No.

IN THE

Supreme Court of the United States

AURORA ENERGY SERVICES, LLC,
ALASKA RAILROAD CORPORATION

Petitioners,

v.

ALASKA COMMUNITY ACTION ON TOXICS,
ALASKA CHAPTER OF THE SIERRA CLUB

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Clean Water Act, 33 U.S.C. §§ 1251 *et seq*. ("Clean Water Act" or "the Act"), permit shield protects a permittee from liability where the permittee has complied with its Clean Water Act permit. 33 U.S.C. § 1342(k). This protection is known as the "permit shield." It has long been held that compliance with one's permit bars Clean Water Act liability for any and all types of discharges, whether specifically discussed in the permit or not, unless the discharge was not known to the permitting agency at the time the permit was issued.

The Ninth Circuit read the permit here to reverse that rule, holding that general prohibitory language in the permit meant that a permittee could be held liable for discharges unless the permit affirmatively addressed them. Thus the permittee could be held liable in a citizen suit, notwithstanding that the permitting agency knew of the discharge when it issued the permit (and had declined to address it), and the agency affirmed that it did not view the permit as prohibiting the discharge.

Does the statutory permit shield protect a permittee from liability under the Clean Water Act for a discharge where the permitting agency was aware of the discharge at the time it approved the permit, and did not include any specific prohibition or limitation on the discharge in the permit?

PARTIES TO THE PROCEEDINGS

Petitioners are Aurora Energy Services, LLC and Alaska Railroad Corporation, both of which were Appellees in the Ninth Circuit proceeding below and Defendants in the district court. Respondents Alaska Community Action on Toxics and the Alaska Chapter of the Sierra Club were Appellants in the Ninth Circuit proceeding and Plaintiffs in the district court.

RULE 29.6 STATEMENT

Petitioner Aurora Energy Services, LLC is a wholly-owned subsidiary of Usibelli Coal Mine, Inc., incorporated in Alaska. No publicly held corporation owns any percentage of Aurora Energy Services, LLC.

Petitioner Alaska Railroad Corporation is a public corporation created by Alaska state statute and an instrumentality of the State of Alaska within the Department of Commerce, Community and Economic Development. It is not a subsidiary of any parent corporation, and no publicly-held corporation or other publicly-held entity owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Aurora Energy Services, LLC and Alaska Railroad Corporation respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 765 F.3d 1169 (9th Cir. 2014) and reprinted at App.1a. The Ninth Circuit order denying rehearing is reprinted at App.11a. The district court's opinion is reported at 940 F. Supp. 2d 1005 (D. Ak. 2013) and reprinted at App.12a.

JURISDICTION

This case was filed in the district court under 33 U.S.C. §§ 1311, 1342, and 1365. The district court issued final judgment on July 8, 2013. A part of that judgment was appealed pursuant to 28 U.S.C. § 1291. The Ninth Circuit reversed and remanded on September 3, 2014. Timely motions for panel rehearing and rehearing *en banc* were denied on October 31, 2014. On January 29, 2014, Justice Kennedy granted an extension to and including February 28, 2015 to file this Petition. This Petition is being filed within the time allowed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The principal statutory provision at issue here is 33 U.S.C. § 1342(k). It provides, in relevant part:

> Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health.

Additional statutory provisions relevant to the Petition are set forth in the Appendix beginning at App.61a.

STATEMENT

The Clean Water Act's National Pollution Discharge Elimination System ("NPDES") permit program contemplates a cooperative process for dischargers and permitting agencies to determine which point source discharges require explicit limits and controls in a permit. While the discharger is responsible for complying with reporting and disclosure requirements, the permitting agency is responsible for setting permit limits and conditions for the point source discharges of pollutants that, in its view, present a risk to the environment and water quality. The Second, Fourth, Sixth, and Seventh Circuits have held that upon permit issuance, the permit shield, 33 U.S.C. § 1342(k), protects a compliant permittee from liability for any discharge known to the permitting authority at the time the permit issued. The Ninth Circuit decision is the only circuit court decision to hold otherwise.

The Ninth Circuit interpreted Petitioners' NPDES permit as allowing liability for a discharge disclosed and well-known to the permitting agency. The Ninth Circuit decision undermines the cooperative permitting process, overrides the

permitting agency's decision, and nullifies the permit shield. Because the Ninth Circuit decision has significant implications for the implementation of the Clean Water Act and conflicts with every other circuit that has considered the provision, this Petition should be granted.

I. STATUTORY AND REGULATORY BACKGROUND.

The Clean Water Act prohibits the discharge of any pollutant into waters of the United States except in compliance with one of the statute's regulatory or permit programs. 33 U.S.C. § 1311(a). The Clean Water Act's NPDES program is the mechanism for permitting, and thus controlling, discharges of pollutants from point sources.[1] *See* 33 U.S.C. § 1342. Thus, discharges of pollutants that are expressly addressed by a NPDES permit are not prohibited by the Act.

The Clean Water Act also includes a separate "permit shield" that provides that "[c]ompliance with a permit issued pursuant to this section ***shall be deemed compliance***" for purposes of Clean Water Act enforcement and citizen suits. 33 U.S.C. § 1342(k) (emphasis added). For this provision to have meaning, it cannot simply be read to reiterate § 1311's directive that a discharge of pollutants that is specifically addressed by a NPDES permit is legal. Because such discharges do not expose a permittee to liability, the permit shield of § 1342(k)

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[1] The U.S. Environmental Protection Agency ("EPA") administers the Clean Water Act, including the NPDES program, but it may delegate its administrative and permitting authority to states. 33 U.S.C. § 1342(b).

would be unnecessary. Moreover, except for toxic pollutants that are not relevant to this case, the permit shield provision does not limit its scope to particular "pollutants." Rather, it protects a permittee broadly from liability under the Act. Therefore, the permit shield provision must mean what it plainly says: That compliance with a permit is deemed compliance with the Clean Water Act.

Consistent with this statutory language, until now, every federal circuit court to consider the issue has interpreted § 1342(k) permit shield as preventing liability not only for discharges expressly identified in a permit, but also discharges not identified in the permit so long as they were disclosed to the permitting agency. The Second, Fourth, and Sixth Circuits have explicitly held that the permit shield deems a discharge in compliance with a NPDES permit, and, in turn, the statute, as long as (1) the permittee complied with its permit and all disclosure and reporting requirements, and (2) the discharge was within the reasonable contemplation of the permitting agency at the time the permit was issued. *See Sierra Club v. ICG Hazard, LLC*, No. 13-5086, 2015 U.S. App. LEXIS 1283 at 7, 12 (6th Cir. Jan. 27, 2015); *Piney Run Pres. Ass'n v. County Comm'rs*, 268 F.3d 255, 258 (4th Cir. 2001); *Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 367 (2d Cir. 1993). The Seventh Circuit has extended this reasoning to protect permittees even when the permitting agency exceeded its legal authority in permitting a discharge. *See Wis. Res. Prot. Council v. Flambeau Mining Co.,* 727 F.3d 700, 706 (7th Cir. 2013).

These Circuit decisions effectuate Congress' designation of agencies as the controlling

authorities upon whom regulated parties must rely to obtain a permit. Permittees provide information about their discharges, but it is the agency that decides how to regulate permitted facilities. *See* Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,312 (May 19, 1980) (explaining that the permit shield "places the burden on permit writers rather than permittees to search through the applicable regulations and correctly apply them to the permittee through its permit"). The agency decides which pollutants pose a risk to the environment, and establishes discharge limits and other conditions in the permit to ensure the discharge of those pollutants satisfy applicable water quality standards. *See ICG Hazard,* 2015 U.S. App. LEXIS at 11-12; *Piney Run*, 268 F.3d at 265-66, 268; *Atlantic States*, 12 F.3d at 357. All other discharges within the agency's reasonable contemplation are allowed without permit limits, and the permit shield bars liability based on allegations that such discharges are not properly permitted. *See Atlantic States*, 12 F.3d at 357; *see also In re Ketchikan Pulp Co.*, 7 E.A.D. 605, 618-19 (EPA Envt'l App. Bd. 1998). These holdings conform to the permit shield's purpose of insulating permittees from liability for regulatory decisions committed to the agency. *See E.I. Du Pont de Nemours & Co. v. Train,* 430 U.S. 112, 138 n.28 (1977) ("The purpose of [the permit shield] seems to be to . . . relieve [permittees] of having to litigate in an enforcement action the question whether their permits are sufficiently strict. In short, [the permit shield] serves the purpose of giving permits finality."); *Coon v. Willet Dairy, LP*, 536 F.3d 171, 173 (2d Cir. 2008) (explaining that the permit shield "protects [Clean Water Act] permit holder[s] from

facing suits challenging the adequacy of [their] permit[s]").

By shielding permittees from liability for discharges not identified in a permit, the permit shield also addresses the practical problems presented by the immense burden and near impossibility of identifying and imposing limits on every possible discharge from a facility or class of facilities. *See Piney Run*, 268 F.3d at 357; *Atlantic States*, 12 F.3d at 357; *see also Ketchikan*, 7 E.A.D. at 618. Because it provides protection to permittees for discharges of pollutants not identified in the permit, and thus saves permit writers from the burden of listing every possible pollutant or wastestream, the permit shield is essential to a functioning NPDES program. This functional role of the permit shield is especially important for "general" NPDES permits (as opposed to "individual" permits), which apply to an entire category of discharging facilities (as opposed to an individual facility) because it would be impossible to list every pollutant that might be discharged from any number of facilities that might be covered by the general permit in the future. *See ICG Hazard*, 2015 U.S. App. LEXIS at 9.

II. FACTUAL BACKGROUND.

The Seward Coal Loading Facility (the "Seward Facility" or "Facility"), located on the shore of Resurrection Bay in Alaska, loads coal received by rail onto ships for delivery to markets. App.15a. The loading process includes a conveyor system that transports coal over open water to the loading equipment that places the coal on the ships. *Id.* Coal may fall into the Bay while being transported

on the conveyor system and while being loaded onto the ships. App.16a.

EPA has long known that coal occasionally spills from the conveyor. EPA first permitted the Seward Facility under the Clean Water Act in 1984 using an individual NPDES permit. App.18a. In a 1987 dive inspection at the Facility, EPA found coal beneath the conveyor system and observed that the coal had "probably spilled from the loading conveyor belt." App.42a. EPA attached this report to a 1988 inspection report in which EPA found the Seward Facility to be in compliance with its individual NPDES permit. *Id.*

In 1999, the Facility sought to renew its NPDES permit. App.18a. Rather than renew the individual permit, EPA urged the Facility to renew the permit under the Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (the "Multi-Sector Permit"). App.42a-43a. The Multi-Sector Permit is "a general, non-facility-specific permit that authorizes stormwater discharges for a variety of industrial operations." App.29a. EPA explained that renewing the permit under the Multi-Sector Permit would reduce the administrative burden for both EPA and the Seward Facility. App.18a-19a. There is no evidence in the record that EPA suggested a separate, individual permit for any part of the Seward Facility, including the conveyor system.

The Facility began operating under the Multi-Sector Permit in 2001. App.19a. EPA regularly inspected the Facility from that time.[2]

In March 2009, the Facility notified EPA of its intent to renew its coverage under the Multi-Sector Permit. The Facility is permitted under Sector AD, the Multi-Sector Permit's "catch-all" provision for facilities not covered by any of the specific industry categories listed in the Multi-Sector Permit. *See* App.8a. The Multi-Sector Permit allows coverage under the "catch-all" provision only upon special permission granted by the permitting authority.[3] The record shows that Petitioner Aurora Energy requested, as required, written authorization of EPA to renew its permit coverage under this portion of the Multi-Sector Permit.[4] App.38a. Although the Multi-Sector Permit empowered EPA to obtain further information about the Facility or to require an individual permit, EPA declined to do so. Instead, EPA elected to provide the Facility with express, written authorization to obtain coverage under the Permit.[5] *Id.* EPA's written authorization imposed standards borrowed from a part of the Multi-Sector Permit that governs coal piles.[6]

During the permitting process, as required by the Multi-Sector Permit, the Facility provided EPA

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[2] *See* Appellees' Supplemental Excerpts of Record ("SER") in the Ninth Circuit at 1315, 1319.

[3] SER 809.

[4] SER 567.

[5] *Id*.

[6] *Id*.

with a copy of its Stormwater Pollution Prevention Plan ("Prevention Plan"). App.18a-19a, 38a. The Prevention Plan describes potential pollution sources, control measures, and best management practices implemented by the Facility to minimize pollution discharges. App.19a. The Prevention Plan specifically identifies the conveyor system and measures implemented at the Facility to minimize incidents of coal falling from the conveyor system into the Bay, including: "(1) covers over the conveyor; (2) wipers on the conveyor belt to reduce coal carry back on the return belt; (3) chute modification to reduce coal spillage; (4) seal replacement on the conveyor to minimize spillage from the sides of the conveyor belt; (5) seals at transfer points to keep the coal on the belt as it is being loaded; and (6) conveyor maintenance to minimize the amount of coal escaping from the conveyor." App.38a-39a (internal quotations and alterations omitted). The Prevention Plan is an enforceable requirement of the Multi-Sector Permit. App.19a, 38a. EPA received the Prevention Plan at least two weeks before the renewed coverage of the Multi-Sector Permit became effective on June 14, 2009. App.38a, 39a.

In October 2009, after EPA had re-permitted the Seward Facility under the Multi-Sector Permit, EPA delegated the authority to administer this part of the NPDES program in Alaska to the Alaska Department of Environmental Conservation ("Alaska"). App.14a. In February 2010, Alaska inspected the Seward Facility to ensure compliance with the Multi-Sector Permit and with state water quality standards. App.19a-20a, 40a. There is no dispute that a "significant portion" of Alaska's inspection report addressed coal entering

Resurrection Bay from the conveyor system. App.40a-41a. The report recorded the inspector's observation of coal dust and coal chunks accumulated on and around the conveyor system, and of coal debris falling from the conveyor system into the Bay. *Id.* The "Areas of Concern" and "Action Items" sections were devoted almost entirely to discharges of coal from the ship loading process. App.41a-42a. The report concluded that: "although the amounts of these pollutants being generated [from the ship loading process] appear to have been substantially reduced, there is still room for improvement." App.41a. The "Action Items" section specifically instructed the Facility to research and determine whether additional control measures could be implemented to further reduce coal discharges from the conveyor system. App.41a-42a. Nowhere in the inspection report did Alaska suggest that a separate, individual NPDES permit would be required for the conveyor system discharges or that those discharges were not covered under the Multi-Sector Permit.

EPA inspected the Facility in August 2011. App.20a. The EPA inspector walked the length of the conveyor, examined the pollution prevention measures, and specifically evaluated the Prevention Plan.[7] EPA did not find any violations of the Multi-Sector Permit, the Prevention Plan, or the Clean Water Act.[8] *Id.* There is no evidence in the record

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[7] *See* SER 1044, 1160, 1319-20.

[8] *See* SER 1160; *see also* SER 1153.

that EPA suggested further permitting. In short, EPA found "no issues with the facility."[9]

Alaska has consistently stated that the Multi-Sector Permit covers the conveyor system discharges and that no other permitting is necessary. *Id.* at 1020-21.

III. PROCEEDINGS BELOW.

Respondent advocacy groups commenced this litigation under the Clean Water Act's citizen suit provision, 33 U.S.C. § 1365, alleging, among other things, that a provision of the Multi-Sector Permit barred all non-stormwater discharges that were not expressly authorized by the Permit. Respondents alleged that because the conveyor discharges do not "fall within the scope of the discharges authorized by" the Multi-Sector Permit, those discharges are illegal under the Clean Water Act. App.27a.

Alaska disagreed and offered a declaration supporting Petitioners' motion for summary judgment. In her declaration, Alaska's Deputy Commissioner of the Department of Environmental Conservation stated that the "coal discharges are covered by the Facility's [Multi-Sector] Permit and that no additional permit is necessary to comply with the [Clean Water Act]." App.43a. Explaining that requiring an individual permit for the Seward Facility would be "needlessly cumbersome," the Deputy Commissioner further maintained that Alaska "does not require, and has no current plans to require, a separate, individual NPDES[] permit for" the conveyor system discharges. *Id.*

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[9] SER 1044.

Examining the language of the permit, the district court found that the Multi-Sector Permit neither expressly authorized nor prohibited the conveyor system discharges. The court specifically analyzed Part 2.1.2.10, which the Respondents had identified as barring the conveyor system discharge. That section required:

> You must eliminate all non-stormwater discharges not authorized by an NPDES permit. See Part 1.2.3 for a list of non-stormwater discharges authorized by this permit.

App.31a; *see also* App.7a-8a. Respondents argued that this language effected a prohibition of all non-stormwater discharges that were not listed in Part 1.2.3 (actually Part 1.1.3). Because the conveyor system's coal discharges were not on that list, Respondents argued that they were prohibited. App.31a-32a.

The district court disagreed. Finding that other parts of the Multi-Sector Permit both authorized and prohibited various non-stormwater discharges that were not on the Part 1.1.3 list, the court concluded that the list was not intended to be exhaustive. Thus, Multi-Sector Permit did not bar the conveyor system discharges. App.30a-37a.

The district court further concluded that the permit shield applied to protect Petitioners from liability. The court relied on the "actions and statements" of EPA and Alaska, such as the agencies' many inspections of the coal discharges from the conveyor system, EPA's encouragement of the Seward Terminal to seek coverage under the Multi-Sector Permit, and Alaska's statements that

the Multi-Sector Permit covers the conveyor system discharges. App.42a-44a. All of this evidence demonstrated that the agencies "actively regulated" the conveyor discharges under the Multi-Sector Permit. *Id.*

The Ninth Circuit reversed, holding that because the discharges were not affirmatively listed in Part 1.1.3, they were barred by the general requirement that non-authorized non-stormwater discharges be eliminated. App.7a-10a. The court questioned neither EPA's knowledge of the discharge nor the agency's authorization of the discharge. Instead, the court applied its own interpretation of the Multi-Sector Permit concluding that, "the express terms of the [Multi-Sector Permit] prohibit [Petitioners'] non-stormwater coal discharges, thus [Petitioners] would not be shielded from liability." App.10a. Requests for rehearing and rehearing en banc were denied. App.11a.

REASONS FOR GRANTING THE PETITION

The Petition warrants this Court's review because the Ninth Circuit decision undermines the security of thousands of permits issued under the Clean Water Act. It is well established that under the NPDES permitting scheme, the permitting agency—either EPA or the state—decides which discharges and pollutants should be subject to explicit permit limits and which warrant no explicit permit limits. Thus, as long as the permit holder complies with its permit, it cannot be liable for a discharge of pollutants that was reasonably contemplated by the permitting authority, *even if* the pollutants are not expressly regulated in the permit. The Ninth Circuit decision would allow

reversal of these agency permitting decisions and expose thousands of permittees to liability.

Review is further warranted because the Ninth Circuit ruling flatly contradicts the holdings of all of the other federal circuit courts that have considered the Clean Water Act's permit shield. These courts have consistently affirmed the NPDES permitting scheme and application of the permit shield to all discharges within the permitting agency's reasonable contemplation. The Ninth Circuit holding ignores the statutory mandate that a permittee in compliance with its permit is not liable under the Clean Water Act, even for discharges not expicitly covered by a permit. Thus, contrary to the other circuit courts, the Ninth Circuit leaves permittees exposed to liability, even when both they and the permitting authority agree that no further permitting is required.

The Ninth Circuit holding thus deprives permittees of the permit shield's protection and upends the NPDES permitting scheme. Because of the far-reaching and disruptive consequences of the Ninth Circuit's holding, this Petition should be granted.

I. THE NINTH CIRCUIT DECISION UNDERMINES THE NPDES PERMITTING SCHEME.

The Ninth Circuit decision would dismantle much of the structure of the NPDES permitting scheme by denying permittees protection for discharges that the permitting agency knew about but declined to mention in the permit. This undercuts the permitting agency's central role in determining the appropriate level of regulation for

discharged pollutants. It also guts the permit shield by allowing a court's disagreement with the agency's permitting decision to impose liability on a compliant permittee.

The plain language of the permit shield appears to protect a compliant permittee from all liability under the Clean Water Act. 33 U.S.C. § 1342(k) ("Compliance with a permit issued pursuant to [the NPDES program] shall be deemed compliance, for purposes" of various sections of the Clean Water Act, including sections covering enforcement and citizen suits). But because the NPDES program relies on permitting agencies being able to make informed judgments about discharged pollutants, the protection of the permit shield does not extend quite that far: If a particular discharged pollutant was not known to the agency during the permitting process, the agency could not have judged the pollutant's environmental impacts and included it in the permit. *See Piney Run*, 268 F.3d at 268. In that case, the rationale underlying the permit shield (giving finality to the agency's permitting decision and insulating permit holders from liability for that decision) cannot apply. Of course, the converse is also true. If the type of discharge was known to the agency, and the agency elected not to address it in the permit, the permit shield applies with all its force.

Recognizing this, federal circuit courts have held that the permit shield does not shield permittees from liability for discharges that were not known to the agency at the time of permitting. *See Sierra Club v. ICG Hazard, LLC,* No. 13-5086, 2015 U.S. App. LEXIS 1283 at 7, 11-12 (6th Cir. Jan. 27, 2015) ("it would not help to administer the

[Clean Water Act's] scheme more effectively if polluters . . . could escape liability for extraordinary discharges not within the authority's reasonable contemplation."); *Piney Run Pres. Ass'n v. County Comm'rs*, 268 F.3d 255, 268 (4th Cir. 2001) ("discharges not within the reasonable contemplation of the permitting authority during the permit application process . . . do not come within the protection of the permit shield."); *Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 357 n.8 (2d Cir. 1993) (distinguishing cases where the discharges were not disclosed to the permitting agency); *see also S. Appalachian Mountain Stewards v. A&G Coal Corp.*, 758 F.3d 560, 564 (4th Cir. 2014). But barring any prohibition in the permit, the permit shield absolutely extends to discharges that were in the agency's reasonable contemplation at the time it issued the permit. *ICG Hazard*, 2015 U.S. App. LEXIS at 7, 10; *Piney Run*, 268 F.3d at 268; *Atlantic States*, 12 F.3d at 357; *see also S. Appalachian Mountain Stewards*, 758 F.3d at 565.

The Ninth Circuit has turned that approach upside down. The court devised its own interpretation of the Multi-Sector Permit that indisputably differed from the interpretation adopted by EPA at the time it was issued, and by Alaska, the current NPDES permitting authority for the Seward Facility. Focusing on the Multi-Sector Permit's general requirement that non-authorized, non-stormwater discharges be eliminated, the Ninth Circuit held that the language of the Multi-Sector Permit prohibited all non-stormwater discharges that were not explicitly listed as authorized by the permit. App.7a-10a. Because the conveyor system's coal discharges were not on the list of authorized,

non-stormwater discharges, the court concluded that the discharges were prohibited,[10] and that the permit shield did not protect Petitioners from liability for those discharges. App.10a.

The Ninth Circuit's view does not align with the NPDES permitting scheme or the permit shield. Indeed, by adopting an interpretation of the Multi-Sector Permit at odds with EPA's interpretation during permitting (with which Alaska agreed), the Ninth Circuit effectively reverses EPA's permitting decision and the permit shield's protection for non-listed, non-prohibited discharges that were reasonably contemplated by the agency at the time of permitting. The language of the Multi-Sector Permit does not compel such an interpretation.

On its face, the Multi-Sector Permit provision simply states the uncontroversial proposition that if discharges are not "authorized," they are to be eliminated. *See* App.8a ("You must eliminate non-stormwater discharges not authorized by an NPDES permit."). But that still leaves open the question of

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[10] Although the district court and Ninth Circuit assumed that the conveyor discharges were "non-stormwater," whether a particular discharge is "stormwater" or "non-stormwater" must be determined as a matter of fact and depends on whether the discharge was associated with some form of precipitation. *See* 40 C.F.R. § 122.26(b)(13) (defining "stormwater" as "storm water runoff, snow melt runoff, and surface runoff and drainage"). For the purpose of this Petition, it is unnecessary to determine whether the conveyor system discharges were stormwater. It is undisputed that non-stormwater discharges of coal from the conveyor system were known to the agency and within their reasonable contemplation at the time of the agency permitting decision. Thus, they are covered by the statutory permit shield.

what discharges are "authorized." As discussed above, NPDES permits together with the permit shield authorize discharges of pollutants reasonably contemplated by the permitting authority at the time the permit was issued, even if they are not affirmatively discussed in the permit, so long as the permit does not expressly prohibit them. In such instances, permittees may discharge pollutants known to the agency but not affirmatively discussed in their NPDES permit without fear of liability. Nothing in the Multi-Sector Permit provision disturbs this well-settled rule of what is covered by a NPDES permit.

Moreover, there is nothing in the Multi-Sector Permit provision that mandates treating the Part 1.1.3 list of authorized non-stormwater discharges as exhaustive. *See* App.8a ("See Part [1.1.3] for a list of non-stormwater discharges authorized by this permit."). Absent are the words "only," or "limited to," or any other language indicating an intention to constrain the scope of the permit or application of the permit shield. *See* App.33a-34a.

The district court saw that the Multi-Sector Permit did not require the constrained interpretation imposed by the Ninth Circuit. The district court observed that other non-stormwater discharges were listed in the Permit itself, thus precluding the interpretation that the list was intended to be exclusive. App.35a-36a. The court further understood that "[i]f EPA had intended that the [Multi-Sector] Permit prohibit every non-stormwater discharge not listed in Section 1.1.3, it easily could have added a provision to that effect." App.36a. So, far from holding that the Multi-Sector Permit prohibited the conveyor system discharges,

the district court found that the agencies "actively regulated" those discharges under the Permit. App.44a.

And it is clear that the permitting agencies—EPA and Alaska—did not interpret the Multi-Sector permit as prohibiting all non-listed non-stormwater discharges.[11] With full knowledge of the conveyor system discharges, EPA approved the Seward Facility's coverage under the Multi-Sector permit—twice. At the time this lawsuit was commenced, Alaska, the current permitting agency, affirmed its view that the Multi-Sector Permit covered the conveyor system discharges and that those discharges did not require a separate, individual permit. Despite multiple inspections of the Facility, including the conveyor system, over the course of a decade, neither EPA nor Alaska cited the conveyor system discharges as a violation of the Multi-Sector Permit.

By giving effect to the permitting agencies' regulatory decisions, the district court interpretation preserved the agencies' prime role in the NPDES permitting scheme. It is up to the agency to impose restrictions through the permitting process on anticipated discharges. And under the permit shield, a permittee that abides by the agency's decision by complying with its permit is

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[11] Until the eve of summary judgment motions in this matter, EPA did not express a contrary view. Neither EPA nor the Plaintiffs cite *any* evidence controverting the district court's conclusion that EPA knew of the discharge. After the Ninth Circuit decision, and pending this Petition, Aurora Energy and Alaska agreed that the Facility should pursue an individual permit for the coal discharge from the conveyor.

shielded from liability for its discharges as long as the agency knew about them. The Ninth Circuit's approach inverts these principles and allocates the liability risk to the permittee: Rather than placing responsibility on the permitting authority to specifically call out and restrict those disclosed discharges that require permit limits, the Ninth Circuit approach holds permittees liable for all discharges not affirmatively discussed in the permit, regardless of the agency's contemplation at the time the permit was issued.

Properly applied, the permit shield saves Petitioners from liability in this case. Here, agency knowledge is not at issue. EPA was fully aware that as coal is loaded on ships at the Seward Facility, some can fall off the conveyor system. EPA was also fully aware of measures implemented at the Seward Facility to minimize these discharges. These measures were fully described in the Prevention Plan and were subject to multiple inspections by EPA and Alaska. With this knowledge, EPA approved, and Alaska affirmed, coverage of the Seward Facility under the Multi-Sector Permit for over a decade. At no time did EPA or Alaska indicate that the Multi-Sector Permit prohibited the coal discharges from the conveyor system. Because EPA and Alaska clearly intended the Multi-Sector Permit to cover the conveyor system discharges, and because there is no other allegation that Petitioners violated the Permit,[12] the permit shield should apply.

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[12] Even Respondents do not allege that Petitioners are violating the Multi-Sector Permit. *See* App.37a (quoting (continued…)

Ignoring the permit shield and disregarding the permitting agencies' regulatory judgment, the Ninth Circuit decision undermines the NPDES framework. The permitting agencies' reasonably contemplated the conveyor system discharges and Petitioners complied with the Multi-Sector Permit as directed by the agencies. Thus, the permit shield protects them from liability. Nothing in the Multi-Sector Permit required the Ninth Circuit to disturb this well-settled permitting scheme.

II. THE NINTH CIRCUIT DECISION CONFLICTS WITH THE DECISIONS FROM ALL OF THE CIRCUITS THAT HAVE CONSIDERED THE PERMIT SHIELD.

The decision of the Ninth Circuit conflicts with decisions from the Second, Fourth and Sixth Circuits. These decisions have clearly held that, if a pollutant is known to the permitting authority, a discharge that includes this pollutant is protected by the permit shield, even if it is not among those catalogued in the permit.

In addition, the Ninth Circuit holding conflicts with a decision of the Seventh Circuit that, even if the permitting authority permitted a discharge outside of its legal authority, the permit shield prevents the permit holder from being held liable for the errant permitting decision. Applied to this case, the Seventh Circuit reasoning would prevent

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(continued)
Respondents' oral argument statement that this lawsuit "is not a challenge that the Facility is violating its stormwater permit."); *see also* SER 659.

Petitioners' liability regardless of the current interpretation of the Multi-Sector Permit, leaving Respondents with remedies against EPA and Alaska.

A. The Ninth Circuit Decision Conflicts with Second, Fourth, and Sixth Circuit Decisions that Interpret the Permit Shield To Bar Liability for Known Discharges.

The Ninth Circuit decision starkly conflicts with Second, Fourth, and Sixth Circuit decisions. These courts have applied the permit shield to discharges of pollutants that were not recited in a NPDES permit as long as they were known to the permitting agency at the time of the permit. *See ICG Hazard*, 2015 U.S. App. LEXIS 1283; *Piney Run*, 268 F.3d 265; *Atlantic States*, 12 F.3d 353. So long as the permitting agency knows about the discharge and is able to make an informed permitting decision, the discharge is considered "within the scope" of the permit, and the permit shield protects the permit holder from liability for those discharges. *See Piney Run*, 268 F.3d at 267-69.

Applied to this case, the reasoning and rulings of these courts would bar liability. Just as heat was known to the permitting agency in *Piney Run,* 268 F.3d at 271-72, selenium was known to the permitting agency in *ICG Hazard*, 2015 U.S. App. LEXIS at 13, and unlisted chemicals were known to the permitting agency in *Atlantic States*, 12 F.3d at 359, the precise coal discharges at issue here were known to EPA in this case. EPA permitted this facility with a decades-old, complete understanding of the conveyor system discharges that at times can be categorized as "non-stormwater."

Indeed, the long permitting history of the Seward Facility gave EPA even more knowledge about the discharges than what was deemed sufficient in those cases. In *ICG Hazard*, for example, the court found that the permitting agency's contemplation that facilities subject to the general permit would discharge selenium was sufficient to trigger the protection of the permit shield. *ICG Hazard*, 2015 U.S. App. LEXIS at 12-13. Here, EPA had extensive, site-specific knowledge of the Seward Facility, including the conveyor system discharges, at the time that it issued and renewed the Multi-Sector Permit for the Facility. EPA had regulated and inspected the Seward Facility for decades and was aware of the coal discharges from the conveyor system before it directed the Facility to renew its permit coverage under the Multi-Sector Permit. EPA conducted regular inspections of the Facility since 2000, affirmed coverage under the Multi-Sector Permit in 2009, and received the Prevention Plan detailing measures to control the conveyor system discharges. In its most recent inspection in 2011, EPA found "no problems" with the Seward Facility. Thus, if this case were decided by any of the other circuit courts the permit shield would protect Petitioners from liability to third parties.

Nor does the language in the Multi-Sector Permit distinguish this case. The Second and Fourth Circuits declined to interpret comparable prohibitory language as precluding permit shield protection for discharges known to the permitting agency. *See Piney Run*, 268 F.3d at 269-71 (analyzing a footnote stating that "the discharge of pollutants not shown shall be illegal"); *Atlantic States*, 12 F.3d at 359-61 (analyzing provision

stating "the discharge of any pollutant not identified . . . by this permit shall constitute a violation of the terms and conditions of this permit"). These courts evaluated prohibitory language in a permit to discern whether it would be consistent with the permitting agency's decision to cover a particular discharge and the NPDES permitting scheme as a whole. *See Piney Run*, 268 F.3d at 270-71 (recognizing the permit reflected the "permitting process as a whole"); *Atlantic States*, 12 F.3d at 359 (relying on written notification from the state permitting agency that acknowledged discharges not specifically listed in the NPDES permit). These courts measured the permit language against the overall NPDES permitting process. Seeking an interpretation that coincided with the agencies' regulatory decisions, the courts held that the prohibitory language would not override the permit shield.

Here, an interpretation that is congruent with EPA and Alaska's regulatory decisions is plainly possible. Thus, on the current record, the Ninth Circuit's interpretation of the Multi-Sector Permit as denying Petitioners permit shield protection for discharges well known to the agency starkly conflicts with all the other circuits that have considered comparable prohibitions.

B. The Ninth Circuit Decision also Conflicts with the Seventh Circuit's Holding that Even if the Permitting Authority Is Without Authority To Cover a Discharge, the Permit Shields the Permit Holder From Liability.

The Seventh Circuit was the first circuit court to address the Clean Water Act's permit shield in a

setting where the permitting agency was without authority to permit the discharge at issue. In *Wis. Res. Prot. Council v. Flambeau Mining Co.,* 727 F.3d 700 (7th Cir. 2013) the Seventh Circuit considered a permitted discharge of stormwater issued by a state authority under the Clean Water Act. The state agency errantly terminated an NPDES permit and, instead, opted to regulate the stormwater discharge under the company's mining permit. The state agency had determined that this permitting approach was consistent with the state's NPDES program. *Id.* at 706. At trial, the district court found that discharges containing *de minimis* concentrations of copper were, in fact, unpermitted in violation of the Clean Water Act. *Id.* at 708.

On appeal, the Seventh Circuit explained that, "where the permitting authority issues a facially valid NPDES permit and the permit holder lacks notice of the permit's (potential) invalidity, we hold that the permit shield applies. To hold otherwise would be inconsistent with the requirements of due process." *Id.* at 711.

Thus, even in an instance where the permitting agency lacked legal authority to cover a discharge, the Seventh Circuit invoked the permit shield to protect the permittee from the liability alleged in a citizen suit. Applied to this case, the Seventh Circuit holding would instruct that, regardless of how one parses the language of the Multi-Sector Permit, the permitting agency's determination that the Facility is covered would be sufficient to shield the permit holder from Clean Water Act liability. Said otherwise, EPA's authorization of the known discharge of "non-stormwater" coal would be enough to prevent an attack from a third party.

This approach comports with the permit shield's straightforward wording that "[c]ompliance with a permit . . . shall be deemed compliance [with the Clean Water Act]." 33 U.S.C. § 1342(k). Whether EPA properly applied the Multi-Sector Permit is of no moment. EPA knew of and approved the discharge at issue subject to the controls imposed by the Prevention Plan. Petitioners complied with the permit, and Petitioners cannot be held liable if EPA was mistaken about the Multi-Sector Permit's applicability. The permit shield "protects [Clean Water Act] permit holder[s] from facing suits challenging the adequacy of [their] permit[s]." *Coon v. Willet Dairy, LP*, 536 F.3d 171, 173 (2d Cir. 2008); *see also E.I. Du Pont de Nemours & Co. v. Train,* 430 U.S. 112, 138 n.28 (1977) (explaining that one purpose of the permit shield is to "to relieve [permittees] of having to litigate in an enforcement action the question whether their permits are sufficiently strict").

Nor would this approach mean that third parties would be without recourse for a permitting authority's mistake. Rather, the Clean Water Act and EPA regulations grant the public authority to challenge the issuance of a permit, 33 U.S.C. § 1369(b), or, alternatively, to petition the permitting authority to rescind coverage under a general permit. 40 C.F.R. § 122.28(b)(3) (authorizing any "interested person" to petition EPA to "require any discharger authorized by a general permit to apply for and obtain an individual NPDES permit"). These mechanisms properly direct concerns about the scope of the permit to the agency itself. *ICG Hazard,* 2015 U.S. App. LEXIS at 12. After all, once armed with information about a facility's discharges, the permit writers, rather than

the permit holders, bear the burden of "search[ing] through the applicable regulations and correctly apply[ing] them to the permittee through its permit." Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33312 (May 19, 1980). In this instance, Respondents declined to pursue these avenues of relief.

III. APPLYING THE PERMIT SHIELD IS NECESSARY TO ENSURE THE INTEGRITY OF THE NPDES PERMIT PROGRAM.

The Ninth Circuit decision has far-reaching consequences. First, by reversing the permitting agencies' interpretation of a permit, the decision treats the terms of the permit as changeable, and thus deprives permit holders of any certainty regarding their operations. *See E.I. Du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n.28 ("In short, § 402 (k) serves the purpose of giving permits finality."). Without the finality afforded by the permit shield, permit holders must operate under a perpetual cloud of uncertainty as to whether they can rely on the permitting agency's interpretation and issuance of a permit.

The Ninth Circuit decision also undermines the cooperative relationship between permitting agencies and permittees. As illustrated by the record in this case, the NPDES process involves a longstanding relationship between agencies and permittees that exchange information for the purpose of properly permitting a facility, after which a permittee is entitled to rely on the permitting agency's decisions. *See Wis. Res. Prot. Council,* 727 F.3d at 708-09. If a permittee cannot rely on the decisions and assurances of the permitting agency to

protect it, it must constantly second guess the agency and demand an unworkably exhaustive permitting system. Permittees would have to demand that their permits exhaustively list every potential discharge from their facilities; this is not possible.

Additionally, the Ninth Circuit decision may effectively eliminate general permits as a tool for efficiently administering the NPDES program. While individual NPDES permits apply to specific discharging facilities, a general NPDES permit sets limits for discharges from a category of sources, such as stormwater point sources or a group of industrial sources with similar operations and discharges. *See* 40 C.F.R. § 122.28. Clean Water Act general permits currently regulate thousands of facilities across the United States. Because they apply to an entire category of industrial facilities, the general permits are by nature "general"—they target discharges common to all facilities in a particular industry that the permitting agency has determined require regulation. It is this generality that makes them an effective and efficient regulatory tool. But because they are "general" and because an agency issues a general permit before individual facilities provide notice of their intent to be covered, general permits cannot expressly list every discharge from every covered facility.

The Ninth Circuit's holding exposes all facilities covered by general permits to liability for discharges not listed in the permit, and thus general permit holders may logically request to be permitted under more facility-specific individual permits to reduce the litigation risk. This will lead to increased administrative burdens for agencies as they lose the

efficiency benefits of general permits, as well as additional uncertainty for permit applicants. *See* General Permit Guidance at 2-3 (explaining that regulated entities can obtain permit coverage more quickly under general permits and that general permits "reduce paperwork for all parties").[13]

The permit shield should extend to discharges contemplated by the permitting agencies to maintain a workable NPDES program. By undermining the permit shield, the Ninth Circuit decision undermines the integrity of the NPDES permitting scheme.

[13] http://www.epa.gov/npdes/pubs/owm0381.pdf

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 13-35709
D.C. No. 3:09-cv-00255-TMB

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ALASKA COMMUNITY ACTION ON TOXICS; ALASKA CHAPTER OF THE SIERRA CLUB,

Plaintiffs-Appellants,

v.

AURORA ENERGY SERVICES, LLC; ALASKA RAILROAD CORPORATION,

Defendants-Appellees.

———

Appeal from the United States District Court
for the District of Alaska
Timothy M. Burgess, District Judge, Presiding

———

Argued and Submitted
August 13, 2014—Anchorage, Alaska

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Filed September 3, 2014

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Before: Jerome Farris, Dorothy W. Nelson, and Jacqueline H. Nguyen, *Circuit Judges*.

Opinion by Judge Farris

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SUMMARY*

Clean Water Act

The panel reversed the district court's summary judgment entered in favor of Aurora Energy Services, LLC and Alaska Railroad Corporation in a citizen suit that challenged, pursuant to the Clean Water Act, defendants' non-stormwater discharges of coal into Resurrection Bay, Alaska.

The panel held that the district court erred in concluding that the Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity—a general permit under the Environmental Protection Agency's National Pollutant Discharge Elimination System—shielded the defendants from liability under the Clean Water Act for their non-stormwater coal discharges. The panel remanded for further proceedings.

COUNSEL

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

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OPINION

FARRIS, *Circuit Judge*:

Plaintiffs Alaska Community Action on Toxics and Alaska Chapter of the Sierra Club appeal from the district court's grant of summary judgment to defendants Aurora Energy Services, LLC, and Alaska Railroad Corp. The district court ruled that defendants' non-stormwater discharges of coal into Resurrection Bay, Alaska, complied with the Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity—a general permit under EPA's National Pollutant Discharge Elimination System—and thus defendants were shielded from liability under the Clean Water Act. We have jurisdiction under 28 U.S.C. § 1291 and hold that the General Permit prohibits defendants' non-stormwater coal discharges. We reverse the district court's judgment and remand for further proceedings.

I.

"Section 301(a) of the [Clean Water Act] prohibits the 'discharge of any pollutant' from any 'point source' into 'navigable waters' unless the discharge complies with certain other sections of the CWA." *Natural Res. Def. Council, Inc. v. Cnty. of L.A.*, 725 F.3d 1194, 1198

(9th Cir. 2013) (citing 33 U.S.C. § 1311(a)). "One of those sections is section 402, which provides for the issuance of NPDES permits." *Id*. (citing 33 U.S.C. § 1342). "In nearly all cases, an NPDES permit is required before anyone may lawfully discharge a pollutant from a point source into the navigable waters of the United States." *Id*. If a discharger is covered by a NPDES permit and complies with that permit, the permit "shields" it from liability under the CWA, even if EPA promulgates more stringent limitations over the life of the permit. 33 U.S.C. § 1342(k); *Natural Res. Def. Council*, 725 F.3d at 1204. However, any violation of the permit's terms constitutes a violation of the CWA. *See* 40 C.F.R. § 122.41(a); *Natural Res. Def. Council*, 725 F.3d at 1204.

There are two types of NPDES permit: individual and general. *Natural Res. Def. Council v. U.S. E.P.A.*, 279 F.3d 1180, 1183 (9th Cir. 2002). "An individual permit authorizes a specific entity to discharge a pollutant in a specific place and is issued after an informal agency adjudication process." *Id*. (citing 40 C.F.R. §§ 122.21, 124.1–124.21, 124.51–124.66). A general permit, by contrast, is issued for an entire class of hypothetical dischargers in a given geographical region and is issued pursuant to administrative rulemaking procedures. *See id*. § 122.28. Once a general permit has been issued, an entity seeking coverage generally must submit a "notice of intent" to discharge pursuant to the permit. *Id*. § 122.28(b)(2). The date on which coverage commences depends on the terms of the particular general permit, such as, *inter alia*, upon receipt of the notice of intent or after a specified waiting period. *Id*. § 122.28(b)(2)(iv). Additionally, the permit issuer may require a potential discharger to apply for an individual permit. *Id*. § 122.28(b)(3).

An NPDES permit is required for stormwater discharges associated with industrial activity. 33 U.S.C. § 1342(p); 40 C.F.R. § 122.26(c)(1); *Envtl. Def. Ctr., Inc. v. U.S. E.P.A.*, 344 F.3d 832, 841 (9th Cir. 2003). Under EPA regulations, "stormwater" is defined as "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13). "Storm water discharge associated with industrial activity" is defined as "the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant." *Id*. § 122.26(b)(14). At issue here is the Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity, first issued in 1995 and since reissued in 2000 and 2008. *See* E.P.A., EPA's Multi-Sector General Permit (MSGP), http://water.epa.gov/polwaste/npdes/stormwater/EPA-Multi-Sector-General-Permit-MSGP.cfm (last visited August 13, 2014).

II.

The Seward Coal Loading Facility, owned by defendant Alaska Railroad Corp. and operated by defendant Aurora Energy Services, is located in Seward, Alaska, on the northwest shore of Resurrection Bay. The Seward Facility receives coal by railcar and transfers it onto ships through a conveyor system. Allegedly, this system spills coal into the bay—a non-stormwater discharge. However, the Seward Facility has been covered under the Multi-Sector General Permit since 2001, and defendants argue that any such discharge is authorized by the General Permit.

Plaintiffs disagree, and filed a citizen suit in district court on December 28, 2009. On March 28, 2013, the district court granted summary judgment to defendants on the bulk of plaintiffs' claims, reasoning

that defendants' non-stormwater coal discharges were covered by the General Permit. After plaintiffs voluntarily dismissed the surviving claim, the court entered judgment for defendants.

III.

We review the district court's grant of summary judgment *de novo*. *Cohen v. City of Culver City*, 754 F.3d 690, 694 (9th Cir. 2014). In particular, we review *de novo* "[t]he district court's interpretation of unambiguous terms of [an] NPDES permit." *Russian River Watershed Prot. Comm. v. City of Santa Rosa*, 142 F.3d 1136, 1141 (9th Cir. 1998).

IV.

The sole issue on appeal is whether defendants' alleged non-stormwater discharge of coal from the Seward Facility's conveyor system and ship loading area into Resurrection Bay is covered by the General Permit. We interpret general permits as we would a regulation. *See Natural Res. Def. Council*, 279 F.3d at 1183 (noting that general permits "are issued pursuant to administrative rulemaking procedures"); E.P.A., General Permit Program Guidance 21 (1988), *available at* http://www.epa.gov/npdes/pubs/owm0381.pdf ("[G]eneral permits are considered to be rulemakings . . . .").

"A regulation should be construed to give effect to the natural and plain meaning of its words." *Bayview Hunters Point Cmty. Advocates v. Metro. Transp. Comm'n*, 366 F.3d 692, 698 (9th Cir. 2004) (quoting *Crown Pacific v. Occupational Safety & Health Review Comm'n*, 197 F.3d 1036, 1038 (9th Cir. 1999)).

The plain terms of the General Permit prohibit defendants' non-stormwater discharge of coal. In Part

2.1.2.10, the General Permit states: "You must eliminate non-stormwater discharges not authorized by an NPDES permit. See Part 1.2.3 for a list of non-stormwater discharges authorized by this permit." The referenced section (which is actually Part 1.1.3) lists eleven categories of non-stormwater discharge which are "the non-stormwater discharges authorized under this permit." None of these categories cover defendants' coal discharge.

Defendants point to other sections of the General Permit to argue that the list in Part 1.1.3 was not intended to circumscribe the universe of authorized non-stormwater discharges. First, they note that Part 8.A.2.2 authorizes certain non-stormwater discharges by timber products facilities beyond those listed in Part 1.1.3. However, although this shows that Part 1.1.3 does not provide an exclusive list of permissible non-stormwater discharges by timber products facilities, it does not disturb our conclusion with regard to the Seward Facility. An examination of the permit's structure shows why.

After establishing general requirements for all covered facilities, the General Permit sets out, in Part 8, additional provisions pertaining to specific industrial sectors. The section cited by defendants, for instance, governs Sector A, pertaining to timber products facilities. The Seward Facility is classified under Sector AD. This sector does not pertain to any particular industry, but rather is a catchall category for "facilities designated by the Director as needing a stormwater permit, and any discharges of stormwater associated with industrial activity that do not meet the description of an industrial activity covered by Sectors A-AC." Unlike sections governing other sectors, the section governing Sector AD does not

specify additional categories of non-stormwater discharge that are authorized or prohibited. With the possible exception of additional monitoring or reporting requirements that may be imposed, Sector AD facilities are governed only by the permit's general provisions.

The authorization in Part 8.A.2.2 is simply one part of the General Permit's customization of its requirements for particular industrial sectors. The list in Part 1.1.3 states the non-stormwater discharges authorized by the permit's general regulatory scheme, and Part 8.A.2.2 supplements this scheme for timber products facilities. For facilities in Sector AD, however, non-stormwater discharges are regulated only by the permit's general scheme, and for those purposes the list in Part 1.1.3 is exclusive.

Defendants also point out that several sector-specific sections (applicable to sectors other than Sector AD) explicitly prohibit various categories of non-stormwater discharge, yet these sections would be surplusage if Part 2.1.2.10 already prohibited all non-stormwater discharges not listed in Part 1.1.3. However, although we generally seek to avoid constructions of a general permit that render certain of its provisions superfluous, *see Hart v. McLucas*, 535 F.2d 516, 519 (9th Cir. 1976), our analysis here is controlled by the plain text of Part 2.1.2.10, which prohibits defendants' discharges. *See Bayview*, 366 F.3d at 698. If the provision had simply stated, "You must eliminate non-stormwater discharges not authorized by an NPDES permit," one might have been able to argue that it was ambiguous, leaving unanswered the question of which discharges the permit authorizes. However, the provision answers that question in the next sentence: "See Part 1.[1].3 for

a list of non-stormwater discharges authorized by this permit." Rather than leaving permittees to guess which discharges are excepted from the general prohibition, EPA explicitly refers them to the list in Part 1.1.3. Defendants' non-stormwater coal discharges are not on this list, thus they are plainly prohibited.

We would have reached the same result had we employed the permit shield analysis that has been applied to individual permits in decisions such as *Piney Run Preservation Association v. County Commissioners of Carroll County, Maryland*, 268 F.3d 255 (4th Cir. 2001). Under that analysis, a permittee is shielded from liability under the CWA if it (1) complies with the permit's express terms, and (2) discharges pollutants that were disclosed to and within the reasonable contemplation of the permitting authority during the permitting process. *Id*. at 259. Here, the express terms of the General Permit prohibit defendants' non-stormwater coal discharges, thus defendants would not be shielded from liability. As our outcome would be the same regardless of whether *Piney Run*'s analysis applies to general permits, we need not decide whether it does.

V.

The district court erred in concluding that the General Permit shielded defendants from liability for their non-stormwater coal discharges. We reverse the grant of summary judgment to defendants and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed October 31, 2014]

No. 13-35709
D.C. No. 3:09-cv-00255-TMB
District of Alaska, Anchorage

ALASKA COMMUNITY ACTION ON TOXICS and ALASKA CHAPTER OF THE SIERRA CLUB,

Plaintiffs-Appellants,

v.

AURORA ENERGY SERVICES, LLC and ALASKA RAILROAD CORPORATION,

Defendants-Appellees.

ORDER

Before: FARRIS, D.W. NELSON, and NGUYEN, *Circuit Judges*.

The panel has voted to deny the petition for panel rehearing. Judge Nguyen votes to deny the petition for rehearing en banc and Judges Farris and Nelson so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

[Filed March 28, 2013}

Case No. 3:09-cv-00255-TMB

ALASKA COMMUNITY ACTION ON TOXICS and ALASKA CHAPTER OF THE SIERRA CLUB,

Plaintiffs,

v.

AURORA ENERGY SERVICES, LLC and ALASKA RAILROAD CORPORATION,

Defendants.

ORDER

I. INTRODUCTION

This is an action by two environmental groups—Alaska Community Action on Toxics and the Alaska Chapter of the Sierra Club ("Plaintiffs")—against the Alaska Railroad Corporation and Aurora Energy Services, LLC ("Defendants") for violations of the Clean Water Act at the Seward Coal Loading Facility. Plaintiffs and Defendants have filed cross motions for summary judgment on each of Plaintiffs' claims.[1] Each motion was fully briefed. On March 6, 2013, the parties presented oral argument on their motions. For the reasons discussed below, Plaintiffs' motion for

[1] Dkt. 104; Dkt. 112.

summary judgment is DENIED, and Defendants' motion for summary judgment is GRANTED, in part, and DENIED, in part.

Both parties have filed motions to strike certain documents from the opposing parties' summary judgment motion.[2] These motions are DENIED.

II. BACKGROUND

A. The Clean Water Act

Congress enacted the Clean Water Act ("CWA") in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[3] Consistent with this purpose, the CWA prohibits "the discharge of any pollutant by any person" to navigable waters "except in compliance" with other provisions of the CWA, including the National Pollution Discharge Elimination System ("NPDES") permitting requirements (codified at 33 U.S.C. § 1342).[4] The NPDES "requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters."[5]

The phrase "discharge of any pollutant" is "defined broadly"[6] to mean "any addition of any pollutant to navigable waters from any point source."[7] "Pollutant"

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[2] Dkt. 132; Dkt. 137.

[3] 33 U.S.C. § 1251.

[4] 33 U.S.C. § 1311(a); *see also Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 650 (2007); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004).

[5] *Miccosukee Tribe*, 541 U.S. at 102.

[6] *Rapanos v. United States*, 547 U.S. 715, 723 (2006).

[7] 33 U.S.C. § 1362(12); *see also Miccosukee Tribe*, 541 U.S. at 102.

is defined "to include not only traditional contaminates but also solids such as dredged soil, . . . rock, sand, [and] cellar dirt."[8] The term "navigable waters" means "the waters of the United States, including territorial seas."[9] The combined effect of these provisions is that "[t]he CWA prohibits the discharge of any pollutant from a point source into navigable waters of the United States without an NPDES permit."[10]

The Environmental Protection Agency ("EPA") is the regulatory authority tasked with administering the NPDES permitting system for each state.[11] However, EPA may delegate its permitting authority to individual states, after which state officials have primary responsibility, with EPA oversight, for reviewing and approving NPDES permits.[12] EPA delegated its permitting authority to the State of Alaska in October 2009.[13] Alaska administers its program through the Alaska Department of Environmental Conservation ("DEC").[14]

B. The Seward Coal Loading Facility

The Seward Coal Loading Facility ("Seward Facility" or "Facility") is located on the northwest shore of

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[8] *Rapanos*, 547 U.S. at 723 (quoting 33 U.S.C. § 1362(6)) (internal quotations omitted).

[9] 33 U.S.C. § 1362(7).

[10] *N. Plains Res. Council v. Fid. Exploration Dev. Co.*, 325 F.3d 1155, 1160 (9th Cir. 2003).

[11] *Nat'l Ass'n of Home Builders*, 551 U.S. at 650.

[12] *Id*. (citing 33 U.S.C. § 1342 (b); 33 U.S.C. § 1251(b)).

[13] Dkt. 117 at 2; *see also* 73 Fed. Reg. 66243, 66244 (Nov. 7, 2008).

[14] Dkt. 117 at 2.

Resurrection Bay in Seward, Alaska.[15] Defendant Alaska Railroad Corporation ("Alaska Railroad") purchased the Seward Facility in 2003.[16] The Facility has been operated by Defendant Aurora Energy Services ("Aurora Energy") since 2007.[17] The Facility's purpose is to receive coal by railcar from the Usibelli Coal Mine located near Healy, Alaska, and to transfer that coal onto ships for delivery to out-of-state markets.[18]

When a railcar carrying coal arrives at the Facility, the coal is unloaded at the "railcar dumper facility" and then placed on a conveyer system.[19] The conveyer transports the coal to roughly 1000-foot-long stockpiles for storage or, alternatively, sometimes carries the coal past the stockpiles directly to the ships.[20] At the coal stockpiles, the coal is moved from the conveyer to the piles by the "stacker-reclaimer."[21] The stacker-reclaimer both "stacks" coal onto the stockpiles and "reclaims" coal from the stockpiles to place it back onto the conveyer, which then carries the coal over open water to the "ship loader."[22] The ship loader is a stationary piece of equipment used to discharge coal from the conveyer into the holds of oceangoing bulk carriers.[23]

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[15] Dkt. 1 at ¶ 27; Dkt. 14 at ¶ 27; Dkt. 120-5.

[16] Dkt. 118 at 2; Dkt. 120-5.

[17] Dkt. 1 at ¶ 27; Dkt. 14 at ¶ 27; Dkt. 120-5.

[18] Dkt. 1 at ¶ 28-29; Dkt. 14 at ¶ 28-29; Dkt. 120-5.

[19] Dkt. 120-5.

[20] Dkt. 1 at ¶ 29; Dkt. 14 at ¶ 29. The average size of the stockpiles is 90,000 to 95,000 tons. Dkt. 120-5 at 1.

[21] Dkt. 120-5 at 1.

[22] Dkt. 120-5 at 1; Dkt. 120-15 at 7.

[23] Dkt. 120-5.

C. The Discharges

Plaintiffs' claims in this lawsuit correspond to the following three ways in which Plaintiffs allege that coal has been, and continues to be, discharged into Resurrection Bay. Plaintiffs assert that: (1) coal falls into the Bay, either directly or as coal dust, during the over-water transfer of coal from the stockpiles to the ship holds; (2) coal dust generated at the stockpiles, and other land-based areas of the Facility, migrate to the Bay as airborne dust; and (3) coal-contaminated snow is intentionally plowed into the Bay and into a pond and wetlands north of the Facility.

1. *Coal from the Over-Water Conveyer and Ship Loader*

The ship loader is located at the end of a loading dock, approximately 1700 feet from the shore of Resurrection Bay.[24] A portion of the conveyer system carries the coal from the stockpiles, over open water, to the ship loader.[25] During the process of transferring coal from the stockpiles to the ship holds, coal may unintentionally be discharged into the water in a number of ways. For instance, residual coal, referred to as "carry back," sometimes falls from the underside of the belt on the return trip.[26] Coal may also fall into the Bay, either as dust or as spillage, during the process of loading the coal into a ship's hold.[27] Although the Facility has implemented measures to minimize both coal sediment and coal dust from entering the water during this process, Defendants

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[24] Dkt. 120-15 at 7.

[25] *See*, *e.g.*, Dkt. 120-15 at 7.

[26] Dkt. 125-1 at 4-8; Dkt. 120-23 at 16.

[27] *See*, *e.g.*, Dkt. 125-1 at 18, 27; Dkt. 120-21 at 1, 5.

do not claim to have eliminated the discharges completely.

2. *Windblown Coal Dust*

On windy days, coal from the Facility's land-based activities (rather than coal discharged into the Bay from the Facility's over-water activities) sometimes migrates to the Bay as airborne dust.[28] The dust originates from several sources around the Facility, including the stacker-reclaimer, the railcar unloader, and the coal stockpiles.[29]

According to both Defendants and DEC, the dust emissions are not subject to NPDES permitting requirements.[30] Rather, DEC regulates these dust emissions under Alaska's clean air regulations.[31] The Facility was cited twice, in 2007 and in 2008, for violating the State regulations.[32] As a result, the Facility paid a sizable civil penalty and agreed to implement a variety of measures to control the dust.[33] These control measures have reduced the dust emissions considerably, but have not eliminated the dust entirely.[34]

3. *Coal-Contaminated Snow*

Plaintiffs' final claim concerns the Facility's snow removal practices. Plaintiffs rely primarily on the declaration and deposition testimony of Russell

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[28] Dkt. 106; Dkt. 120-24; Dkt. 120-25.

[29] Dkt. 106; Dkt. 120-24; Dkt. 121-54.

[30] *See* Dkt. 113 at 6-7; Dkt. 117.

[31] Dkt. 116; Dkt. 117.

[32] Dkt. 116 at 3.

[33] *Id.*; Dkt. 121-32.

[34] *See*, *e.g.*, Dkt. 121-52.

Maddox ("Maddox"), a member of both Alaska Toxics and Sierra Club, to support this claim.[35] Maddox states that Aurora Energy intentionally plows coal-contaminated snow directly off of the dock into the Bay.[36] Plaintiffs also allege that Defendants unintentionally discharge coal-contaminated snow from the loading dock when the snow falls from the sides or through the slats in the dock.[37] Finally, Plaintiffs (through Maddox) claim that Defendants plow coal-contaminated snow directly into wetlands and a pond north of the Facility.[38] Defendants do not dispute that the wetlands and pond fall within the CWA's definition of navigable waters. However, Defendants do dispute that any of the alleged snow-related discharges actually occur.[39]

D. The Facility's NPDES Permit History

EPA issued the Facility its original individual NPDES permit in 1984.[40] In 1999, when it came time for the Facility to renew the permit, EPA advised the Facility that its discharges could be regulated under either an individual permit like the one it had, or under the NPDES Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activities ("General Permit" or "Permit").[41] EPA indicated that the "application, issuance, and maintenance of the General Permit" would "require[]

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[35] *See* Dkt. 106.

[36] *Id*.

[37] Dkt. 120 at 52.

[38] *See* Dkt. 120 at 52-53 (citing Maddox Decl. at Dkt. 106).

[39] *See* Dkt. 112 at 55-58; Dkt. 128 at 36-46.

[40] Dkt. 121-47 at 2.

[41] Dkt. 121-5.

a lower administrative burden to both EPA and the facility" and that, "since the General Permit [was] already written," renewal under the General Permit would save EPA from "having to prepare a new individual permit for [the] facility."[42] In 2001, the Seward Facility switched from its individual NPDES permit to the General Permit.[43]

In 2009, the Facility renewed its General Permit.[44] As a prerequisite to coverage, the Facility was required to have developed and implemented a Storm Water Pollution Prevention Plan ("Prevention Plan or "Plan").[45] The Prevention Plan implements and is an enforceable requirement of the General Permit.[46] The Plan documents potential pollutant sources, including materials handling activities such as storage, loading, unloading, transportation, and conveyance of materials.[47] The Plan also requires that the Facility implement a variety of control measures and good housekeeping measures to prevent pollutants from entering Resurrection Bay.[48]

In early February 2010, EPA and DEC conducted a site inspection of the Seward Facility.[49] The purpose of the inspection was to "ensure that water quality standards and permit requirements [were] being met."[50] A significant portion of the inspection report focuses on the coal that enters the Bay from the ship

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[42] Dkt. 121-5.

[43] Dkt. 121-6.

[44] *See* Dkt. 121-9.

[45] Dkt. 121-8.

[46] Dkt. 117 at 3.

[47] Dkt. 120-4; Dkt. 117 at 3.

[48] *See* Dkt. 120-4; Dkt. 117 at 3.

[49] Dkt. 121-52.

[50] Dkt. 120-20; *see also* Dkt. 121-52 at 1.

loader area and conveyer belt, and the coal dust the Facility generates.[51] No violations of the General Permit, the Prevention Plan, or water quality standards generally, were reported.[52] In August 2011, the Facility was inspected again.[53] Again, no violations were reported.[54]

III. LEGAL STANDARD

Summary judgment is warranted when the pleadings and the evidence in the record "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[55] An issue is genuine only if there is sufficient evidence for a reasonable fact-finder to find for the non-moving party, and material only if the fact may affect the outcome of the case.[56]

Generally, it is the moving party that must demonstrate it is entitled to summary judgment.[57] The moving party bears the initial burden of identifying the elements of the claim or defense and evidence that it believes demonstrates the absence of an issue of material fact.[58] Where the non-moving party has the burden at trial, however, the moving party is not required to produce evidence negating or disproving

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[51] *See* Dkt. 121-52.

[52] *See id*.

[53] *See* Dkt. 121-54.

[54] *See id*.

[55] Fed. R. Civ. P. 56(c).

[56] *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248-49 (1986).

[57] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Nissan Fire Marine Ins. Co. v. Fritz Co., Inc*., 210 F.3d 1099, 1102-03 (9th Cir. 2000).

[58] *Celotex*, 477 U.S. at 323.

every essential element of the non-moving party's case.[59] Instead, the moving party's burden is met by pointing out that there is an absence of evidence supporting the non-moving party's claim.[60] The burden then shifts to the non-moving party to show that there is a genuine issue of material fact that must be resolved at trial.[61] The non-moving party must make an affirmative showing on all matters placed in issue by the motion as to which it has the burden of proof at trial.[62]

Where parties have filed cross-motions for summary judgment, "[e]ach motion must be considered on its own merits."[63] Accordingly, this Court would ordinarily address each party's summary judgment motion individually. However, in this case, the arguments set forth in the parties' summary judgment motions are the same as those set forth in their oppositions to the opposing parties' summary judgment motion. The Court will therefore address the motions together.

IV. DISCUSSION

A. Procedural Matters

Before addressing the merits of the parties' motions, the Court must first address two motions to strike,

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[59] *Id*.

[60] *Id*.

[61] Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 256.

[62] *Celotex*, 477 U.S. at 322; *Anderson*, 477 U.S. at 252.

[63] *Fair Housing Council of Riverside Cnty., Inc. v. Riverside Two*, 249 F.3d 1132, 1135-36 (9th Cir. 2001); *see also Shafer v. City of Boulder*, __F. Supp. 2d__, 2012 WL 4051892, at *4 (D. Nevada Sept. 12, 2012).

filed by the parties at Docket Nos. 132 and 137. For the reasons discussed below, these motions are DENIED.

1. *Plaintiffs' Motion to Strike*

Plaintiffs move to strike Appendix A from Defendants' opposition to Plaintiffs' summary judgment motion.[64] "Appendix A" is a chart in which Defendants identify various factual assertions made by Plaintiffs in their summary judgment motion and explain why those factual assertions are not supported by the evidence.[65]

Plaintiffs, citing Local Rule 7.1., argue that the chart is not among the types of documents that may be attached to a summary judgment opposition.[66] Defendants, on the other hand, assert that the chart is part of their opposition and, because the chart and opposition together do not exceed their page allowance, the Court should not strike it.[67]

The Court need not resolve this dispute. The summary judgment rulings that follow are based primarily on factual, rather than legal, grounds. Because none of the information contained in Defendants' Appendix is material to the Court's rulings, Plaintiffs' motion to strike at Docket 137 is DENIED as moot.

2. *Defendants' Motion to Strike*

Defendants move to strike, on evidentiary grounds, numerous exhibits submitted by Plaintiffs in support

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[64] Dkt. 137.

[65] *See* Dkt. 128-1.

[66] Dkt. 137 at 2.

[67] Dkt. 147 at

of their summary judgment motion.[68] Defendants argue: (1) that various third-party statements are inadmissible hearsay; (2) that a number of photographs cannot be properly authenticated; and (3) that the declarations of Russell Maddox ("Maddox") and another witness are inconsistent with their deposition testimony and therefore should be stricken as "sham" affidavits.[69] As the Court just explained, the parties' summary judgment motions are resolvable largely on legal grounds and the majority of the evidence to which Defendants object is therefore immaterial to the Court's resolution of the summary judgment motions. The Court therefore declines to address most of the challenges raised in Defendants' motion. However, the Court will address the parties' dispute concerning Maddox's statements because those statements are relevant to the Court's decision on Plaintiffs' third claim.

Maddox is Plaintiffs' primary witness in support of their summary judgment motion.[70] He is also a member of both Plaintiff Alaska Toxics and Plaintiff Sierra Club.[71] Defendants move to strike Maddox's declaration because, they assert, it is inconsistent with his prior sworn deposition testimony and therefore constitutes a "sham" affidavit.[72] Plaintiffs do not acknowledge the apparent inconsistencies in Maddox's

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[68] Dkt. 132.

[69] Dkt. 132.

[70] *See generally* Dkt. 120; Dkt. 106 (and attached photographs).

[71] Dkt. 106 at 1.

[72] Dkt. 132 at 5-7; Dkt. 143 at 8-12.

statements, but argue that the "sham" affidavit rule does not apply here.[73]

"The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony."[74] The purpose of this rule is "to bar a plaintiff from creating a factual dispute with himself for the sole purpose of arguing that summary judgment is inappropriate until the dispute is settled."[75] However, because the rule "is in tension with the principle that a court's role in deciding a summary judgment motion is not to make credibility determinations or weigh conflicting evidence," the rule must be applied with caution.[76] Before a court may strike an affidavit under this rule, the "court must make a factual determination that the contradiction was actually a "sham."[77]

The inconsistencies cited in the motion to strike relate to Plaintiffs' claim that Defendants intentionally plow coal-contaminated snow into navigable waters. For example, at Maddox's January 31, 2012 deposition, Maddox stated that the last time he saw snow plowed from the dock was November 2011.[78] But, in his declaration in support of Plaintiffs' summary judgment motion, Maddox states that he saw Defendants plow snow over the edge of the dock

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[73] Dkt. 138 at 18-20.

[74] *Kennedy v. Allied Mut. Ins. Co*., 952 F.2d 262, 266 (9th Cir. 1991).

[75] *Nelson v. City of Davis*, 571 F.3d 924, 927-28 (9th Cir. 2009).

[76] *Van Asdale v. International Game Technology*, 577 F.3d 989, 998 (9th Cir. 2009).

[77] *Id*.

[78] Dkt. 121-14 at 13-14.

in "*January*, February, and March of 2012."[79] Maddox also stated at his deposition that he was "just assum[ing]" that the snow contained coal because coal sometimes spilled onto the dock from the conveyer.[80] But, in his declaration, Maddox states that he saw Defendants plow "snow covered with coal-dust and coal spillage" directly from the dock into the Bay.[81]

Although these statements appear to be inconsistent, they are not impossible to reconcile. For example, if Maddox witnessed snow being plowed into the Bay on January 31, 2012, after his deposition, the statements regarding the dates would not be inconsistent. In any event, the Court declines to make a specific finding that Maddox's declaration is a "sham." The majority of Maddox's declaration is consistent with his prior testimony. To the extent inconsistencies exist, they raise issues concerning Maddox's credibility as a witness. Credibility determinations are to be made by the fact-finder at trial, not by the court on summary judgment.[82]

Accordingly, Defendants' motion to strike Maddox's declaration (Docket No. 132) is DENIED. And, for the reasons previously discussed, Defendants' remaining requests are also DENIED, as moot.

B. Motions for Summary Judgment

As discussed above, Plaintiffs' three claims correspond to three ways in which they allege that Defendants have discharged and continue to discharge coal into Resurrection Bay. Plaintiffs move for

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[79] Dkt. 106 at 11.

[80] Dkt. 121-14 at 18.

[81] Dkt. 106 at 11.

[82] *Nelson*, 571 F.3d at 928.

summary judgment on each of their claims on the basis that these discharges are not authorized by an NPDES permit and therefore each constitutes a CWA violation.[83] Defendants move for summary judgment on the basis that each of the alleged discharges is either covered by their existing permit, subject to the protections of the CWA's permit shield provision, not regulated by the CWA, or is unproven by Plaintiffs.[84]

For the reasons discussed below, the Court finds that summary judgment in favor of Defendants is appropriate on Plaintiffs' first and second claims. The Court therefore denies Plaintiffs' motion for summary judgment on those claims. However, with respect to Plaintiffs' third claim, material issues of fact remain and both parties' summary judgment motions are therefore denied.

1. Coal Discharges from Over-Water Conveyer and Ship Loader.

Plaintiffs' first claim is that Defendants, without an NPDES permit, have discharged and continue to discharge coal from the over-water conveyer and ship loading area into Resurrection Bay.[85] Defendants object to Plaintiffs' motion, and separately move for

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[83] Dkt. 120.

[84] *See generally* Dkt. 112. Defendants also challenge Plaintiffs' ability to bring this action on the basis that Plaintiffs did not first exhaust their administrative remedies. Dkt. 112 at 30-31. The Court declines to address this argument in any detail because it is clear from the statute that the only prerequisite to Plaintiffs' bringing this citizen suit was sixty days notice to Defendants, EPA, and the State of Alaska. *See* 33 U.S.C. § 1365(b)(1)(A). Defendants do not dispute that Plaintiffs' complied with the statute's notice requirements prior to filing their complaint.

[85] *See* Dkt 120 at 21-22.

summary judgment on this claim, on the basis that these discharges are covered by the General Permit or, alternatively, that Defendants are protected from liability by the CWA's permit shield provision.[86]

The "CWA prohibits the discharge of any pollutant from a point source into navigable waters of the United States without an NPDES permit."[87] Defendants do not dispute that coal is a "pollutant," that Resurrection Bay constitutes "navigable waters," or that the conveyer belt and ship loading area from which coal falls into the Bay are "point sources."[88] The parties' disagreement concerns whether these discharges fall within the scope of discharges authorized by Defendants' existing permit.

A discharge in violation of the CWA is ordinarily a strict liability offense.[89] An NPDES permit, while placing limits on the pollutants that may be discharged, may also protect the permit holder from strict liability for unauthorized discharges through what is known as the "permit shield" defense, codified at 33 U.S.C. § 1342(k).[90] Section 1342(k) provides that "[c]ompliance with a permit issued pursuant to this section shall be deemed compliance" with various sections of the CWA, including the provisions

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[86] Dkt 112 at 22-28; Dkt. 128 at 15-18.

[87] *Northwest Envtl. Advocates v. EPA*, 537 F.3d 1006, 1010 (9th Cir. 2008) (quoting *N. Plains Res. Council*, 325 F.3d at 1160); *see also* 33 U.S.C. §§ 1311(a), 1342.

[88] *See generally* Dkt. 112 at 22-28; Dkt. 128 at 15-18.

[89] *Santa Monica Baykeeper v. Kramer Metals, Inc*., 619 F. Supp. 2d 914, 919 (C.D. Cal. 2009); *Save Our Boys and Beaches v. City and Cnty. of Honolulu*, 904 F. Supp. 1098, 1105 (D. Haw. 1994).

[90] *See Piney Run Pres. Assoc. v. Cnty. Comm'rs of Caroll Cnty, Md*., 268 F.3d 255, 267 (4th Cir. 2001).

prohibiting unpermitted discharges. Whether the permit shield defense applies necessarily depends on the scope of the permit.

The Fourth Circuit's decision in *Piney Run Preservation Association v. County Commissioners of Carroll County* is the seminal case addressing the scope of the CWA's permit shield provision.[91] In interpreting this provision, the Fourth Circuit applied the Supreme Court's two-part Chevron analysis.[92] At the first step, the court determined that the text of the permit shield provision was ambiguous.[93] At the second step, the court determined that EPA's Environmental Appeals Board had already reasonably interpreted the provision to apply to "pollutants that are not listed in [the] permit as long as [the party] only discharges pollutants that have been adequately disclosed to the permitting authority."[94] In other words, although a permit holder "is liable for any discharges not in compliance with its permit," the court recognized that EPA intended compliance to be "a broader concept than merely obeying the express restrictions set forth on the face of the NPDES permit."[95] Accordingly, any discharge that has been adequately disclosed to the permitting authority, and

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[91] *Id*.

[92] *Id*. at 266 (applying *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 842-43 (1984)).

[93] *Id*. at 267 (citing *Atlantic States Legal Found. v. Eastman Kodak Co*., 12 F.3d 353, 357-58 (2d Cir. 1994)).

[94] *Id*. at 267-68 (citing *In re Ketchikan Pulp Co*., 7 E.A.D. 605, 1998 WL 284964 (EAB 1998)).

[95] *Id*. at 269.

is not expressly prohibited by the permit, is considered to be within the scope of the permit's protection.[96]

With these principles in mind, the Court turns to the permit and coal discharges at issue in this case.

The Seward Facility's General Permit is a general, non-facility-specific permit that authorizes stormwater discharges for a variety of industrial operations.[97] The General Permit expressly authorizes the permit holder to discharge several categories of "stormwater,"[98] which is defined as "storm water runoff, snow melt runoff, and surface runoff and drainage."[99] The General Permit also authorizes several specified categories of "non-stormwater discharges," which are primarily unpolluted discharges and discharges associated with emergency services activities.[100] The General Permit does not, by its plain language, authorize non-stormwater discharges of coal into Resurrection Bay.

Defendants assert that the coal discharges are expressly authorized by the General Permit because they are contemplated in the Facility's Prevention Plan.[101] But this argument ignores the fact that the General Permit *requires* that Defendants describe in

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[96] *Id*.

[97] *See generally* Dkt. 120-1.

[98] Dkt. 120-1 at 6.

[99] 40 C.F.R. § 122.26(b)(13). Stormwater discharges associated with industrial activity are defined as "discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant." 40 C.F.R. § 122.26(b)(14).

[100] *See* Dkt. 120-1 at 7-8.

[101] *See* Dkt. 112 at 25.

their Prevention Plan all "non-stormwater discharge(s) and source locations" and the control measures the Facility has implemented to eliminate those discharges.[102] Because Defendants were required to include this information in the Prevention Plan regardless of whether the coal discharges were authorized by the General Permit, Defendants cannot rely solely on the Prevention Plan, absent corresponding authorization in the Permit itself, as evidence that the discharges are expressly allowed by the Permit.

The Court concludes that Defendants' permit does not expressly allow non-stormwater discharges of coal into the Bay. However, the coal discharges are nonetheless "within the scope of the permit's protection" as long as: (1) Defendants have complied with the express terms of their existing permit— i.e., the General Permit does not "specifically bar[]" the coal discharges; and (2) the discharges were adequately disclosed to, and reasonably anticipated by, the permitting authority during the permitting process.[103] As discussed below, the Court finds that the coal discharges are not specifically prohibited by the General Permit and that they were adequately disclosed to and reasonably anticipated by EPA.

a. *The General Permit Does Not Specifically Prohibit the Coal Discharges from the Conveyer and Ship Loader.*

The CWA's permit shield provision protects a permit holder who complies with the express terms of its permit from liability for discharges not expressly

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[102] Dkt. 120-1 at 33.

[103] *Piney Run*, 268 F.3d at 266, 269; see also 33 U.S.C. § 1342(k).

authorized in the permit, as long as the discharges were not "specifically barred" by the permit.[104] The Court analyzes an NPDES permit in the same manner it would interpret a contract or other legal document.[105] In doing so, the Court begins with the plain language of the permit provisions, and must interpret each provision with reference to the entire permit.[106] Where a provision is ambiguous, the Court "look[s] to extrinsic evidence to determine the correct understanding of the permit."[107]

The Seward Facility's General Permit authorizes specific categories of "stormwater discharges."[108] Section 1.1.3 of the General Permit describes several types of "allowable non-stormwater discharges," none of which includes coal.[109] The permit, in Section 2.1.2.10, also requires Defendants to "eliminate non-stormwater discharges not authorized by an NPDES permit" and refers the permit holder to Section 1.1.3 for a list of "authorized" non-stormwater discharges.[110] Plaintiffs argue that these provisions amount to an express prohibition against Defendants' coal discharges. Specifically, Plaintiffs contend that

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[104] *Id*. at 259, 268-69 (citing *Ketchikan*, 7 E.A.D. 605, 1998 WL 284964).

[105] *See City of Portland*, 56 F.3d at 982; *Piney Run*, 268 F.3d at 269.

[106] *See AOL LLC*, 552 F.3d 1077, 1081 (9th Cir. 2009) (each part of a contract is read with reference to the whole); *Piney Run*, 268 F.3d at 270 (an NPDES permit provision should be examined in the context of the entire permit).

[107] *Piney Run*, 268 F.3d at 270.

[108] Dkt. 120-1 at 6.

[109] *See* Dkt. 120-1 at 7-8.

[110] Dkt. 120-1 at 20.

the list of "allowable non-stormwater discharges" is exhaustive and that all other non-stormwater discharges are implicitly "prohibited" by the Permit.[111] Defendants, on the other hand, argue that the list of allowable non-stormwater discharges is non-exhaustive.[112] The Court agrees with Defendants that, when the Permit is viewed in its entirety, it cannot be strictly construed as prohibiting all non-stormwater discharges not listed in Section 1.1.3.

The facts here are similar, although not entirely analogous, to the facts in *Piney Run*, the seminal case on the permit shield defense.[113] In *Piney Run*, an environmental organization challenged a county-run treatment plant's discharge of heat into a local stream as an illegal discharge not covered by an NDPES permit.[114] The County's permit listed a number of pollutants which the plant was authorized to discharge, but it did not list heat.[115] The permit also contained a footnote, which stated that the "discharge of pollutants not shown shall be illegal."[116] The Fourth Circuit concluded that the footnote was ambiguous because it did not indicate where or to whom the pollutants must "be shown" in order to fall within the scope of the permit.[117] The court then analyzed the footnote in the context of the entire document and concluded that other parts of the permit contemplated

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[111] Dkt. 127 at 13-15, 19; Dkt. 139 at 10.

[112] *See*, *e.g.*, Dkt. 140 at 10-11.

[113] *See* 268 F.3d 255.

[114] *Id*. at 259-62.

[115] *Id*. at 260-61.

[116] *Id*. at 269.

[117] *Id*. at 270.

that additional discharges might occur.[118] Based on this analysis, the court determined that the footnote making it "illegal" to discharge pollutants "not shown" applied only to pollutants "not disclosed" to the permitting authority.[119] Because heat was not "specifically barred" by the permit, and because the heat discharges had been adequately disclosed to the permitting authority, the defendants were shielded from liability.[120]

Unlike the permit at issue in *Piney Run*, the Seward Facility's permit contains no express clause making it "illegal" to discharge non-stormwater substances not specifically listed in Section 1.1.3 ("allowable non-stormwater discharges"). Section 2.1.2.10 of the Permit does, however, require permit holders to "eliminate" pollutants not "authorized," and refers the permit holder to Section 1.1.3 for a list of "authorized" non-stormwater discharges. Section 2.1.2.10 could therefore be reasonably interpreted to mean that non-stormwater discharges not listed in Section 1.1.3 are barred.

Although this interpretation would be reasonable, it is not the only reasonable interpretation. Section 2.1.2.10 indicates that Section 1.1.3 contains a list of "authorized" non-stormwater discharges, but neither section expressly states that the Section 1.1.3 discharges are the *only* non-stormwater discharges that may be "authorized." This leaves open the possibility that other non-stormwater discharges could be authorized under the Permit. Because the General Permit does not indicate the manner in which

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[118] *Id.*

[119] *Id.* at 270-71.

[120] *Id.*

non-stormwater discharges must be "authorized" to be covered under the permit, and the permit's provisions could reasonably be interpreted in more than one way, the Court finds that the provisions are ambiguous.

Moreover, like the permit in *Piney Run*, the language in other sections of the General Permit tends to indicate that Section 1.1.3 was not intended as an express prohibition against all unlisted non-stormwater discharges. The Seward Facility's General Permit for stormwater discharges is a generic permit (i.e., not specific to the Seward Facility) that is issued to a variety of industrial facilities either by EPA or by state agencies with delegated authority.[121] The General Permit sets forth requirements generally applicable to all industrial categories covered by the Permit and, in a series of sub-sections, sets forth specific requirements, restrictions, and authorizations applicable to specific industries.[122] Each industrial category is given a "sector" designation.[123] The Seward Facility is designated as Sector AD.[124] Sector AD is a catch-all category encompassing facilities that do not otherwise fit within the General Permit's specific categories.[125] The Prevention Plan requirements for Sector AD "are the same as in the baseline general permit to ensure flexibility given the broad universe of

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[121] *See* Dkt. 120-1; *see also* Dkt. 121-5 (EPA letter describing the general permit as a pre-written document not prepared specifically for the Seward Facility).

[122] *See generally* Dkt. 120-1.

[123] *See* Dkt. 120-1 at 47-139.

[124] *See* Dkt. 121-9.

[125] *See* Dkt. 120-1 at 144; see also 63 Fed. Reg. 52430, at *52443 (September 30, 1998).

potential types of facilities which may be covered."[126] Unlike other sectors, the Seward Facility has no requirements or restrictions beyond those generally applicable to all sectors.[127] Consequently, the only permit conditions specific to the Seward Facility are those found in its Prevention Plan.

Sector AD facilities such as the Seward Facility are the exception, not the rule. Every other sector is subject to additional General Permit requirements, restrictions, and authorizations. For example, Sector A encompasses "timber products."[128] In addition to the "allowable non-stormwater discharges" listed in Section 1.1.3 of the General Permit, Sector A facilities are also authorized to discharge limited "non-storm-water" discharges associated with "the spray[ing] down of lumber and wood product storage yards[.]"[129] The fact that the General Permit contemplates, for Sector A facilities, non-stormwater discharges different from those listed in Section 1.1.3 indicates that Section 1.1.3 was not intended to be an exhaustive list.

In addition to contemplating other non-stormwater discharges, the General Permit also expressly prohibits specific types of non-stormwater discharges for certain sectors. For example, Sector C facilities ("chemical and allied products manufacturing, and refining") are expressly prohibited from discharging "non-stormwater discharges containing inks, paints,

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[126] 63 Fed. Reg. 52430, at *52443.

[127] *See* Dkt. 120-1 at 144. However, the regulatory agency has the authority, if it wishes, to establish additional requirements for Sector AD facilities. *Id*.

[128] Dkt. 120-1 at 47.

[129] *Id*.

or substances (hazardous, nonhazardous, etc.) resulting from an onsite spill[.]"[130] Other sectors are subject to similarly individualized restrictions on non-stormwater discharges.[131] If Section 1.1.3 is an exhaustive list, these individualized prohibitions would be unnecessary.

The purpose of the permit shield is to protect permit holders from liability for unauthorized discharges as long as those discharges are not "specifically barred" by the existing permit, provided the other permit shield conditions exist. If EPA had intended that the General Permit prohibit every non-stormwater discharge not listed in Section 1.1.3, it easily could have added a provision to that effect. Instead, the Permit, in another section, contemplates non-stormwater discharges that are not listed in Section 1.1.3, and in other sections, individually prohibits specific non-stormwater discharges. This indicates to the Court that the list of discharges in Section 1.1.3 was not intended to strictly prohibit all unlisted non-stormwater discharges. This does not mean that the coal discharges at the Seward Facility are automatically authorized by the General Permit; just that they are not "specifically barred" by any permit provision.[132]

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[130] Dkt. 120-1 at 51.

[131] *See* Dkt. 120-1 at 61, 71, 87, 91, 97, 110.

[132] Plaintiffs also cite 40 C.F.R. § 122.28(2) to argue that the coal discharges cannot be allowed under the General Permit because EPA regulations do not authorize permitting authorities to cover both stormwater and non-stormwater discharges under the same permit. Dkt. 127 at 15. This argument is contrary to the plain language of the cited regulation, which provides, in relevant part, that a general permit may regulate "one or more categories or subcategories of discharges . . . where the *sources* within a

Plaintiffs do not dispute that Defendants have otherwise complied with the express terms of their existing permit.[133] Having concluded that the coal discharges are not explicitly prohibited by the permit, the Court turns to whether the discharges were adequately disclosed to, and reasonably anticipated by, the permitting authority.

b. *The Coal Discharges Were Adequately Disclosed to and Reasonably Anticipated by the Permitting Authority.*

Where a permit holder is in compliance with the express terms of its existing NPDES permit, the permit holder is shielded from liability for unpermitted discharges that were both "adequately disclosed" during the permitting process and "reasonably anticipated by" the permitting authority.[134] If "these conditions are satisfied, then [defendants] are protected by the permit shield defense and they are not liable under the CWA."[135] As discussed below, the Court finds that EPA was aware of the discharges and reasonably anticipated their coverage under the General Permit.

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covered subcategory of discharges are . . . storm water point *sources*." 40 C.F.R. 122.28(2)(i) (emphasis added).

[133] *See* Dkt. 165 at 14 (oral argument testimony in which Plaintiffs state that their lawsuit "is not a challenge that the Facility is violating its stormwater permit").

[134] *Piney Run*, 268 F.3d at 268 (citing *Ketchikan*, 7 E.A.D. 605, 1998 WL 284964).

[135] *Id*. at 271.

i. The Discharges were Adequately Disclosed to EPA.

The Court finds that Defendants adequately disclosed the coal discharges to EPA during the permitting process. In 2009, the Facility filed its Notice of Intent to renew the General Permit.[136] On May 15, 2009, EPA acknowledged receipt of the Notice and indicated that coverage under the General Permit would begin on June 14, 2009, following a thirty-day waiting period.[137] Both the General Permit and EPA's May 15, 2009 letter indicate that Defendants were required to prepare and implement a Prevention Plan as a prerequisite to coverage.[138] The Prevention Plan implements and is an enforceable component of the Permit.[139] EPA received the Prevention Plan in May 2009, prior to the June 14, 2009 effective coverage date.[140] The Plan was therefore submitted "during the permitting process."

The Prevention Plan separates the Facility into several "drainage areas."[141] The Plan identifies the "conveyer over water and ship loader" as "Drainage Area H," and identifies "coal" as the suspected pollutant that enters the Bay.[142] Under the Plan, Defendants were required to implement the following measures to control the amount of coal that enters the Bay: (1) "cover[s]" over the conveyer; (2) "wipers on

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[136] Dkt. 121-8

[137] Dkt. 121-8.

[138] Dkt. 120-1; Dkt. 121-8.

[139] Dkt. 117 at 3.

[140] *See* Dkt. 121-11 at 11.

[141] *Id*.

[142] *Id*.

[the] conveyer belt to reduce coal carry back on the return belt"; (3) "chute modifications to reduce coal spillage"; (4) seal replacement on the conveyer to "minimize spillage from [the] sides of the [conveyer] belt"; (5) seals "at transfer points" to "keep the coal on the belt as it is being loaded"; and (5) proper conveyer maintenance "to minimize the amount of coal escaping from the conveyer."[143] These requirements appear in two separate sections of the Prevention Plan and are intended to prevent coal discharges while "the conveyer [is] deliver[ing] coal from the stockpile to [the] ships."[144] Regardless of whether EPA reasonably contemplated that the coal discharges would be covered by the General Permit, it is clear that the discharges were "adequately disclosed" to the agency "during the permitting process."[145]

ii. The Discharges were Reasonably Anticipated by EPA.

The Court further concludes that EPA reasonably anticipated these discharges during the permitting process. Plaintiffs speculate that EPA may not have reviewed the Prevention Plan before the permit went into effect, but Defendants submitted the Plan at least two weeks before the effective date of coverage and Plaintiffs offer no evidence to support this assertion. More importantly, and as discussed below, Defendants have presented substantial circumstantial evidence, from both before and after the permit was issued, that indicates EPA reasonably anticipated these discharges.

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[143] *Id*. at 11, 15.

[144] *See id*. at 11, 15, 20.

[145] *See Piney Run*, 268 F.3d at 269.

The Court recognizes that disclosure of the discharges in the Prevention Plan is not, by itself, sufficient to establish that EPA reasonably contemplated that the discharges would be covered under the General Permit. As noted earlier, the General Permit required disclosure of all non-stormwater discharges regardless of whether they were authorized by the Permit.[146] However, EPA's history with the Facility, and EPA's (and DEC's) actions and statements soon after the General Permit was issued, indicate that EPA did, at the time the permit was issued, reasonably anticipate that the discharges would be regulated under the General Permit and Prevention Plan.

DEC took over NPDES permitting for Alaska in late 2009.[147] In early February 2010, less than eight months after EPA issued the Permit, inspectors from both EPA and DEC conducted a site inspection of the Facility to verify compliance with the Permit and Prevention Plan.[148] No violations were noted in the inspection report.[149] Plaintiffs assert that inspectors whose purpose it was to ensure compliance with a "stormwater" permit would not have been looking for other types of discharge violations. Therefore, they argue, the fact that Defendants were found to be in compliance with their stormwater permit is irrelevant to whether Defendants were discharging non-stormwater in violation of the CWA. But, this argument ignores the fact that a significant portion of the 2010 inspection report is directly focused on the

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[146] *See* Dkt. 120-1 at 33.

[147] Dkt. 117 at 2.

[148] *See* Dkt. 120-52.

[149] *See id*.

coal spills and coal dust discharged from the conveyer and ship loading area.[150] That is, the inspection and inspectors were focused substantially on non-stormwater discharges.

In the 2010 report, the inspectors discuss the measures the Facility has taken "to reduce coal spillage."[151] The report also documents the inspectors' observations that the dock along the conveyer was coated in coal dust, that coal dust had accumulated below the conveyer, and that there were coal chunks and coal dust on the dock below the ship loader.[152] The report also indicates that the inspectors watched "flakes of carry-back coal," both from the conveyer and ship loader, fall into the Bay, and that an inspector walked along the beach to ascertain whether "coal or coal debris" was "falling from the conveyer."[153] The final pages of the report, titled "Areas of Concern" and "Action Items," discuss almost exclusively the coal discharges resulting from "dust generation and coal spillage" during the ship loading process.[154] Referring to these discharges, the report notes that, "although the amounts of these pollutants being generated appear to have been substantially reduced, there is still room for improvement."[155] The only action required of the Facility following the inspection was that it "[c]onduct research to determine if any additional control measures exist in similar industries, which might be implemented to further reduce

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[150] *See generally* Dkt. 120-52.

[151] *Id*. at 2.

[152] *Id*. at 3

[153] *Id*. at 3.

[154] Dkt. 121-52 at 4.

[155] *Id*.

carry-back and spillage of coal during the transfer process."[156]

These actions and statements by EPA and DEC, made shortly after EPA issued the General Permit, indicate that the discharges were not only "reasonably contemplated" by EPA, but were actively regulated by the agencies under the General Permit. This conclusion is also consistent with the Facility's permitting history. It is clear that EPA knew for years prior to receiving the May 2009 Prevention Plan that coal regularly falls into Resurrection Bay during the coal-loading process. In a 1987 dive inspection report, EPA discovered a significant amount of coal (thirty centimeters deep in some places) covering the ocean floor beneath the conveyer and dock.[157] The report explains that the coal "probably spilled from the loading conveyer belt."[158] EPA attached this dive report to a 1988 inspection report, in which EPA found the Facility to be in compliance with its former permit.[159]

In 1999, EPA informed the facility in a letter that its discharges could either be regulated under the facility's then-existing individual permit or under the General Permit for stormwater.[160] In the same letter, EPA encouraged the Facility to switch to the General Permit, in part, because not having to draft a facility-specific permit would create less of an "administrative

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[156] *Id*.

[157] Dkt. 121-4.

[158] *Id*.

[159] *See* Dkt. 121-3.

[160] Dkt. 121-5.

burden" on EPA.[161] Thereafter, the Facility switched to the General Permit.[162] This history, combined with the agencies' recent active regulation of the discharges under the General Permit, convinces the Court that EPA reasonably anticipated, at the time the permit was renewed in 2009, that these discharges would be regulated under the General Permit and accompanying Prevention Plan.

Furthermore, although DEC did not take over the NPDES permitting program from EPA until several months after the General Permit was issued, DEC's recent statements regarding coverage of these discharges under the General Permit are consistent with the Court's decision. The DEC Deputy Commissioner states that the coal discharges are covered by the Facility's General Permit and that no additional permit is necessary to comply with the CWA.[163] The Deputy Commissioner also states that "requiring an individual NPDES[] permit, rather than the current coverage under the [General Permit], would be duplicative and needlessly cumbersome (both for []DEC and the permittee)" and "would provide no additional environmental benefit or protection."[164] Finally, DEC indicates that it "does not require, and has no current plans to require, a separate, individual NPDES[] permit for these discharges."[165]

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[161] *Id*.

[162] Dkt. 121-6.

[163] Dkt. 117.

[164] *Id*. at 5.

[165] *Id*.

Application of the permit shield defense does not require that Defendants prove conclusively that EPA intended to cover the coal discharges from the conveyer and ship loader under the General Permit. Rather, Defendants are entitled to the protections of the CWA's permit shield provision if, assuming they are otherwise in compliance with the General Permit, they "adequately disclosed" the discharges to EPA during the permitting process and the discharges were "reasonably anticipated" by EPA. The totality of the evidence presented by the parties indicates that the regulatory agencies not only knew about the discharges, but, in fact, actively regulated them under the existing Permit. Defendants are therefore "shielded" from liability for these discharges and judgment in their favor is warranted on Plaintiffs' first claim.

This decision should not be construed as an opinion—and the Court offers no opinion— on whether coverage of these discharges under the General Permit is generally appropriate. The Court finds only that the evidence presented in support of the parties' summary judgment motions establishes that the coal spills and coal dust created during the transfer of coal from the shore to the ships were both disclosed to and reasonably contemplated by the EPA.

2. Discharge of Airborne Coal Dust into Resurrection Bay.

Plaintiffs next claim that Defendants violate the CWA each time coal dust is blown by the wind into the Bay from the Facility's coal stockpiles, stacker-reclaimer, and railcar unloader.[166] Defendants, in both

[166] *See* Dkt. 120 at 43. Plaintiffs also cite the conveyer and ship loader as sources of coal dust that ends up in the Bay. However,

their opposition to Plaintiffs' summary judgment motion and in their own summary judgment motion, assert that the coal carried to the Bay as airborne dust does not violate the CWA because it is not a "point source" discharge.[167] The Court agrees that the coal blown into the Bay as airborne dust is not a point source discharge and is therefore exempt from NPDES permitting requirements. Because Defendants are entitled to summary judgment on this basis, the Court declines to address Defendants' alternative arguments.[168]

"The CWA prohibits the discharge of any pollutant from a point source into navigable waters of the United States without an NPDES permit."[169] "Discharge of a pollutant" is "defined broadly"[170] to mean "any addition of any pollutant to navigable

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these are among the discharges that were disclosed to, contemplated by, and regulated by EPA. Defendants are therefore shielded from liability, pursuant to 33 U.S.C. § 1342(k), for coal dust that enters the Bay from those sources.

[167] Dkt. 112 at 39-47; Dkt. 128 at 25-30.

[168] Defendants alternatively argue that: (1) airborne dust emissions are regulated by the Clean Air Act, not the Clean Water Act; and (2) even if the dust emissions were regulated by the CWA, the coal dust is covered by Defendants' existing permit. Dkt. 128 at 30; Dkt. 112 at 35.

[169] *N. Plains Res. Council*, 325 F.3d at 1160 (citing 33 U.S.C. §§ 1311(a), 1342); *see also Northwest Envtl. Advocates*, 537 F.3d at 1010.

[170] *Rapanos*, 547 U.S. at 723.

waters from any point source."[171] The CWA defines "point source" as:

> any *discernible, confined and discrete conveyance*, including but not limited to *any pipe, ditch, channel, tunnel, conduit*, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. [. . .][172]

All other sources of pollution—i.e., pollution that does not reach the water through a "discernible, confined and discrete conveyance"—is "nonpoint source" pollution.[173] Nonpoint source pollution is "generally excluded from CWA regulations" and is left to the states to regulate through their own tracking and targeting methods.[174] The reason for this is, in part, because "nationwide uniformity in controlling non-point source pollution [is] virtually impossible" and, in part, because Congress is reluctant "to allow extensive federal intrusion into areas of regulation that might implicate land and water uses in individual states." [175]

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[171] 33 U.S.C. § 1362(12) (emphasis added); *Miccosukee Tribe*, 541 U.S. at 102.

[172] 33 U.S.C. § 1362(14) (emphasis added).

[173] *Or. Natural Desert Ass'n v. U.S. Forest Serv*., 550 F.3d 778, 780 (9th Cir. 2008).

[174] *Id*. at 785; *see also Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1096 (9th Cir. 1998) (the CWA "provides no direct mechanism to control nonpoint source pollution but rather uses the threat and promise of federal grants to the states to accomplish this task") (citation and internal quotations omitted).

[175] *See id*. (citing Poirier, *Non-point Source Pollution*, ENV'L L. PRACTICE GUIDE § 18.1 (2008)).

Although nonpoint source discharges are exempt from NPDES permitting requirements, the CWA does not define "nonpoint source" pollution.[176] Congress left this task to EPA, which has published guidelines explaining that:

> [nonpoint source pollution] is caused by diffuse sources that are not regulated as point sources and normally is associated with agricultural, silviculteral, urban runoff, runoff from construction activities, etc. Such pollution results in human-made or human-induced alteration of the chemical, physical, biological, and radiological integrity of water. In practical terms, nonpoint source pollution does not result from a discharge at a specific, single location (such as a single pipe) but generally results from land runoff, precipitation, *atmospheric deposition*, or percolation.[177]

The majority of the case law distinguishing point source from nonpoint source pollution does so in the context of stormwater runoff. These cases explain that runoff "that is not collected or channeled and then discharged, but rather runs off and dissipates in a natural and unimpeded manner, is not a discharge from a point source[.]"[178] Conversely, when runoff is

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[176] *Id*.; *see also Or. Natural Res. Council v. U.S. Forest Serv*., 834 F.2d 842, 849 n.9 (9th Cir. 1987) ("Nonpoint source pollution is not specifically defined in the Act, but is pollution that does not result from the 'discharge' or 'addition' of pollutants from a point source.").

[177] EPA Office of Water, *Nonpoint Source Guidance* 3 (1987) (emphasis added).

[178] *Northwest Environmental Def. Ctr. v. Brown*, 640 F.3d 1063, 1070-71 (9th Cir. 2011), rev'd on other grounds, *Decker v. Northwest Environmental Center*, __ U.S. __, 2013 WL 1131708

"collected in a system of ditches, culverts, and channels and is then discharged into a stream or river, there is a discernible, confined and discrete conveyance of pollutants, and there is therefore a discharge from a point source."[179]

Plaintiffs argue that these principles apply only in the context of stormwater runoff and that, absent precipitous events, the only prerequisite to establishing a point source discharge is the ability to trace the pollutant back to a single, identifiable source.[180] But this argument is not supported by the law, which clearly establishes that "point sources are not distinguished by the kind of pollution they create or by the activity causing the pollution, but rather by *whether the pollution reaches the water through a confined, discrete conveyance*."[181] In short, Plaintiffs' position is contrary to the CWA's unambiguous definition of "point source."

As the Court previously described, a "point source" is a "*conveyance*."[182] "Conveyance" is defined by both ordinary and legal dictionaries as a "means of transport" or the act of taking or carrying something

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(Mar. 20, 2013), (citing *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002)).

[179] *Id*.

[180] *See* Dkt. 120 at 32-34; Dkt. 127 at 47-50; Dkt. 139 at 19-20.

[181] *Brown*, 640 F.3d at 1071 (quoting *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984) (citing *United States v. Earth Sciences, Inc*., 599 F.2d 368, 373 (10th Cir. 1979)) (emphasis in original).

[182] *See* 33 U.S.C. § 1362(14); *Miccosukee Tribe*, 541 U.S. at 102.

from one place to another.[183] Consequently, the Seward Facility's coal piles, stacker-reclaimer, and railcar unloader, no matter how easily they are identified as the original sources of coal dust blown into the Bay, cannot by themselves constitute "point sources" where there is no "discernible, confined and discrete conveyance" of the dust from those sources to the water.[184] To find otherwise would require the Court to ignore clear statutory language.[185]

This is not to say that coal piles and similar amassments cannot cause a point source discharge where the coal or other pollutant travels from the pile to the water through a "point source," as that term is defined by the CWA. For example, in *Sierra Club v. Abston Construction Company*, the Fifth Circuit found a point source discharge where runoff from highly erodible piles of strip mining waste was carried through naturally occurring ditches to nearby waters.[186] Similarly, in *Parker v. Scrap Metal Processors, Inc.*, the Eleventh Circuit found a point source discharge where runoff from piles of scrap metal

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[183] *See*, *e.g.*, Black's Law Dictionary (9th ed. 2009) (defining "conveyance"); Webster's II New College Dictionary (2001) (defining "convey" and "conveyance").

[184] *See*, *e.g.*, *Brown*, 640 F.3d at 1071; *Trustees for Alaska*, 749 F.2d at 558 (9th Cir. 1984); *Earth Sciences*, 599 F.2d at 373 (all indicating that point sources are distinguished from nonpoin sources by whether the pollution *reaches the water through a confined, discrete conveyance*).

[185] *See League of Wilderness Defenders*, 309 F.3d at 1185-86 (because the CWA point source definitions are "clear and unambiguous" the court must "read the regulation to conform to the statute and to the common understanding of the difference between point source and nonpoint source pollution").

[186] 620 F.2d 41, 45-46 (5th Cir. 1980).

debris was carried to the water through erosion gullies.[187]

Conversely, in *Greater Yellowstone Coalition v. Lewis*, the Ninth Circuit held that waste rock pits were not point sources within the meaning of the CWA because seepage from the pits that eventually made its way to surface waters was "not collected or channeled."[188] Likewise, in *Ecological Rights Foundation v. Pacific Gas & Electric Co*., a California district court dismissed allegations that chemical pollutants from the defendant's utility poles were illegally discharged via stormwater runoff into San Francisco Bay because the plaintiffs did not show that the chemicals "reache[d] the water through a confined, discrete conveyance."[189]

Plaintiffs rely, in part, on the Second Circuit's decision in *Concerned Area Residents for Environment v. Southview Farm*,[190] to support their position that, absent rainfall, a point source is any singularly identifiable "source" of pollution.[191] In *Southview Farm*, the plaintiffs argued that the defendant's liquid manure spreading operations on its dairy farm were a "point source" from which pollutants were discharged into a nearby river.[192] The liquid manure was spread by tanker trucks over fields, after which some of the manure flowed into a swale on the property.[193] From

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[187] 386 F.3d 993, 1009 & n.17 (11th Cir. 2004).

[188] 628 F.3d 1143, 1153 (9th Cir. 2010).

[189] 803 F. Supp. 2d 1056, 1063 (N.D. Cal. 2011) (quoting *Trustees for Alaska*, 749 F.2d at 558).

[190] 34 F.3d 114 (2d Cir. 1994).

[191] *See* Dkt. 139 at 20; Dkt. 165 at 13.

[192] 34 F.3d 114.

[193] *Id*. at 118-119.

the swale, the manure flowed through a pipe, which led to a ditch, which led to a stream that fed into the river.[194] The defendants argued that the manure-spreading facilities were not "point sources" because the pollutants naturally flowed to the swale and reached the river "in too diffuse a manner to create a point source discharge."[195] The court disagreed, concluding that, even if the flow from the fields into the swale could be characterized as diffuse runoff, the pollutant was thereafter collected in the swale and sufficiently channeled to constitute a discharge from a point source.[196] The court alternatively found that the tanker trucks themselves were point sources because they were used to collect the manure and discharge it onto the fields, after which it directly flowed (via the swale, pipe, and stream) into the river.[197]

In their briefing, Plaintiffs assert that the Second Circuit in *Southview Farm* "rejected" any channelization requirement "in the absence of rainfall."[198] And, at oral argument, Plaintiffs asserted that the Second Circuit "didn't care" how the pollutant reached the water as long as the source was identifiable.[199] These assertions are simply not accurate. The Second Circuit's point source determinations in Southview Farm were based largely on the fact that, after the manure was collected, either in the tanker trucks or subsequently in the swale, the manure was channelized through a pipe, ditch, and stream, directly

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[194] *Id*.

[195] *Id*. at 118.

[196] *Id*. at 118-19.

[197] *Id*.

[198] Dkt. 139 at 20.

[199] Dkt. 165 at 13.

into navigable waters.[200] If anything, *Southview Farm* indicates that, regardless of whether the discharge results from rainfall or some other event, the discharge is "from [a] point source" only if the pollutant reaches the water by way of a "discernible, confined and discrete conveyance."[201]

Moreover, several years after deciding *Southview Farm*, the Second Circuit, in *Cordiano v. Metacon Gun Club, Inc.*, specifically rejected an argument that "windblown pollutants from any identifiable source, whether channeled or not, are subject to the CWA permit requirement."[202] In *Cordiano*, a shooting range was sued for discharging lead munitions into bordering wetlands without a permit.[203] The plaintiffs in *Cordiano* argued, among other things, that the berm into which bullets were fired was a point source because the wind carried lead dust from the berm to the wetlands.[204] Rejecting this argument, the court stated that "[t]he berm [could] not be described as a 'discernible, confined and discrete conveyance' *with*

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[200] *See* 34 F.3d at 118-119; *see also Cordiano v. Metacon Gun Club*, 575 F.3d 199, 223-24 (2d Cir. 2009) (discussing *Southview Farm* and explaining that the point source findings in that case were based on the fact that the manure was "channelized" directly into navigable waters).

[201] 33 U.S.C. §§ 1362(12), 1362(14).

[202] 575 F.3d at 224. The Second Circuit explained that "[s]uch a construction would eviscerate the point source requirement and undo Congress's choice," and that "[t]he CWA's broad remedial purpose, *i.e.*, to 'restore and maintain the chemical, physical and biological integrity of the Nation's waters,' cannot override the plain text and structure of the statute." *Id.*

[203] *Id.* at 224-25.

[204] *Id.*

respect to lead that is carried by the wind[.]"[205] Consequently, any lead "that migrate[d] to jurisdictional wetlands as airborne dust d[id] not constitute a discharge from a point source."[206]

Apart from *Cordiano*, there are few cases that address point source discharges in the context of airborne pollution. The handful of cases that do exist address the issue in the context of pesticide spraying. Plaintiffs rely heavily on three of these cases—*League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*,[207] *Peconic Baykeeper, Inc. v. Suffolk County*,[208] and *No Spray Coalition, Inc. v. City of New York*[209]—to argue that aerial spraying of pesticides is analogous to windblown coal dust.[210] However, these cases do not support Plaintiffs' claim. In each of the cases, the courts found that pesticides *channeled through a spraying apparatus* on a truck or plane, when sprayed *directly over water*, met the statutory definition of a point source discharge.[211] As pointed out by the Southern District of New York in *No Spray Coalition*, there is no difference between "a sprayer releasing a fine mist of pollutant into the atmosphere *over the water* and a pipe that release[s]

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[205] *Id*. (emphasis added).

[206] *Id*.

[207] 309 F.3d 1181 (9th Cir. 2002).

[208] 600 F.3d 180 (2d Cir. 2010).

[209] No. 00-CIV-5395 (GBD), 2005 WL 1354041 (S.D.N.Y. June 8, 2005) (unpublished).

[210] *See* Dkt. 127 at 51.

[211] *See League of Wilderness Defenders*, 309 F.3d at 1185-86; *Peconic Baykeeper*, 600 F.3d at 188-89; *No Spray Coalition*, 2005 WL 1354041, at *5, 8.

the same flow of pollutant directly into water."[212] The spraying apparatus and pipe are both "discernible, confined and discrete conveyance[s]."

The law is clear that a plaintiff seeking to establish a point source discharge, even in the context of airborne pollution, must prove more than that the pollutant originated from an identifiable source. Regardless of from where the pollution originates, a plaintiff must prove that "the pollut[ant] reache[d] the water through a confined, discrete conveyance."[213] With respect to the land-based activities at the Seward Facility, the coal carried to the Bay by the wind as airborne dust cannot constitute a point source discharge. As touched on in *Cordiano*, wind is the polar opposite of a "discernible, confined and discrete conveyance."[214] Consequently, Plaintiffs' second claim fails as a matter of law and Defendants are entitled to summary judgment on that claim. For the same reason, Plaintiffs' motion for summary judgment is denied.

3. Snow-Related Discharges.

Plaintiffs' final claim is that Defendants plow or otherwise discharge coal-contaminated snow into Resurrection Bay and into a nearby pond and wetlands. Specifically, Plaintiffs allege: (1) that Defendants unintentionally discharge coal-contaminated snow into the Bay when it falls from the edges or through the slats of the loading dock; (2) that Defendants intentionally plow coal-contaminated snow into the

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[212] 2005 WL 1354041, at *4.

[213] *Trustees for Alaska*, 749 F.2d at 558 (citing *Earth Sciences*, 559 F.2d at 373).

[214] *See Cordiano*, 575 F.3d at 224.

Bay and onto a nearby beach; and (3) that Defendants plow contaminated snow into a pond and wetlands north of the Facility.[215] Defendants argue, among other things, that Plaintiffs' evidence does not support their snow-related allegations.[216]

a. *The Snow that Falls through or from the Dock*.

The Court agrees that Plaintiffs have not presented evidence sufficient to establish a CWA violation resulting from coal-contaminated snow falling from or through the loading dock. As an initial matter, the Court notes that the only coal alleged by Plaintiffs to have fallen from the dock is the coal that falls from the conveyer and ship loader, or coal that reaches the dock via atmospheric deposition.[217] This Court, *supra*, concluded that these are discharges from which Defendants are either protected from liability by the CWA's permit shield provision, or which are not regulated by the CWA. That being said, this claim separately fails because Plaintiffs do not support it with actual evidence.

The only evidence Plaintiffs point to is that: (1) coal sometimes falls onto the dock during ship loading operations and as the result of atmospheric deposition; and (2) the Facility's manager has, at some point, seen snow fall through the slats of the dock.[218] Based on this evidence, Plaintiffs assume that coal-contaminated snow falls from the dock into the Bay. Plaintiffs do not claim to have seen these discharges and provide no

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[215] Dkt. 120 at 51-52; Dkt. 127 at 58-59.

[216] *See* Dkt. 128 at 35-41.

[217] *See* Dkt. 120 at 52.

[218] *Id*.

dates, approximate or otherwise, on which coal-contaminated snow actually entered the Bay in this manner. As the Court explained its January 2011 Order, civil penalties assessed against Defendants for unpermitted discharges must be based on actual discharges that are proven to have occurred on specific days.[219]

Furthermore, whether snow on the dock is contaminated by coal at any given time depends on a number of factors. The coal Plaintiffs claim falls from the dock into the Bay is coal that spills from the conveyer and ship loader.[220] The loading dock is approximately ten feet from, and runs alongside, the covered conveyer.[221] Coal that spills from the ship loader and conveyer generally lands only on the very end of the dock.[222] When coal does spill onto the dock, the Facility cleans it up and returns it to the coal stockpiles.[223] Because of the improvements required by the 2009 Prevention Plan, coal no longer spills onto the dock every time a ship is loaded and sometimes no clean up is necessary.[224] Because fewer than twenty ships are loaded per year, as much as a month can go by with no loading activity.[225] The parties agree that snow that accumulates on the dock is regularly removed.[226] Under these circumstances, whether the snow falling

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[219] *See* Dkt. 56 at 27 (January 10, 2011 Order on Defendants' motion for judgment on the pleadings).

[220] *See* Dkt. 120 at 52.

[221] Dkt. 114 at 5.

[222] Dkt. 114 at 5.

[223] *Id*.

[224] Dkt. 114 at 4; Dkt. 125-1 at 18.

[225] *See* Dkt. 120-5; Dkt. 120-13; Dkt. 120-15 at 7.

[226] Dkt. 114 at 4; Dkt. 121-14 at 13.

from or through the dock is actually contaminated by coal depends largely on the Facility's activities between the time it snows and the time the snow is removed or falls into the Bay. Plaintiffs' bare assumptions are insufficient to establish an actual CWA violation.

Because this claim is not supported by evidence from which a reasonable fact finder could find for Plaintiffs, Defendants are entitled to summary judgment on this portion of Plaintiffs' third claim. Plaintiffs' summary judgment motion on this issue is denied.

b. *The Snow Plowed Directly into the Bay or onto the Beach*.

Plaintiffs next claim that Defendants intentionally plow coal-contaminated snow directly from the dock into Resurrection Bay and that Defendants plow coal-contaminated snow from the Facility directly onto the beach, which is then swept into the Bay.[227] The Court finds that material issues of fact prevent these claims from being resolved on summary judgment.

Defendants deny that snow is plowed off of the dock or onto the beach and point to policies prohibiting the intentional discharge of snow or coal into the Bay.[228] Plaintiffs, on the other hand, rely on the statements of Maddox, with no corroborating photographic or other evidence, to support the allegations.[229]

Maddox reports that, in winter 2012, he saw Defendants scoop up coal-contaminated snow and

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[227] Dkt. 127 at 58; *see also* Dkt. 106.

[228] *See* Dkt. 128 at 40-41; Dkt. 129; Dkt. 130.

[229] *See* Dkt. 127 at 58-59; Dkt. 120 at 51.

dump it on the shoreline of the beach.[230] Maddox also states that "every time it snows and [the snow] accumulates enough to be removed, [Defendants] plow [snow] off the dock into the water."[231] At his January 31, 2012 deposition, Maddox stated that the last time he saw snow plowed from the dock was November 2011.[232] But, in his declaration in support of Plaintiffs' summary judgment motion, Maddox states that he saw Defendants plow snow over the edge of the dock in "*January*, February, and March of 2012."[233] Maddox has taken hundreds of photos of the facility, many of which are attached to Plaintiffs' summary judgment motion.[234] He has also complained, many hundreds of times, to DEC and to EPA regarding discharges of coal at the Seward Facility.[235] However, Plaintiffs do not present any photographs of Defendants dumping coal off of the dock or onto the beach, or any evidence that Maddox reported these incidents to DEC or EPA.[236] In short, Maddox asserts that Defendants dump snow from the dock and onto the beach, and Defendants assert that this never happens.

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[230] Dkt. 106 at 11.

[231] Dkt. 121-14 at 13.

[232] *Id*. at 13-14.

[233] Dkt. 106 at 11.

[234] *See generally* Dkt. 106 (and attached photographs).

[235] Dkt. 121-14 at 17-20.

[236] Maddox provides photos from 2010 of a pile of what appears to be coal-covered snow near the beach, just outside of the Seward Facility. *See* Dkt. 106 at 9; Dkt. 106-37. However, he does not claim to have seen how the snow arrived at that location or when it was put there. The first time he claims to have actually seen Defendants plow snow onto the beach was 2012. *See* Dkt. 106.

Because material issues of fact exist as to whether Defendants plow snow either directly off of the dock into the Bay or onto a beach near the Facility, these claims cannot be resolved on summary judgment and both parties' motions with respect to this portion of Plaintiffs' third claim are DENIED.

c. The Snow Plowed into the Pond and Wetlands.

Plaintiffs' final snow-related claim is that Defendants plow coal-contaminated snow into a pond and wetlands north of the Facility.[237] The only evidence Plaintiffs provide in support of this claim is several of Maddox's photographs, taken in February 2010 and April 2010, which depict piles of dirty snow in an area north of, and outside of, the Facility's boundaries.[238] Although Maddox asserts in his declaration that the "photos show that snow with coal is plowed directly into a pond and wetland north of the facility," he does not claim to have witnessed the snow being dumped there.[239] In short, Plaintiffs have presented no evidence of when the snow piles were created or who put them there. Because Plaintiffs have presented insufficient evidence to support this claim, Defendants are entitled to summary judgment on this portion of Plaintiffs' third claim, and Plaintiffs' motion for summary judgment on this issue is denied.

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[237] *See* Dkt. 120 at 52-53.

[238] Dkt. 106 at 9; Dkt. 106-38.

[239] Dkt. 106 at 9.

V. CONCLUSION

For the foregoing reasons, Plaintiffs' summary judgment motion (Docket No. 104) is DENIED. Defendants' summary judgment motion (Docket No. 112) is GRANTED with respect to Plaintiffs' first and second claims, and GRANTED, in part, and DENIED, in part, with respect to Plaintiffs' third claim. The parties' motions to strike (Docket Nos. 132 and 137) are DENIED.

Dated at Anchorage, Alaska this 28th day of March, 2013.

/s/ Timothy M. Burgess
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE

APPENDIX D

33 U.S.C. § 1311

Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law. Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [33 USCS §§ 1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives. In order to carry out the objective of this Act there shall be achieved—

(1) (A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act [33 USCS § 1314(b)], or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 307 of this Act [33 USCS § 1317]; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 203 of this Act [33 USCS § 1283] prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 304(d)(1) of this Act [33 USCS § 1314(d)(1)]; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 510 [33 USCS § 1370]) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act.

(2) (A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act [33 USCS § 1314(b)(2)], which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 315 [33 USCS § 1325]), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act [33 USCS § 1314(b)(2)], or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 307 of this Act [33 USCS § 1317];

(B) [Repealed]

(C) with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b) [33 USCS § 1314(b)], and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 307 of this Act [33 USCS § 1317] which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 304(b) [33 USCS § 1314(b)], and in no case later than March 31, 1989;

(E) as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b) [33 USCS § 1314(b)], and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 304(a)(4) of this Act [33 USCS § 1314(a)(4)] shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(4) of this Act [33 USCS § 1314(b)(4)]; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3) (A) for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January 1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b) [33 USCS § 1314(b)], and in no case later than March 31, 1989; and

(B) for any effluent limitation in accordance with paragraph (1)(A)(i), (2)(A)(i), or (2)(E) of this subsection established only on the basis of section 402(a)(1) [33 USCS § 1342(a)(1)] in a permit issued after enactment of the Water Quality Act of 1987 [enacted Feb. 4, 1987], compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989.

(c) Modification of timetable. The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner

or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

(d) Review and revision of effluent limitations. Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

(e) All point discharge source application of effluent limitations. Effluent limitations established pursuant to this section or section 302 of this Act [33 USCS § 1312] shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Act [33 USCS §§ 1251 et seq.].

(f) Illegality of discharge of radiological, chemical, or biological warfare agents, high-level radioactive waste or medical waste. Notwithstanding any other provisions of this Act [33 USCS §§ 1251 et seq.] it shall be unlawful to discharge any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste, into the navigable waters.

(g) Modifications for certain nonconventional pollutants.

(1) General authority. The Administrator, with the concurrence of the State, may modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge from any point source of ammonia, chlorine, color, iron, and total phenols (4AAP) (when determined by the Administrator to be a pollutant covered by subsection (b)(2)(F)) and any other pollutant which the Administrator lists under paragraph (4) of this subsection.

(2) Requirements for granting modifications. A modification under this subsection shall be granted only upon a showing by the owner or operator of a point source satisfactory to the Administrator that—

(A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b)(1)(A) or (C) of this section, whichever is applicable;

(B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and

(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.

(3) Limitation on authority to apply for subsection (c) modification. If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time period as he is eligible to apply for a modification under this subsection.

(4) Procedures for listing additional pollutants.

(A) General authority. Up on petition of any person, the Administrator may add any pollutant to the list of pollutants for which modification under this section is authorized (except for pollutants identified pursuant to section 304(a)(4) of this Act [33 USCS § 1314(a)(4)], toxic pollutants subject to section 307(a) of this Act [33 USCS § 1317(a)], and the thermal component of discharges) in accordance with the provisions of this paragraph.

(B) Requirements for listing.

(i) Sufficient information. The person petitioning for listing of an additional pollutant under this subsection shall submit to the Administrator sufficient information to make the determinations required by this subparagraph.

(ii) Toxic criteria determination. The Administrator shall determine whether or not the pollutant meets the criteria for listing as a toxic pollutant under section 307(a) of this Act [33 USCS § 1317(a)].

(iii) Listing as toxic pollutant. If the Administrator determines that the pollutant meets the criteria for listing as a toxic pollutant under section 307(a) [33 USCS § 1317(a)], the Administrator shall list the pollutant as a toxic pollutant under section 307(a) [33 USCS § 1317(a)].

(iv) Nonconventional criteria determination. If the Administrator determines that the pollutant does not meet the criteria for listing as a toxic pollutant under such section and determines that adequate test methods and sufficient data are available to make the determinations required by paragraph (2) of this subsection with respect to the pollutant, the

Administrator shall add the pollutant to the list of pollutants specified in paragraph (1) of this subsection for which modifications are authorized under this subsection.

(C) Requirements for filing of petitions. A petition for listing of a pollutant under this paragraph—

(i) must be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 304 [33 USCS § 1314];

(ii) may be filed before promulgation of such guideline; and

(iii) may be filed with an application for a modification under paragraph (1) with respect to the discharge of such pollutant.

(D) Deadline for approval of petition. A decision to add a pollutant to the list of pollutants for which modifications under this subsection are authorized must be made within 270 days after the date of promulgation of an applicable effluent guideline under section 304 [33 USCS § 1314].

(E) Burden of proof. The burden of proof for making the determinations under subparagraph (B) shall be on the petitioner.

(5) Removal of pollutants. The Administrator may remove any pollutant from the list of pollutants for which modifications are authorized under this subsection if the Administrator determines that adequate test methods and sufficient data are no longer available for determining whether or not modifications may be granted with respect to such pollutant under paragraph (2) of this subsection.

(h) Modification of secondary treatment requirements. The Administrator, with the concurrence of the

State, may issue a permit under section 402 [33 USCS § 1342] which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from a publicly owned treatment works into marine waters, if the applicant demonstrates to the satisfaction of the Administrator that—

(1) there is an applicable water quality standard specific to the pollutant for which the modification is requested, which has been identified under section 304(a)(6) of this Act [33 USCS § 1314(a)(6)];

(2) the discharge of pollutants in accordance with such modified requirements will not interfere, alone or in combination with pollutants from other sources, with the attainment or maintenance of that water quality which assures protection of public water supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife, and allows recreational activities, in and on the water;

(3) the applicant has established a system for monitoring the impact of such discharge on a representative sample of aquatic biota, to the extent practicable, and the scope of such monitoring is limited to include only those scientific investigations which are necessary to study the effects of the proposed discharge;

(4) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(5) all applicable pretreatment requirements for sources introducing waste into such treatment works will be enforced;

(6) in the case of any treatment works serving a population of 50,000 or more, with respect to any toxic pollutant introduced into such works by an industrial discharger for which pollutant there is no applicable pretreatment requirement in effect, sources introducing waste into such works are in compliance with all applicable pretreatment requirements, the applicant will enforce such requirements, and the applicant has in effect a pretreatment program which, in combination with the treatment of discharges from such works, removes the same amount of such pollutant as would be removed if such works were to apply secondary treatment to discharges and if such works had no pretreatment program with respect to such pollutant;

(7) to the extent practicable, the applicant has established a schedule of activities designed to eliminate the entrance of toxic pollutants from nonindustrial sources into such treatment works;

(8) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(9) the applicant at the time such modification becomes effective will be discharging effluent which has received at least primary or equivalent treatment and which meets the criteria established under section 304(a)(1) of this Act [33 USCS § 1314(a)(1)] after initial mixing in the waters surrounding or adjacent to the point at which such effluent is discharged.

For the purposes of this subsection the phrase "the discharge of any pollutant into marine waters" refers to a discharge into deep waters of the territorial sea or the waters of the contiguous zone, or into saline

estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the Administrator determines necessary to allow compliance with paragraph (2) of this subsection, and section 101(a)(2) of this Act [33 USCS § 1251(a)(2)]. For the purposes of paragraph (9), "primary or equivalent treatment" means treatment by screening, sedimentation, and skimming adequate to remove at least 30 percent of the biological oxygen demanding material and of the suspended solids in the treatment works influent, and disinfection, where appropriate. A municipality which applies secondary treatment shall be eligible to receive a permit pursuant to this subsection which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from any treatment works owned by such municipality into marine waters. No permit issued under this subsection shall authorize the discharge of sewage sludge into marine waters. In order for a permit to be issued under this subsection for the discharge of a pollutant into marine waters, such marine waters must exhibit characteristics assuring that water providing dilution does not contain significant amounts of previously discharged effluent from such treatment works. No permit issued under this subsection shall authorize the discharge of any pollutant into saline estuarine waters which at the time of application do not support a balanced indigenous population of shellfish, fish and wildlife, or allow recreation in and on the waters or which exhibit ambient water quality below applicable water quality standards adopted for the protection of public water supplies, shellfish, fish and wildlife or recreational activities or such other standards necessary to assure support and protection of such uses. The prohibition

contained in the preceding sentence shall apply without regard to the presence or absence of a causal relationship between such characteristics and the applicant's current or proposed discharge. Notwithstanding any other provisions of this subsection, no permit may be issued under this subsection for discharge of a pollutant into the New York Bight Apex consisting of the ocean waters of the Atlantic Ocean westward of 73 degrees 30 minutes west longitude and northward of 40 degrees 10 minutes north latitude.

(i) Municipal time extensions.

(1) Where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under subsection (b)(1)(B) or (b)(1)(C) of this section, but (A) construction cannot be completed within the time required in such subsection, or (B) the United States has failed to make financial assistance under this Act [33 USCS §§ 1251 et seq.] available in time to achieve such limitations by the time specified in such subsection, the owner or operator of such treatment works may request the Administrator (or if appropriate the State) to issue a permit pursuant to section 402 of this Act [33 USCS § 1342] or to modify a permit issued pursuant to that section to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after the date of enactment of the Water Quality Act of 1987 [enacted Feb. 7, 1987]. The Administrator (or if appropriate the State) may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the publicly owned treatment works based on the earliest date by which such financial assistance will be available from the United States and construction can be completed, but in no event

later than July 1, 1988, and shall contain such other terms and conditions, including those necessary to carry out subsections (b) through (g) of section 201 of this Act [33 USCS § 1281(b)-(g)], section 307 of this Act [33 USCS § 1317], and such interim effluent limitations applicable to that treatment works as the Administrator determines are necessary to carry out the provisions of this Act [33 USCS §§ 1251 et seq.].

(2) (A) Where a point source (other than a publicly owned treatment works) will not achieve the requirements of subsections (b)(1)(A) and (b)(1)(C) of this section and—

(i) if a permit issued prior to July 1, 1977, to such point source is based upon a discharge into a publicly owned treatment works; or

(ii) if such point source (other than a publicly owned treatment works) had before July 1, 1977, a contract (enforceable against such point source) to discharge into a publicly owned treatment works; or

(iii) if either an application made before July 1, 1977, for a construction grant under this Act [33 USCS §§ 1251 et seq.] for a publicly owned treatment works, or engineering or architectural plans or working drawings made before July 1, 1977, for a publicly owned treatment works, show that such point source was to discharge into such publicly owned treatment works, and such publicly owned treatment works is presently unable to accept such discharge without construction, and in the case of a discharge to an existing publicly owned treatment works, such treatment works has an extension pursuant to paragraph (1) of this subsection, the owner or operator of such point source may request the Administrator (or if appropriate the State) to issue or modify such a

permit pursuant to such section 402 [33 USCS § 1342] to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after the date of enactment of this subsection [enacted Dec. 27, 1977] or the filing of a request by the appropriate publicly owned treatment works under paragraph (1) of this subsection, whichever is later. If the Administrator (or if appropriate the State) finds that the owner or operator of such point source has acted in good faith, he may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the point source to achieve the requirements of subsections (b)(1)(A) and (C) of this section and shall contain such other terms and conditions, including pretreatment and interim effluent limitations and water conservation requirements applicable to that point source, as the Administrator determines are necessary to carry out the provisions of this Act [33 USCS §§ 1251 et seq.].

(B) No time modification granted by the Administrator (or if appropriate the State) pursuant to paragraph (2)(A) of this subsection shall extend beyond the earliest date practicable for compliance or beyond the date of any extension granted to the appropriate publicly owned treatment works pursuant to paragraph (1) of this subsection, but in no event shall it extend beyond July 1, 1988; and no such time modification shall be granted unless (i) the publicly owned treatment works will be in operation and available to the point source before July 1, 1988, and will meet the requirements of subsections (b)(1)(B) and (C) of this section after receiving the discharge from that point source; and (ii) the point source and the publicly owned treatment works have entered into an enforceable contract requiring the point source to

discharge into the publicly owned treatment works, the owner or operator of such point source to pay the costs required under section 204 of this Act [33 USCS § 1284], and the publicly owned treatment works to accept the discharge from the point source; and (iii) the permit for such point source requires that point source to meet all requirements under section 307(a) and (b) [33 USCS § 1317(a), (b)] during the period of such time modification.

(j) Modification procedures.

(1) Any application filed under this section for a modification of the provisions of—

(A) subsection (b)(1)(B) under subsection (h) of this section shall be filed not later that [than] the 365th day which begins after the date of enactment of the Municipal Wastewater Treatment Construction Grant Amendments of 1981 [enacted Dec. 29, 1981], except that a publicly owned treatment works which prior to December 31, 1982, had a contractual arrangement to use a portion of the capacity of an ocean outfall operated by another publicly owned treatment works which has applied for or received modification under subsection (h), may apply for a modification of subsection (h) in its own right not later than 30 days after the date of the enactment of the Water Quality Act of 1987 [enacted Feb. 7, 1987], and except as provided in paragraph (5);

(B) subsection (b)(2)(A) as it applies to pollutants identified in subsection (b)(2)(F) shall be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 304 [33 USCS § 1314] or not later than 270 days after the date of enactment of the Clean Water Act of 1977 [enacted Dec. 27, 1977], whichever is later.

(2) Subject to paragraph (3) of this section, any application for a modification filed under subsection (g) of this section shall not operate to stay any requirement under this Act [33 USCS §§ 1251 et seq.], unless in the judgment of the Administrator such a stay or the modification sought will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity, or teratogenicity), or synergistic propensities, and that there is a substantial likelihood that the applicant will succeed on the merits of such application. In the case of an application filed under subsection (g) of this section, the Administrator may condition any stay granted under this paragraph on requiring the filing of a bond or other appropriate security to assure timely compliance with the requirements from which a modification is sought.

(3) Compliance requirements under subsection (g).

(A) Effect of filing. An application for a modification under subsection (g) and a petition for listing of a pollutant as a pollutant for which modifications are authorized under such subsection shall not stay the requirement that the person seeking such modification or listing comply with effluent limitations under this Act [33 USCS §§ 1251 et seq.] for all pollutants not the subject of such application or petition.

(B) Effect of disapproval. Disapproval of an application for a modification under subsection (g) shall not stay the requirement that the person seeking such modification comply with all applicable effluent limitations under this Act [33 USCS §§ 1251 et seq.].

(4) Deadline for subsection (g) decision. An application for a modification with respect to a pollutant filed under subsection (g) must be approved or disapproved not later than 365 days after the date of such filing; except that in any case in which a petition for listing such pollutant as a pollutant for which modifications are authorized under such subsection is approved, such application must be approved or disapproved not later than 365 days after the date of approval of such petition.

(5) Extension of application deadline.

(A) In general. In the 180-day period beginning on the date of the enactment of this paragraph [enacted Oct. 31, 1994], the city of San Diego, California, may apply for a modification pursuant to subsection (h) of the requirements of subsection (b)(1)(B) with respect to biological oxygen demand and total suspended solids in the effluent discharged into marine waters.

(B) Application. An application under this paragraph shall include a commitment by the applicant to implement a waste water reclamation program that, at a minimum, will—

(i) achieve a system capacity of 45,000,000 gallons of reclaimed waste water per day by January 1, 2010; and

(ii) result in a reduction in the quantity of suspended solids discharged by the applicant into the marine environment during the period of the modification.

(C) Additional conditions. The Administrator may not grant a modification pursuant to an application submitted under this paragraph unless

the Administrator determines that such modification will result in removal of not less than 58 percent of the biological oxygen demand (on an annual average) and not less than 80 percent of total suspended solids (on a monthly average) in the discharge to which the application applies. A

(D) Preliminary decision deadline. The Administrator shall announce a preliminary decision on an application submitted under this paragraph not later than 1 year after the date the application is submitted.

(k) Innovative technology. In the case of any facility subject to a permit under section 402 [33 USCS § 1342] which proposes to comply with the requirements of subsection (b)(2)(A) or (b)(2)(E) of this section by replacing existing production capacity with an innovative production process which will result in an effluent reduction significantly greater than that required by the limitation otherwise applicable to such facility and moves toward the national goal of eliminating the discharge of all pollutants, or with the installation of an innovative control technique that has a substantial likelihood for enabling the facility to comply with the applicable effluent limitation by achieving a significantly greater effluent reduction than that required by the applicable effluent limitation and moves toward the national goal of eliminating the discharge of all pollutants, or by achieving the required reduction with an innovative system that has the potential for significantly lower costs than the systems which have been determined by the Administrator to be economically achievable, the Administrator (or the State with an approved program under section 402 [33 USCS § 1342], in consultation with the Administrator) may establish a date for compliance under subsection (b)(2)(A) or (b)(2)(E) of

this section no later than two years after the date for compliance with such effluent limitation which would otherwise be applicable under such subsection, if it is also determined that such innovative system has the potential for industry-wide application.

(l) Toxic pollutants. Other than as provided in subsection (n) of this section, the Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 307(a)(1) of this Act [33 USCS § 1317(a)(1)].

(m) Modification of effluent limitation requirements for point sources.

(1) The Administrator, with the concurrence of the State, may issue a permit under section 402 [33 USCS § 1342] which modifies the requirements of subsections (b)(1)(A) and (b)(2)(E) of this section, and of section 403 [33 USCS § 1343], with respect to effluent limitations to the extent such limitations relate to biochemical oxygen demand and pH from discharges by an industrial discharger in such State into deep waters of the territorial seas, if the applicant demonstrates and the Administrator finds that—

(A) the facility for which modification is sought is covered at the time of the enactment of this subsection [enacted Jan. 8, 1983] by National Pollutant Discharge Elimination System permit number CA0005894 or CA0005282;

(B) the energy and environmental costs of meeting such requirements of subsections (b)(1)(A) and (b)(2)(E) and section 403 [33 USCS § 1343] exceed by an unreasonable amount the benefits to be obtained, including the objectives of this Act [33 USCS §§ 1251 et seq.];

(C) the applicant has established a system for monitoring the impact of such discharges on a representative sample of aquatic biota;

(D) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(E) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(F) the discharge is into waters where there is strong tidal movement and other hydrological and geological characteristics which are necessary to allow compliance with this subsection and section 101(a)(2) of this Act [33 USCS § 1251(a)(2)];

(G) the applicant accepts as a condition to the permit a contractural [contractual] obligation to use funds in the amount required (but not less than $250,000 per year for ten years) for research and development of water pollution control technology, including but not limited to closed cycle technology;

(H) the facts and circumstances present a unique situation which, if relief is granted, will not establish a precedent or the relaxation of the requirements of this Act [33 USCS §§ 1251 et seq.] applicable to similarly situated discharges; and

(I) no owner or operator of a facility comparable to that of the applicant situated in the United States has demonstrated that it would be put at a competitive disadvantage to the applicant (or the parent company or any subsidiary thereof) as a result of the issuance of a permit under this subsection.

(2) The effluent limitations established under a permit issued under paragraph (1) shall be sufficient to implement the applicable State water quality standards, to assure the protection of public water supplies and protection and propagation of a balanced, indigenous population of shellfish, fish, fauna, wildlife, and other aquatic organisms, and to allow recreational activities in and on the water. In setting such limitations, the Administrator shall take into account any seasonal variations and the need for an adequate margin of safety, considering the lack of essential knowledge concerning the relationship between effluent limitations and water quality and the lack of essential knowledge of the effects of discharges on beneficial uses of the receiving waters.

(3) A permit under this subsection may be issued for a period not to exceed five years, and such a permit may be renewed for one additional period not to exceed five years upon a demonstration by the applicant and a finding by the Administrator at the time of application for any such renewal that the provisions of this subsection are met.

(4) The Administrator may terminate a permit issued under this subsection if the Administrator determines that there has been a decline in ambient water quality of the receiving waters during the period of the permit even if a direct cause and effect relationship cannot be shown: Provided, That if the effluent from a source with a permit issued under this subsection is contributing to a decline in ambient water quality of the receiving waters, the Administrator shall terminate such permit.

(n) Fundamentally different factors.

(1) General rule. The Administrator, with the concurrence of the State, may establish an alternative requirement under subsection (b)(2) or section 307(b) [33 USCS § 1317(b)] for a facility that modifies the requirements of national effluent limitation guidelines or categorical pretreatment standards that would otherwise be applicable to such facility, if the owner or operator of such facility demonstrates to the satisfaction of the Administrator that—

(A) the facility is fundamentally different with respect to the factors (other than cost) specified in section 304(b) or 304(g) and considered by the Administrator in establishing such national effluent limitation guidelines or categorical pretreatment standards;

(B) the application—

(i) is based solely on information and supporting data submitted to the Administrator during the rule-making for establishment of the applicable national effluent limitation guidelines or categorical pretreatment standard specifically raising the factors that are fundamentally different for such facility; or

(ii) is based on information and supporting data referred to in clause (i) and information and supporting data the applicant did not have a reasonable opportunity to submit during such rulemaking;

(C) the alternative requirement is no less stringent than justified by the fundamental difference; and

(D) the alternative requirement will not result in a nonwater quality environmental impact which is markedly more adverse than the impact considered by

the Administrator in establishing such national effluent limitation guideline or categorical pretreatment standard.

(2) Time limit for applications. An application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection must be submitted to the Administrator within 180 days after the date on which such limitation or standard is established or revised, as the case may be.

(3) Time limit for decision. The Administrator shall approve or deny by final agency action an application submitted under this subsection within 180 days after the date such application is filed with the Administrator.

(4) Submission of information. The Administrator may allow an applicant under this subsection to submit information and supporting data until the earlier of the date the application is approved or denied or the last day that the Administrator has to approve or deny such application.

(5) Treatment of pending applications. For the purposes of this subsection, an application for an alternative requirement based on fundamentally different factors which is pending on the date of the enactment of this subsection [enacted Feb. 7, 1987] shall be treated as having been submitted to the Administrator on the 180th day following such date of enactment [enacted Feb. 7, 1987]. The applicant may amend the application to take into account the provisions of this subsection.

(6) Effect of submission of application. An application for an alternative requirement under this subsection shall not stay the applicant's obligation to

comply with the effluent limitation guideline or categorical pretreatment standard which is the subject of the application.

(7) Effect of denial. If an application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection is denied by the Administrator, the applicant must comply with such limitation or standard as established or revised, as the case may be.

(8) Reports. By January 1, 1997, and January 1 of every odd-numbered year thereafter, the Administrator shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a report on the status of applications for alternative requirements which modify the requirements of effluent limitations under section 301 or 304 of this Act [33 USCS § 1311 or 1314] or any national categorical pretreatment standard under section 307(b) of this Act [33 USCS § 1317(b)] filed before, on, or after such date of enactment [enacted Feb. 7, 1987].

(o) Application fees. The Administrator shall prescribe and collect from each applicant fees reflecting the reasonable administrative costs incurred in reviewing and processing applications for modifications submitted to the Administrator pursuant to subsections (c), (g), (i), (k), (m), and (n) of section 301, section 304(d)(4), and section 316(a) of this Act [33 USCS §§ 1311(c), (g), (i), (k), (m), (n), 1314(d)(4), 1316(a)]. All amounts collected by the Administrator under this subsection shall be deposited into a special fund of the Treasury entitled "Water Permits and Related Services" which shall thereafter be available for appropriation to carry out activities of the

Environmental Protection Agency for which such fees were collected.

(p) Modified permit for coal remining operations.

(1) In general. Subject to paragraphs (2) through (4) of this subsection, the Administrator, or the State in any case which the State has an approved permit program under section 402(b) [33 USCS § 1342(b)], may issue a permit under section 402 [33 USCS § 1342] which modifies the requirements of subsection (b)(2)(A) of this section with respect to the pH level of any pre-existing discharge, and with respect to pre-existing discharges of iron and manganese from the remined area of any coal remining operation or with respect to the pH level or level of iron or manganese in any pre-existing discharge affected by the remaining operation. Such modified requirements shall apply the best available technology economically achievable on a case-by-case basis, using best professional judgment, to set specific numerical effluent limitations in each permit.

(2) Limitations. The Administrator or the State may only issue a permit pursuant to paragraph (1) if the applicant demonstrates to the satisfaction of the Administrator or the State, as the case may be, that the coal remining operation will result in the potential for improved water quality from the remining operation but in no event shall such a permit allow the pH level of any discharge, and in no event shall such a permit allow the discharges of iron and manganese, to exceed the levels being discharged from the remined area before the coal remining operation begins. No discharge from, or affected by, the remining operation shall exceed State water quality standards established under section 303 of this Act [33 USCS § 1313].

(3) Definitions. For purposes of this subsection—

(A) Coal remining operation. The term "coal remining operation" means a coal mining operation which begins after the date of the enactment of this subsection [enacted Feb. 4, 1987] at a site on which coal mining was conducted before the effective date of the Surface Mining Control and Reclamation Act of 1977.

(B) Remined area. The term "remined area" means only that area of any coal remining operation on which coal mining was conducted before the effective date of the Surface Mining Control and Reclamation Act of 1977.

(C) Pre-existing discharge. The term "pre-existing discharge" means any discharge at the time of permit application under this subsection.

(4) Applicability of strip mining laws. Nothing in this subsection shall affect the application of the Surface Mining Control and Reclamation Act of 1977 to any coal remining operation, including the application of such Act to suspended solids.

APPENDIX E

33 U.S.C. § 1342

National pollutant discharge elimination system

(a) Permits for discharge of pollutants.

(1) Except as provided in sections 318 and 404 of this Act [33 USCS §§ 1328, 1344], the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a) [33 USCS § 1311(a)], upon condition that such discharge will meet either (A) all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act [33 USCS §§ 1311, 1312, 1316, 1317, 1318, 1343], (B) or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act [33 USCS §§ 1251 et seq.].

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

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 13 of the Act of March 3, 1899 [33 USCS § 407], shall be deemed to be

permits issued under this title [33 USCS §§ 1341 et seq.], and permits issued under this title [33 USCS §§ 1341 et seq.] shall be deemed to be permits issued under section 13 of the Act of March 3, 1899 [33 USCS § 407], and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this Act [33 USCS §§ 1251 et seq.].

(5) No permit for a discharge into the navigable waters shall be issued under section 13 of the Act of March 3, 1899 [33 USCS § 407], after the date of enactment of this title [enacted Oct. 18, 1972]. Each application for a permit under section 13 of the Act of March 3, 1899 [33 USCS § 407], pending on the date of enactment of this Act [enacted Oct. 18, 1972], shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this Act [33 USCS §§ 1251 et seq.], to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on the date of enactment of this Act [enacted Oct. 18, 1972] and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 304(h)(2) [304(i)(2)] of this Act [33 USCS § 1314(i)(2)], or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this Act [33 USCS §§ 1251 et seq.].

No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs. At any time after the promulgation of the guidelines required by subsection (h)(2) of section 304 [304(i)(2)] of this Act [33 USCS § 1314(i)(2)], the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403 [33 USCS §§ 1311, 1312, 1316, 1317, 1343];

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2) (A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act [33 USCS § 1318] or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act [33 USCS § 1318];

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard

is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 307(b) of this Act [33 USCS § 1317(b)] into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 306 [33 USCS § 1316] if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 301 [33 USCS § 1311] if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 204(b), 307, and 308 [33 USCS §§ 1284(b), 1317, 1318].

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator.

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 304(h)(2) [304(i)(2)] of this Act [33 USCS § 1314(i)(2)]. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 304(h)(2) [304(i)(2)] of this Act [33 USCS § 1314(i)(2)].

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) Limitations on partial permit program returns and withdrawals. A State may return to the

Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of—

(A) a State partial permit program approved under subsection (n)(3) only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator.

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) of the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act [33 USCS §§ 1251 et seq.]. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after the date of enactment of this paragraph [enacted Dec. 27, 1977], the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this Act [33 USCS §§ 1251 et seq.].

(e) Waiver of notification requirement. In accordance with guidelines promulgated pursuant to subsection (h)(2) of section 304 [304(i)(2)] of this Act [33 USCS § 1314(i)(2)], the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

(f) Point source categories. The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

(g) Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants. Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

(h) Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works. In the event any condition of a permit for discharges from a treatment works (as defined in section 212 of this Act [33 USCS § 1292]) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator determines pursuant to section 309(a) of this Act [33 USCS § 1319(a)] that a State with an approved program has not commenced appropriate enforcement action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

(i) Federal enforcement not limited. Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 309 of this Act [33 USCS § 1319].

(j) Public information. A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

(k) Compliance with permits. Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 309 and 505 [33 USCS §§ 1319, 1365], with sections 301, 302, 306, 307, and 403 [33 USCS §§ 1311, 1312, 1316, 1317, 1343], except any standard imposed under section 307 [33 USCS § 1317] for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 301, 306, or 402 of this Act [33 USCS § 1311, 1316, or 1342], or (2) section 13 of the Act of March 3, 1899 [33 USCS § 407], unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date of enactment which source is not subject to section 13 of the Act of March 3, 1899 [33 USCS § 407], the discharge by such source shall not be a violation of this Act [33 USCS §§ 1251 et seq.] if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

(l) Limitation on permit requirement.

(1) Agricultural return flows. The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator

directly or indirectly, require any State to require such a permit.

(2) Stormwater runoff from oil, gas, and mining operations. The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

(3) Silvicultural activities.

(A) NPDES permit requirements for silvicultural activities. The Administrator shall not require a permit under this section nor directly or indirectly require any State to require a permit under this section for a discharge from runoff resulting from the conduct of the following silviculture activities conducted in accordance with standard industry practice: nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance.

(B) Other requirements. Nothing in this paragraph exempts a discharge from silvicultural activity from any permitting requirement under section 404

[33 USCS § 1344], existing permitting requirements under section 402 [33 USCS § 1342], or from any other federal law.

(C) The authorization provided in Section 505(a) [33 USCS § 1365(a)] does not apply to any non-permitting program established under 402(p)(6) [33 USCS § 1342(p)(6)] for the silviculture activities listed in 402(l)(3)(A) [33 USCS § 1342(l)(3)(A)], or to any other limitations that might be deemed to apply to the silviculture activities listed in 402(l)(3)(A) [33 USCS § 1342(l)(3)(A)].

(m) Additional pretreatment of conventional pollutants not required. To the extent a treatment works (as defined in section 212 of this Act [33 USCS § 1292]) which is publicly owned is not meeting the requirements of a permit issued under this section for such treatment works as a result of inadequate design or operation of such treatment works, the Administrator, in issuing a permit under this section, shall not require pretreatment by a person introducing conventional pollutants identified pursuant to section 304(a)(4) of this Act [33 USCS § 1314(a)(4)] into such treatment works other than pretreatment required to assure compliance with pretreatment standards under subsection (b)(8) of this section and section 307(b)(1) of this Act [33 USCS § 1317(b)(1)]. Nothing in this subsection shall affect the Administrator's authority under sections 307 and 309 of this Act [33 USCS §§ 1317, 1319], affect State and local authority under sections 307(b)(4) and 510 of this Act [33 USCS §§ 1317(b)(4), 1370], relieve such treatment works of its obligations to meet requirements established under this Act [33 USCS §§ 1251 et seq.], or otherwise preclude such works from pursuing whatever feasible

options are available to meet its responsibility to comply with its permit under this section.

(n) Partial permit program.

(1) State submission. The Governor of a State may submit under subsection (b) of this section a permit program for a portion of the discharges into the navigable waters in such State.

(2) Minimum coverage. A partial permit program under this subsection shall cover, at a minimum, administration of a major category of the discharges into the navigable waters of the State or a major component of the permit program required by subsection (b).

(3) Approval or major category partial permit programs. The Administrator may approve a partial permit program covering administration of a major category of discharges under this subsection if—

(A) such program represents a complete permit program and covers all of the discharges under the jurisdiction of a department or agency of the State; and

(B) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b).

(4) Approval of major component partial permit programs. The Administrator may approve under this subsection a partial and phased permit program covering administration of a major component (including discharge categories) of a State permit program required by subsection (b) if—

(A) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b); and

(B) the State submits, and the Administrator approves, a plan for the State to assume administration by phases of the remainder of the State program required by subsection (b) by a specified date not more than 5 years after submission of the partial program under this subsection and agrees to make all reasonable efforts to assume such administration by such date.

(o) Anti-backsliding.

(1) General prohibition. In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 304(b) [33 USCS § 1314(b)] subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. In the case of effluent limitations established on the basis of section 301(b)(1)(C) or section 303 (d) or (e) [33 USCS § 1311(b)(1)(C) or 1313(d) or (e)], a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 303(d)(4) [33 USCS § 1313(d)(4)].

(2) Exceptions. A permit with respect to which paragraph (1) applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant if—

(A) material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B) (i) information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(ii) the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B);

(C) a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) the permittee has received a permit modification under section 301(c), 301(g), 301(h), 301(i), 301(k), 301(n), or 316(a) [33 USCS § 1311(c), (g), (h), (i), (k), (n), or 1326(a)]; or

(E) the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification). Subparagraph (B) shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not

the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this Act [33 USCS §§ 1251 et seq.] or for reasons otherwise unrelated to water quality.

(3) Limitations. In no event may a permit with respect to which paragraph (1) applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 303 [33 USCS § 1313] applicable to such waters.

(p) Municipal and industrial stormwater discharges.

(1) General rule. Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under section 402 of this Act [this section]) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions. Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before the date of the enactment of this subsection [enacted Feb. 4, 1987].

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements.

(A) Industrial discharges. Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 301 [33 USCS § 1311].

(B) Municipal discharge. Permits for discharges from municipal storm sewers—

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

(4) Permit application requirements.

(A) Industrial and large municipal discharges. Not later than 2 years after the date of the enactment of this subsection [enacted Feb. 4, 1987], the Administrator shall establish regulations setting forth the

permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after such date of enactment [enacted Feb. 4, 1987]. Not later than 4 years after such date of enactment [enacted Feb. 4, 1987], the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges. Not later than 4 years after the date of the enactment of this subsection [enacted Feb. 4, 1987], the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after such date of enactment [enacted Feb. 4, 1987]. Not later than 6 years after such date of enactment [enacted Feb. 4, 1987], the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies. The Administrator, in consultation with the States, shall conduct a study for the purposes of—

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations. Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

(q) Combined sewer overflows.

(1) Requirement for permits, orders, and decrees. Each permit, order, or decree issued pursuant to this Act [33 USCS §§ 1251 et seq.] after the date of enactment of this subsection [enacted Dec. 21, 2000] for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer

Overflow Control Policy signed by the Administrator on April 11, 1994 (in this subsection referred to as the "CSO control policy").

(2) Water quality and designated use review guidance. Not later than July 31, 2001, and after providing notice and opportunity for public comment, the Administrator shall issue guidance to facilitate the conduct of water quality and designated use reviews for municipal combined sewer overflow receiving waters.

(3) Report. Not later than September 1, 2001, the Administrator shall transmit to Congress a report on the progress made by the Environmental Protection Agency, States, and municipalities in implementing and enforcing the CSO control policy.

(r) Discharges incidental to the normal operation of recreational vessels. No permit shall be required under this Act [33 USCS §§ 1251 et seq.] by the Administrator (or a State, in the case of a permit program approved under subsection (b)) for the discharge of any graywater, bilge water, cooling water, weather deck runoff, oil water separator effluent, or effluent from properly functioning marine engines, or any other discharge that is incidental to the normal operation of a vessel, if the discharge is from a recreational vessel.

APPENDIX F

33 U.S.C. § 1362

Definitions

Except as otherwise specifically provided, when used in this Act [33 USCS §§ 1251 et seq.]:

(1) The term "State water pollution control agency" means the State agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.

(2) The term "interstate agency" means an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.

(3) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(4) The term "municipality" means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of this Act [33 USCS § 1288].

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body.

(6) 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, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 312 of this Act [33 USCS § 1322]; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

(8) The term "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

(9) The term "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone [15 UST § 1606].

(10) The term "ocean" means any portion of the high seas beyond the contiguous zone.

(11) The term "effluent limitation" means any restriction established by a State or the Administrator 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.

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

(13) The term "toxic pollutant" means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

(15) The term "biological monitoring" shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants (A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and (B) at appropriate frequencies and locations.

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

(17) The term "schedule of compliance" means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

(18) The term "industrial user" means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category "Division D—Manufacturing" and such other classes of significant waste producers as, by regulation, the Administrator deems appropriate.

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

(20) The term "medical waste" means isolation wastes; infectious agents; human blood and blood products; pathological wastes; sharps; body parts; contaminated bedding; surgical wastes and potentially contaminated laboratory wastes; dialysis wastes; and

such additional medical items as the Administrator shall prescribe by regulation.

(21) Coastal recreation waters.

(A) In general. The term "coastal recreation waters" means—

(i) the Great Lakes; and

(ii) marine coastal waters (including coastal estuaries) that are designated under section 303(c) [33 USCS § 1313(c)] by a State for use for swimming, bathing, surfing, or similar water contact activities.

(B) Exclusions. The term "coastal recreation waters" does not include—

(i) inland waters; or

(ii) waters upstream of the mouth of a river or stream having an unimpaired natural connection with the open sea.

(22) Floatable material.

(A) In general. The term "floatable material" means any foreign matter that may float or remain suspended in the water column.

(B) Inclusions. The term "floatable material" includes—

(i) plastic;

(ii) aluminum cans;

(iii) wood products;

(iv) bottles; and

(v) paper products.

(23) Pathogen indicator. The term "pathogen indicator" means a substance that indicates the potential for human infectious disease.

(24) Oil and gas exploration and production. The term "oil and gas exploration, production, processing, or treatment operations or transmission facilities" means all field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities.

(25) Recreational vessel.

(A) In general. The term "recreational vessel" means any vessel that is—

(i) manufactured or used primarily for pleasure; or

(ii) leased, rented, or chartered to a person for the pleasure of that person.

(B) Exclusion. The term "recreational vessel" does not include a vessel that is subject to Coast Guard inspection and that—

(i) is engaged in commercial use; or

(ii) carries paying passengers.

(26) Treatment works. The term "treatment works" has the meaning given the term in section 212 [33 USCS § 1292].

APPENDIX G

33 U.S.C. § 1365

Citizen Suits

(a) Authorization; jurisdiction. Except as provided in subsection (b) of this section and section 309(g)(6) [33 USCS § 1319(g)(6)], any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act [33 USCS §§ 1251 et seq.] or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act [33 USCS §§ 1251 et seq.] which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309(d) of this Act [33 USCS § 1319(d)].

(b) Notice. No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs,

and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 306 and 307(a) of this Act [33 USCS §§ 1316, 1317(a)]. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; United States interests protected.

(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(3) Protection of interests of United States. Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not a party

prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.

(d) Litigation costs. The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Statutory or common law rights not restricted. Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) Effluent standard or limitation. For purposes of this section, the term "effluent standard or limitation under this Act" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 301 of this Act [33 USCS § 1311(a)]; (2) an effluent limitation or other limitation under section 301 or 302 of this Act [33 USCS § 1311 or 1312]; (3) standard of performance under section 306 of this Act [33 USCS § 1316]; (4) prohibition, effluent standard or pretreatment standards under section 307 of this Act [33 USCS § 1317]; (5) certification under section 401 of this Act [33 USCS § 1341]; (6) a permit or condition thereof issued under section 402 of this Act [33 USCS § 1342], which is in effect under this Act [33 USCS §§ 1251 et seq.] (including a requirement applicable by reason of

section 313 of this Act [33 USCS § 1323]); or (7) a regulation under section 405(d) of this Act [33 USCS § 1345(d)][,].

(g) "Citizen" defined. For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) Civil action by State Governors. A Governor of a State may commence a civil action under subsection (a), without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this Act [33 USCS §§ 1251 et seq.] the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

APPENDIX H

33 U.S.C. § 1369

Administrative procedure and judicial review

(a) Subpenas.

(1) For purposes of obtaining information under section 305 of this Act [33 USCS § 1315], or carrying out section 507(e) of this Act [33 USCS § 1367(e)], the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for effluent date, upon a showing satisfactory to the Administrator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18 of the United States Code [18 USCS § 1905], except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this Act [33 USCS §§ 1251 et seq.], or when relevant in any proceeding under this Act [33 USCS §§ 1251 et seq.]. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subsection, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator, to appear and produce

papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(2) The district courts of the United States are authorized, upon application by the Administrator, to issue subpenas for attendance and testimony of witnesses and the production of relevant papers, books, and documents, for purposes of obtaining information under sections 304(b) and (c) of this Act [33 USCS § 1314(b), (c)]. Any papers, books, documents, or other information or part thereof, obtained by reason of such a subpena shall be subject to the same requirements as are provided in paragraph (1) of this subsection.

(b) Review of the Administrator's actions; selection of court; fees.

(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 306 [33 USCS § 1316], (B) in making any determination pursuant to section 306(b)(1)(C), (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 307 [33 USCS § 1317], (D) in making any determination as to a State permit program submitted under section 402(b) [33 USCS § 1342(b)], (E) in approving or promulgating any effluent limitation or other limitation under section 301, 302, 306, or 405, [33 USCS § 1311, 1312, 1316 or 1345], (F) in issuing or denying any permit under section 402 [33 USCS § 1342], and (G) in promulgating any individual control strategy under section 304(l) [33 USCS § 1314(l)], may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any

such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

(3) Award of fees. In any judicial proceeding under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party whenever it determines that such award is appropriate.

(c) Additional evidence. In any judicial proceeding brought under subsection (b) of this section in which review is sought of a determination under this Act [33 USCS §§ 1251 et seq.] required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.