 n.5.
210 See id. at 1042, 1046.
211 Id. at 1046.
The District Court for the Western District of New York determined that exceedances are permit violations punishable under the Act, but that discharges of unauthorized pollutants are beyond the scope of NPDES.\textsuperscript{212} The district court reasoned:

[I]t strains all credulity to propose that Congress, having enacted such detailed legislation, and having authorized the EPA to adopt such detailed regulations, could have contemplated that a discharge by a permit holder of a pollutant never even referenced in its permit would form the basis of a permit violation cognizable under [the Act].\textsuperscript{213}

In so concluding, the district court acknowledged that nowhere in the Act is there explicit support for a conclusion that unauthorized discharges do not violate the Clean Water Act.\textsuperscript{214}

The United States Court of Appeals for the Second Circuit affirmed, dismissing Atlantic State’s “absolutist and wholly impractical view of a permit.”\textsuperscript{215} The Second Circuit reasoned:

Viewing the regulatory scheme as a whole . . . it is clear that the permit is intended to identify and limit the most harmful pollutants while leaving the control of the vast number of other pollutants to disclosure requirements. Once within the NPDES or SPDES scheme, therefore, polluters may discharge pollutants not specifically listed in their permits so long as they comply with the appropriate reporting requirements and abide by any new limitations when imposed on such pollutants.\textsuperscript{216}

For support in its conclusion, the Second Circuit, like Kodak itself, relied upon internal EPA memoranda and other statements by EPA.\textsuperscript{217} The Second Circuit cited one EPA internal memorandum for the proposition that NPDES permits were not intended to encompass all pollutants a permittee might discharge:

Compliance with [a permit that encompasses all possible pollutants] would be impossible and anybody seeking to harass a permittee need only analyze that permittee’s discharge until determining the presence of a substance not identified in the permit.\textsuperscript{218}

\textsuperscript{212} See id.

\textsuperscript{213} Kodak, 809 F. Supp. at 1046.

\textsuperscript{214} See id.

\textsuperscript{215} Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 809 F. Supp. 1040, aff’d, 12 F.3d 353, 357 (2d Cir. 1993).

\textsuperscript{216} Id.

\textsuperscript{217} See id. (relying on EPA statements in its holding); Kodak, 809 F. Supp. at 1043 (acknowledging that Kodak relies “almost exclusively” on EPA internal memoranda).

\textsuperscript{218} Kodak, 12 F.3d at 357 (citing Memorandum from EPA Deputy Assistant Administrator for
The court also relied upon EPA's 1980 comments to implementing application-based limits under the Clean Water Act reporting scheme.\textsuperscript{219} Recognizing a regulatory gap, EPA commented:

There is still some possibility . . . that a [NPDES or SPDES] permittee may discharge a large amount of a pollutant not limited in its permit, and EPA will not be able to take enforcement action against the permittee as long as the permittee complies with the notification requirements [pursuant to the Clean Water Act].\textsuperscript{220}

Accordingly, the Second Circuit reasoned that any pollutants may be discharged so long as the discharger has a permit to discharge some pollutants and abides by annual reporting requirements.\textsuperscript{221}

In justification, the Second Circuit relied upon the Supreme Court's expression in \textit{E.I. du Pont de Nemours & Co. v. Train} of the judicial canon that a court need not find that an agency's interpretation of a statute is the only permissible interpretation, but a "sufficiently rational" interpretation so as to preclude the court from substituting its judgment for the agency's.\textsuperscript{222} The Second Circuit rested upon the \textit{E.I. du Pont de Nemours} language where the Supreme Court stated:

The purpose of [33 U.S.C. § 1342(k), which defines compliance with a NPDES permit as compliance with § 1311 for purposes of enforcement of the Clean Water Act] seems to be . . . to relieve [permit holders] of having to litigate in an enforcement action the question [of] whether their permits are sufficiently strict.\textsuperscript{223}

This quote was taken out of context, however, and means the exact opposite of the purpose for which the \textit{Kodak} court uses it.\textsuperscript{224} The full quote forbids deviation from permit standards in effect at the time of issuance and reads:

[Section 1342(k)] plainly cannot allow deviations from [§ 1316] standards in issuing the permit. For, after standards of performance are promulgated, the permit can only be issued "upon conditions that such discharge will meet . . . all applicable requirements under [§ 1316]" [citing § 1342(a)(1)]; and one of the requirements

\textsuperscript{219} See id. at 358.
\textsuperscript{220} Id. (citing 45 Fed. Reg. 33,516, 33,523 (1980)).
\textsuperscript{221} See id. at 354, 357–58.
\textsuperscript{222} See id. at 358 (relying upon E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 138 (1977)).
\textsuperscript{223} Kodak, 12 F.3d at 357 (quoting E.I. du Pont de Nemours, 430 U.S. at 138 n.28).
of [§ 1316] is that no new source may operate in violation of any standard of performance. [Citing § 1316(e)]. The purpose of [§ 1342(k)] seems to be to insulate permit holders from changes in various regulations during the period of a permit and to relieve them of having to litigate in an enforcement action the question whether their permits are sufficiently strict. In short, [§ 1342(k)] serves the purpose of giving permits finality. 225

The United States Court of Appeals for the Seventh Circuit later clarified this language of E.I. du Pont de Nemours:

The language should be read to mean that a permit insulates the permit holder from any change in the regulation until the change is incorporated into the permit, and as a recognition that changes in the regulations, except for those prescribing standards for toxic pollutants injurious to human health, are not self-executing but must be placed in a permit before they can be enforced against a permit holder. 226

As further evidence in support of a firm judicial stance on strict permits, the ruling in E.I. du Pont de Nemours reversed a Court of Appeals ruling requiring EPA to allow permit variances. 227

V. THE PROSCRIPTIONS OF THE CLEAN WATER ACT: AN ANALYSIS OF THE ELEMENTS OF A VIOLATION OF THE ACT AND NPDES

A NPDES permit states the pollutants and amounts of pollutants that a permittee may discharge at each of the permittee's point sources. 228 The total prohibition against the discharge of pollutants into the Nation's waters may only be circumvented by possession of a NPDES permit. 229 Not only is discharging in the absence of a permit a violation of the Clean Water Act, "[a]ny discharge of a pollutant not in compliance with the conditions or limitations of such permit is also unlawful." 230 The District of Columbia Circuit in NRDC v. Costle,

225 Id.
226 Inland Steel Co. v. EPA, 574 F.2d 367, 373 (7th Cir. 1978).
227 See E.I. du Pont de Nemours, 430 U.S. at 138 (reversing E.I. du Pont de Nemours v. Train, 541 F.2d 1018 (4th Cir. 1976)).
230 Id.
referring to the legislative history of the Act, enunciated that the Clean Water Act "is founded on the basic premise that a discharge of pollutants without a permit is unlawful and that discharges not in compliance with the limitations and conditions for a permit are unlawful."231 The Sixth Circuit, in *National Wildlife Federation v. Consumers Power Co.*, explains:

Where the source of a pollutant is a point source, and the pollutant is discharged into navigable waters, the source *must* obtain a [NPDES] permit limiting and controlling both the amount and type of pollutants which can lawfully be discharged. . . . EPA or an authorized state agency, may in its discretion exempt a specific pollutant discharge from [§ 1311’s] general prohibition by issuing an NPDES permit. Alternatively, the agency may choose not to issue such a permit, leaving the discharge unlawful . . . .

Although § 1342 reads that EPA “may issue a permit for the discharge of any pollutant,”233 this grant of discretion only applies so as to allow EPA to either issue a permit or to leave the discharger subject to the total proscription of § 1311.234

The Clean Water Act historically has imposed liability upon dischargers for discharges that were not expressly allowed by a NPDES permit or which occurred in the complete absence of a permit.235 Even where defendants have assumed that their activities did not require a permit, courts have imputed liability to dischargers for failing to obtain a permit to discharge the specific pollutant complained of,236 thereby illustrating that permits place express limits, by type and by quantity, on the discharge of pollutants.237

---

231 Id. at 1375 n.16 (citations omitted).
234 NRDC v. Costle, 568 F.2d at 1375.
235 See *Consumers Power*, 862 F.2d at 583, 585 (finding that entrained fish discharged by dam are pollutants under the Clean Water Act since they are “biological materials”); *National Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 174 n.56 (D.C. Cir. 1982) (declaring that sediment discharged by a dam is a pollutant under the Clean Water Act, although it is not clearly listed by the EPA as such); *United States v. Hamel*, 551 F.2d 107, 110–11 (6th Cir. 1977) (holding that gasoline is a pollutant under the Clean Water Act even though not expressly covered by the Act).
236 See *Consumers Power*, 862 F.2d at 583, 585; *National Wildlife Fed’n v. Gorsuch*, 693 F.2d at 174 n.56; *Hamel*, 551 F.2d at 110–11.
237 See 33 U.S.C. § 1311; Public Interest Research Group of New Jersey v. Yates Indus., 757 F. Supp. 438, 445 (D.N.J. 1991) (holding that “[u]nless modified, the permit as originally filed remains in effect,” “and violations of that permit are unlawful. . . . Mere verbal representations by officials that certain portions of a permit will not be enforced, without formal modification in the permit, will not excuse the holder from the terms of that permit.”).
If both reporting requirements and effluent limitations are included in a specific permit, compliance with reporting requirements may not be equated with compliance with effluent limitations. The distinction between the two is reiterated by § 1319(c), which distinguishes criminal penalties for a violation of any permit condition or limitation from penalties for providing false or inaccurate information in response to any reporting requirements. In *Public Interest Research Group of New Jersey v. Yates Industries*, the United States District Court for the District of New Jersey explained, “The purpose of sanctions for reporting violations is to encourage accurate records so that plaintiffs can discover violations.” While reports filed by dischargers are deemed admissions of liability in summary judgment motions, they do not supplant the requirements and penalties of the NPDES permitting program.

VI. ATLANTIC STATES LEGAL FOUNDATION, INC. V. EASTMAN KODAK CO.: A MISGUIDED JUDICIAL APPROACH TO NPDES AND CLEAN WATER ACT VIOLATIONS

A. Judicial Deference

Rather than deferring to a “sufficiently rational” EPA interpretation of how unpermitted discharges are to be treated, in *Kodak*, the Second Circuit contravened the case law and relied upon EPA statements taken out of context in order to create an indicia of deference to a preposterous statutory construction. Had the statute and the common law not been so explicit, the Second Circuit might have been correct in looking to *E.I. du Pont de Nemours* for guidance on judicial deference to the EPA statements. In *E.I. du Pont de Nemours*, the Supreme Court declared that an agency’s interpretation is to be accorded judicial deference when states and other affected parties have relied upon it and it is supported by thorough, scholarly, judicial opin-

---


239 See 33 U.S.C. § 1319(c)(1)–(2).

240 See *Yates*, 757 F. Supp. at 452.

241 See *id.* at 447.

242 See *id.* at 447, 450–52.

ions. Yet, even under the principles of *E.I. du Pont de Nemours*, the Second Circuit’s reliance upon certain EPA comments is ill founded.245

A more appropriate vehicle for treating Kodak’s proffered EPA comments would have been the *Chevron* doctrine.246 The *Chevron* doctrine enunciates the principle that a statute’s construction must be derived from a review of congressional intent if the statute is not plain on its face: “If the intent of Congress is clear that is the end of the matter.”247 If a statute is ambiguous on its face and the legislative history does not speak to the issue, then the *Chevron* doctrine dictates that a court defer to a reasonable interpretation by the agency.248

While the Western District of New York relied upon *Chevron* to validate its interpretations of Kodak’s proffered EPA documents,249 it also noted that § 1311 is plain on its face.250 The Second Circuit did not address these assertions of the district court in its affirmance, but it is possible that the Second Circuit was adhering in spirit to Justice Scalia’s since-proposed manipulation of the *Chevron* doctrine.251

Under any possible interpretation of the *Chevron* doctrine, however, the Second Circuit’s “deference” to EPA’s interpretation of the Clean Water Act is misplaced. The Clean Water Act is an unambiguous mandate barring discharges of pollutants from point sources in the absence of a NPDES permit specific to the discharge.252 The legislative history and two decades of common law do not veer from this mandate.253 Further, the United States Court of Appeals for the District of Columbia Circuit has held that the Agency’s interpretation must be consistent with the Agency’s past actions on the same issue.254 The Second Circuit’s citations to EPA memoranda effects a gross deviation from EPA’s congressionally mandated role under the Clean Water Act.255

---

245 See Kodak, 12 F.3d at 357–58.
248 See id.
250 See id. at 1044.
252 See 33 U.S.C. § 1311; see also infra Sections III.A–B.
253 See infra Sections II., III.A–B.
255 See generally id.
The Fifth Circuit Court of Appeals has asserted in *Louisiana Chemical Association v. Bingham* that “the role of the agencies remains basically to execute legislative policy, they are no more authorized than are the courts to rewrite acts of Congress.”\(^256\) Similar to *E.I. du Pont de Nemours* and *Chevron*, the United States Court of Appeals for the Sixth Circuit has propounded that “construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . .”\(^257\) There are compelling indications that the *Kodak* courts’ reliance upon the EPA’s internal memoranda and comments in the Federal Register is wrong\(^258\)—the overarching indication being the EPA’s history of issuing and enforcing pollutant-specific NPDES permits.\(^259\) This history has been the subject of reliance and has been supported by thorough scholarly judicial opinions.\(^260\)

B. No Visible Support in the Case Law

The source of the Second Circuit’s holding in *Kodak* is not visible in the case law. The Second Circuit’s reasoning in *Kodak* may find support in dicta in *National Wildlife Federation v. Gorsuch*, which states that “EPA’s policy-oriented explanation for the distinction—that Congress purposely limited the federal NPDES permit program to certain well-recognized pollutants and left control of other water-altering substances or conditions to the states . . . —is quite plausible.”\(^261\) However, the *National Wildlife Federation v. Gorsuch* court was likely referring to the prohibition on including general federal water quality standards in NPDES permits, while state water quality standards are included and serve as additional grounds for liability.\(^262\)

---

\(^{256}\) *Louisiana Chem. Ass’n v. Bingham*, 657 F.2d 777, 779 (5th Cir. 1981) (quoting Talley v. Matthews, 550 F.2d 911, 919 (4th Cir. 1977)).


\(^{258}\) See id.; Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 12 F.3d 353, 357–58 (2d Cir. 1993).

\(^{259}\) See *Kodak*, 12 F.3d at 357 (acknowledging plaintiff Atlantic State’s citations to cases where defendants failed to accurately disclose discharges or where defendants failed to secure an applicable permit); *Consumers Power*, 862 F.2d at 583, 585; *National Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 174 n.56 (D.C. Cir. 1982); United States v. Hamel, 551 F.2d 107, 110–11 (6th Cir. 1977).

\(^{260}\) See *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135–37; *Kodak*, 12 F.3d at 357; *Consumers Power*, 862 F.2d at 583, 585; *National Wildlife Fed’n v. Gorsuch*, 693 F.2d at 174 n.56; *Hamel*, 551 F.2d at 110–11; see also supra Section III.A–B.

\(^{261}\) *National Wildlife Fed’n v. Gorsuch*, 693 F.2d at 172.

\(^{262}\) See id.
The *National Wildlife Federation v. Gorsuch* opinion also might be construed mistakenly to support *Kodak*'s proposition where the former states that EPA had been entrusted by Congress with "some discretion over which 'pollutants' and sources of pollutants were to be regulated under the NPDES program." Rather than the free-for-all suggested by the *Kodak* court, however, the *National Wildlife Federation v. Gorsuch* court's statement, taken in context, simply means that for point sources such as dams, EPA has the discretion to construe a dam's alteration of water quality, such as an alteration with oxygen content, as not constituting pollution requiring a permit.

C. Reporting Requirements Are Distinct

The Second Circuit also erred in equating a discharger's compliance with reporting requirements with compliance with effluent limitations. The distinction between the two is reiterated by § 1319(c), which distinguishes criminal penalties for violation of a permit condition from penalties for providing false or inaccurate information in response to any reporting requirements under the chapter. At least one court has noted that the purpose of sanctions for reporting violations is to enable plaintiffs and prosecutors to discover discharge violations. It is significant that discharge reports may constitute admissions of liability in summary judgment motions. In contradiction to the reasoning of the Second Circuit, discharge reports do not supplant the requirements and penalties of the NPDES permitting program.

D. The Implications of *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*

If a permit holder is deemed to have blanket authorization to discharge so long as he or she complies with reporting requirements, EPA's enforcement authority is hobbled because permit holders may

---

263 *Id.* at 173.
264 *See id.* at 171 n.47, 173.
265 *Contra* Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 12 F.3d 353, 357 (2d Cir. 1993); *see* NRDC v. EPA, 822 F.2d 104, 118–119 (D.C. Cir. 1987).
266 *See* 33 U.S.C. § 1319(c)(1)–(2).
268 *See id.* at 447.
269 *See id.* at 447, 450–52.
discharge with impunity. Alternatively, if a permit holder is deemed to be in compliance with his or her permit by reporting only authorized discharges (and by omitting unauthorized discharges), then EPA is barred from discovering, much less prosecuting, unauthorized discharges—if there is, then, such a thing as an unauthorized discharge. The Second Circuit’s holding in Kodak is not a plausible interpretation of the Clean Water Act.\(^{270}\) Kodak is an anomaly. No other federal court has cited to the Second Circuit’s central holding in Kodak. The Second Circuit’s conclusion is self-contradicting: it recognizes a discharger’s liability for failure to obtain a NPDES permit as well as liability for exceedances, but refuses to impose liability where a permittee failed to obtain a permit for the discharge of pollutants not allowed in the NPDES permit.\(^{271}\) Although the defendant’s efforts in Kodak to raise the defense that possession of a permit absolved Kodak of all discharges is not surprising, the Second Circuit’s willingness to adopt a position that would have the effect of overriding congressional intent and nullifying the Clean Water Act is shocking.

VII. ARGUMENT: THE RELATIONSHIP BETWEEN CERCLA AND THE CLEAN WATER ACT

Violations of NPDES may also be punishable under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).\(^{272}\) Designed to complement existing federal regulations,\(^{273}\) CERCLA supplements the Clean Water Act by imposing additional liability for a violation of the Clean Water Act.\(^{274}\) In amending the Clean Water Act, Congress was concerned that if pollution control were limited to NPDES permitting alone, the Act would control “only a part of the total ‘toxic pollutant picture’ for a given industrial site

\(^{270}\) Compare Kodak, 12 F.3d at 357 with 33 U.S.C. §§ 1314, 1342.

\(^{271}\) See Atlantic States Legal Foundation v. Eastman Kodak Co., 12 F.3d 353, 354, 357 (2d Cir. 1993).


or process," and that such incomplete coverage would "undermine overall water pollution abatement efforts."275

That CERCLA's scope includes Clean Water Act violations is also supported by the United States District Court for the District of Minnesota, which asserted in United States v. Reilly Tar & Chemical Corp. that

CERCLA should be given a broad and liberal construction. The statute should not be narrowly interpreted to frustrate the government's ability to respond promptly and effectively, or to limit the liability of those responsible for cleanup costs beyond the limits expressly provided. ... Congress intended to provide the EPA with flexibility to tailor response actions to fit the circumstances of the individual case.276

Additionally, the national contingency plan set out in the Federal Water Pollution Control Act, of which the Clean Water Act is a part, forms the basis for the national contingency plan of CERCLA.277

VIII. RELEVANT STATUTORY AND COMMON LAW BACKGROUND OF CERCLA

A. Liability under CERCLA

Under CERCLA, current and former owners of a facility,278 generators of hazardous substances,279 and transporters of hazardous substances280 are liable for response costs and natural resource damages caused by a release or threatened release of a hazardous substance.281 CERCLA imposes strict liability.282 Congress established this standard while aware of the difficulties that occur when several potentially responsible parties (PRPs) have contributed to a site's contamination, or "when dumped chemicals react with others to form new or more toxic substances, or when records are unavailable."283 Nonetheless,

276 Reilly Tar, 546 F. Supp. at 1112, 1114.
277 See id. at 1115-16. See RODGERS, supra note 38, at 700-10, for a detailed discussion of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). The NCP is a loosely organized federal effort incorporating Superfund and other environmental clean-up efforts for preparing for and responding to discharges and releases of pollutants, contaminants, and hazardous substances. See id. at 701.
278 See 42 U.S.C. § 9607(a)(1)-(2).
279 See id. § 9607(a)(3).
280 See id. § 9607(a)(4).
281 See id.
283 Id. at 805-06.
Congress decided that "those responsible for causing the problems caused by the hazardous wastes were intended to bear the costs and responsibilities for remedying the condition." Congress anticipated that CERCLA would respond to toxic waste sites even where the dangers of the toxins were unknown.

B. Defenses to CERCLA Liability

1. Enumerated Defenses

CERCLA provides certain enumerated defenses to liability. A party will not be held liable where the damages were caused solely by: (1) an act of God; (2) an act of war; (3) an act or omission of a third party other than an employee or contractor of the defendant, if the defendant exercised due care; and (4) any combination of the above.

2. Federally Permitted Releases

CERCLA's exception for "federally permitted releases" is the other statutory defense available to a discharger. It is also the only equitable defense to CERCLA liability. The discharge of pollutants specifically permitted by a permit constitutes a "federally permitted release." To maintain a defense that a release was federally permitted, the terms of the discharger's permit must be legally enforceable. An assertion that a discharge is permitted by implication does not constitute a legally enforceable permit of that discharge.

A discharger who complies with his or her permit but whose federally permitted release causes damage may not be held liable under the Clean Water Act or CERCLA.

---

286 See 42 U.S.C. § 9607(b).
287 See id.
288 See id. § 9607(j). The term "federally permitted release" includes those state permitted releases made pursuant to a SPDES permit. See id. § 9601(10).
292 See id.
In *In Re Acushnet River & New Bedford Harbor* (hereinafter *Acushnet VII*), the United States District Court for the District of Massachusetts held that the only equitable defense which may be maintained against the government in a combined CERCLA/Clean Water Act action is one where the releases allowed by the permit were the direct cause of the harm, even though the defendant had complied with the NPDES permit.\(^{294}\) The *Acushnet VII* holding\(^{295}\) defines federally permitted releases as only those discharges that conform to the exact type and amount of pollutants limited in the NPDES permit.\(^{296}\)

In enacting CERCLA, Congress maintained that "Congress has never said or suggested that a Federal permit amounts to a license to create threats to public health or the environment with legal immunity."\(^{297}\) Federally permitted releases must be reviewed in light of the congressional mandate to safeguard the environment.\(^{298}\)

C. A Defendant's Burden of Proof

A defendant faced with liability under CERCLA bears the burden of proving that he or she falls within the statutory exception of § 9607(j) - Federally Permitted Releases.\(^{299}\) This allocation of the burden of proof conforms to the broad remedial purposes of the statute and Congress's interest in apportioning liability.\(^{300}\) A discharger with a NPDES permit may defend a CERCLA action on the basis that the harm alleged is attributable solely to federally permitted releases in spite of the discharger's non-permitted releases, or that the non-permitted releases are not a contributing factor to the harm.\(^{301}\) Plaintiffs in CERCLA actions are not required to prove that the non-federally permitted releases are "substantial" contributing factors to the harm.\(^{302}\)

---


\(^{295}\) Ruling on the parties' summary judgment motions, the *Acushnet VII* court expressed "diffidence" at releasing its "working hypothesis on the issue of federally permitted releases" but did so in consideration of "the paucity of decided case on these issues" and in order that the opinion might be subject to judicial and scholarly critique to aid in the final resolution of the case. *Id.* at 895 n.1. The case subsequently was settled by consent decree. *See* United States v. AVX Corp., 962 F.2d 108, 111 (1st Cir. 1992).

\(^{296}\) See *Acushnet VII*, 722 F. Supp. at 895-901.

\(^{297}\) S. REP. No. 96--848, at 46 (1980).

\(^{298}\) See *id*.

\(^{299}\) See *Acushnet VII*, 722 F. Supp. at 901 n.21.

\(^{300}\) *See id*.; *see also* S. REP. No. 96--848, at 46 (1980).

\(^{301}\) See *Acushnet VII*, 722 F. Supp. at 897 & n.11.

\(^{302}\) See O'Neil v. Picillo, 883 F.2d 176, 179 n.4 (1st Cir. 1989).
The burden is on the defendant to establish, by a fair preponderance of the evidence, that the damage is divisible between the permitted and non-permitted releases. The defendant also must prove what portion of the damages is allocable to federally permitted releases. A defendant’s failure to sustain this burden of proof subjects the defendant to liability for the entire, indivisible harm, in accordance with traditional tort law principles. This allocation of the burden of proof reflects “Congress’ concern that cleanup efforts not be held hostage to the time-consuming and almost impossible task of tracing all of the waste found at a dump site.”

D. Recovery under CERCLA

1. Where the Discharge Constitutes a Federally Permitted Release

Where response costs are incurred by damage resulting from a federally permitted release, the sovereign’s recovery for response costs is determined by “existing law in lieu of [§ 9607 of CERCLA].” In other words, state common law determines recovery for any damages resulting from permitted releases. Under the statutory scheme of CERCLA, dischargers are held liable under state common law for their federally permitted releases because “[t]he rule of common law is that compliance with a permit is not a defense to liability.”

303 See Acushnet VII, 722 F. Supp. at 901.
304 See id. This burden is placed on defendants because to do otherwise would be to force plaintiffs to prove, as part of their prima facie case, that defendants had been issued no relevant permits. This would impede suits by citizen groups and parties other than the EPA. See id. at 901 n.21.
306 See O’Neil, 883 F.2d at 179 n.4.
307 The Supreme Court of California has declared that although CERCLA expressly distinguishes between response costs and recovery for natural resource damages, they do not require distinct treatment by the courts: “[W]e do not believe . . . that CERCLA intended that reimbursement of ‘response costs’ be treated as definitionally or conceptually distinct from recovery of ‘damages.’ Congress clearly intended considerable overlap between the two forms of recovery.” AIU Ins. Co. v. FMC Corp., 799 P.2d 1253, 1270 (Cal. 1990).
308 The sovereign may be the federal government, a state government, or any Native American tribe. See 42 U.S.C. § 9607(j).
309 Id.
2. CERCLA Actions for Damages Resulting from Clean Water Act Violations

Where a discharger violates a NPDES permit, CERCLA will impute liability for response costs. Courts have allowed claims for recovery under CERCLA, regardless of whether the discharger has a NPDES permit, for any releases: (1) which occurred during a time when there was no permit; or (2) which were not expressly allowed by the permit; or (3) which exceeded the limitations established by the permit.312 Such releases constitute non-federally permitted releases.313 Where damage may be traced to federally permitted releases, response costs and natural resource damages are not recoverable unless non-federally permitted releases contributed to the cost of the natural injury.314

IX. CONCLUSION: CERCLA RECOVERY FOR CLEAN WATER ACT VIOLATIONS

Violations of the Clean Water Act for discharges in the absence of a permit, where the discharger either wholly lacks a permit or a permit specific to the pollutant at issue, subject the discharger to CERCLA liability, because such discharges do not constitute federally permitted releases.315 The rulings in cases such as Iron Mountain Mines and Bunker Hill make clear that a violation of the Clean Water Act is also a violation of CERCLA.316

Congress was concerned with national uniformity in pollution control and in enacting CERCLA sought to prevent hazardous waste generators or handlers from taking advantage of a state's less stringent disposal laws to the detriment of the national goal.317 The Clean Water Act also reflects this concern for "equal treatment for similarly situated dischargers."318 Lax permits issued by some SPDES pro-

grams or EPA's arbitrary issuance of inclusive permits to some dischargers and less stringent permits to others would undermine national pollution control policy.\textsuperscript{319} Implicitly permitting discharge of a hazardous substance would be contrary to congressional intent and the language of both Acts, because the result would be a lack of national uniformity regarding which hazardous substances would require a permit and which would not.\textsuperscript{320} Lack of specificity in permits would trigger litigation and uncertainty over which discharges are permitted by a permit.\textsuperscript{321} The incentive for obtaining a comprehensive permit and the national goal of pollution control would be simultaneously abrogated if permittees were allowed to discharge pollutants not specified in their permits.\textsuperscript{322} The overarching legislative support for these propositions is exemplified by the remarks of Senator Randolph, a sponsor of CERCLA: "There is simply no good reason for us to respond to one type of release of a poison but not [to] another."\textsuperscript{323}

\textsuperscript{319} See id.; Chem-Dyne, 572 F. Supp. at 809.
\textsuperscript{322} See id.
\textsuperscript{323} See 126 CONG. REC. S14,967, S14,967 (daily ed. Nov. 24, 1980).