No. 18-3644

United States Court of Appeals
for the Seventh Circuit

Prairie Rivers Network,

Plaintiff-Appellant

vs.

Dynegy Midwest Generation, LLC,

Defendant-Appellee

Appeal from the U.S. District Court for the Central District of Illinois
No. 18-CV-02148
Hon. Judge Colin S. Bruce

Corrected Brief of Defendant-Appellee Dynegy Midwest Generation, LLC

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-3644

Short Caption: Prairie Rivers Network v. Dynegy Midwest Generation, LLC

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

See attached response, which contains revised information.

Attorney's Signature: s/ Daniel J. Deeb Date: 8/31/2020

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Attorney's Signature: s/ Ryan C. Granholm Date: 8/31/20

Attorney's Printed Name: Ryan C. Granholm

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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See attached response.

Attorney's Signature: s/ Allyson N. Ho (new attorney appearance) Date: 8/31/20

Attorney's Printed Name: Allyson N. Ho

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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Attorney's Signature: s/ Joshua R. More Date: 8/31/20

Attorney's Printed Name: Joshua R. More

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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Attorney's Signature: s/ Michael L. Raiff Date: 8/31/20

Attorney's Printed Name: Michael L. Raiff

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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Response to Questions 3(i) & (ii):

Appellee Dynegy Midwest Generation, LLC is a Delaware LLC and a wholly owned subsidiary of Dynegy HoldCo, LLC, a Delaware limited liability company, which is, in turn, a wholly owned subsidiary of Vistra Operations Company LLC, a Delaware limited liability company. Vistra Operations Company LLC is a wholly owned subsidiary of Vistra Intermediate Company LLC, a Delaware limited liability company, which is, in turn, a wholly owned subsidiary of Vistra Corp. Effective July 2, 2020, Vistra Corp. changed its entity name from Vistra Energy Corp. pursuant to a Certificate of Amendment to Vistra Corp.'s Restated Certificate of Incorporation as filed with the Secretary of State of the State of Delaware.

Vistra Corp., a publicly traded company, is therefore the ultimate corporate parent of Appellee Dynegy Midwest Generation, LLC. No other publicly traded company owns more than 10% of Vistra Corp.'s stock.

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Jurisdictional Statement

Under 7th Cir. R. 28(b), Defendant-Appellee Dynegy Midwest Generation LLC ("Dynegy") states that the jurisdictional statement of Plaintiff-Appellant Prairie Rivers Network ("PRN") is not complete and correct. Dynegy does not dispute that PRN sued under the Clean Water Act's citizen suit provision, 33 U.S.C. § 1365(a), and timely appealed the final judgment dismissing all of its claims. But Dynegy does dispute that PRN has standing to bring this lawsuit and accordingly disagrees that this Court has subject matter jurisdiction. As discussed in Section I of the Argument below, the allegations in the Complaint—the appropriate reference point for an appeal at the motion to dismiss stage—are insufficient to support Article III standing. Nor may PRN establish the adequacy of its pleadings with new, post-judgment declarations filed for the first time in this Court, as explained below and in Dynegy's opposition to PRN's motion to file supplemental declarations (which the Court has taken with the case).

Statement of the Issues

1. May PRN cure its failure to adequately allege Article III standing in its Complaint by filing declarations in this Court in the first instance?
2. In *County of Maui*, the United States Supreme Court held that the federal Clean Water Act may extend to certain limited discharges into navigable waters from groundwater, but that it should neither displace traditional state regulation concerning groundwater nor undermine that traditional state regulation. In light of Illinois' comprehensive regulation of groundwater, should the Court affirm the district court's judgment because the district court's application of *County of Maui*'s test would, as a matter of law, "create serious risks . . . of undermining state regulation of groundwater?" *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1477 (2020).
3. Independently, should the judgment be affirmed because regulations under the Resource Conservation and Recovery Act — and not under the Clean Water Act — govern what PRN alleges are point source discharges from the Vermilion Impoundments?
4. Does Count 2 of the Complaint also fail to state a claim because it is not independent of Count 1?

Statement of the Case

Facts

From the mid-1950s until 2011, the Vermilion Power Station ("Vermilion") produced power by burning coal, a process that generated coal ash (also called coal combustion residuals or "CCR"). Compl. ¶ 30, APP0028. During operations, coal ash was placed into a series of three impoundments (the "Impoundments"). *Id.* Vermilion was authorized to discharge wastewater from its operations to the adjacent Middle Fork of the Vermilion River ("Middle Fork"), under a National Pollutant Discharge Elimination System ("NPDES") permit (the "Permit"), issued by the Illinois Environmental Protection Agency ("IEPA"), under the federal Clean Water Act ("CWA").[1] *Id.* at ¶¶ 36, 47, APP0029, APP0031. The Permit lists nine external outfalls through which direct discharges to the Middle Fork are authorized, including from the Impoundments. *Id.* at ¶ 37, APP0029. The Complaint does not allege any discharges from these outfalls.

PRN instead alleges that constituents from coal ash have leached from the Impoundments, to groundwater, and that allegedly contaminated groundwater subsequently entered the Middle Fork. *See, e.g.*, Order at APP0007 (describing alleged groundwater discharge pathway). PRN alleges that the Permit does not authorize such groundwater discharges, and that they are point source discharges that violate the CWA. *See, e.g.*, Compl. ¶ 61, APP0034 (Count 1). Additionally, PRN contends that these groundwater discharges violate two state-law conditions of

[1] 33 U.S.C. § 1251 *et seq.*

the Permit. *See, e.g.*, Compl. ¶¶ 71, 73, 74, APP0035–36 (Count 2). PRN alleges that the groundwater discharges have "harmed" unspecified PRN members' "use and enjoyment of the Middle Fork" in unspecified ways. Compl. ¶ 13, APP0024.

Procedural History

On November 14, 2018, the district court dismissed both counts of the Complaint. For Count 1, the court concluded that "[d]ischarges from artificial ponds into groundwater are not governed by the CWA, even if there is an alleged hydrological connection between the groundwater and surface waters qualifying as 'navigable waters' of the United States." Order at APP0013. With respect to Count 2, the court found that PRN's allegations were "identical to those alleged in Count [1], different only in that, rather than just a violation of § 1311(a) in general, the discharges also violate Conditions 23 and 25 of the Permit." Order at APP0018. And it concluded that PRN "has not shown that there has been any 'discharge into navigable waters' so as to invoke the jurisdiction of the CWA." *Id.* The district court entered a final judgment, which PRN timely appealed.

Before briefing commenced, this Court granted PRN's unopposed motion to stay pending the Supreme Court's disposition of *County of Maui.* Order, ECF No. 12. Following the Supreme Court's April 23, 2020 decision in *County of Maui*, 140 S. Ct. 1462, 1477 (2020), the parties filed position statements, and the Court set a briefing schedule. Order, ECF No. 17. With its opening brief, PRN filed a motion for "leave to file documents," attaching multiple declarations that were signed just days earlier and never presented to the district court. Plaintiff-Appellant's Mot. for

Leave to File Docs, ECF No. 20. Dynegy opposed the motion, which the Court ordered taken with the case. Defendant-Appellee's Resp. to Mot. for Leave to File Docs, ECF No. 27.

Summary of Argument

The district court's judgment should be affirmed for four independent reasons. First, the Complaint's allegations are insufficient to demonstrate that PRN has Article III standing—and PRN cannot cure the Complaint's deficiencies with declarations presented to this Court in the first instance. Second, PRN's reliance on *County of Maui*, 140 S. Ct. 1462 (2020), is misplaced. *County of Maui* requires affirmance, not reversal. The regulatory gap that the Supreme Court addressed in that case is absent here because Illinois law governing groundwater fills that gap, and the State's regulatory scheme would be substantially undermined by PRN's theory of CWA liability. Third, Congress intended the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*, not the CWA, to regulate the specific groundwater at issue here under a rule promulgated by the EPA (the "CCR Rule").[2] Fourth, the district court was correct that there is no basis to sustain PRN's Count 2 independent of Count 1. These points are explained further below.

At the threshold, PRN lacks Article III standing to assert its claims. The Complaint's conclusory assertion that its members' "use and enjoyment of the Middle Fork is harmed" without identifying how the alleged harm occurred or how it relates to the alleged discharges fails to satisfy the well-settled requirements of Article III. Compl. ¶ 13, APP0024. Effectively acknowledging the Complaint's

[2] 80 Fed. Reg. 21,302 (Apr. 17, 2015), codified at 40 C.F.R. §§ 257.50 – 257.107. The CCR Rule is cited in the Brief and Required Short Appendix of Plaintiff-Appellant Prairie Rivers Network ("PRN Br.") as 40 C.F.R. § 257. PRN Br. at 27 n.7, ECF No. 21-1.

shortcomings, PRN filed post-judgment declarations in this Court in the first instance. But, these declarations are too little, too late, and cannot cure the Complaint's fatal deficiencies. The Court should affirm dismissal for lack of subject matter jurisdiction.

Affirmance is proper for a second reason. As confirmed by the Supreme Court in *County of Maui*, the CWA generally leaves groundwater regulation to the States and Illinois has a longstanding comprehensive groundwater regulatory scheme. PRN sued Dynegy in federal court under the CWA—but the limited groundwater exception the Supreme Court found for CWA jurisdiction does not apply here. More precisely, *County of Maui*'s new "functional equivalent of a direct discharge" test does not apply here because Illinois' groundwater regulations fill the regulatory gap that was of concern to the Supreme Court and because applying CWA requirements would directly undermine those Illinois gap-filling groundwater regulations. PRN is already independently pursuing remedies against Dynegy under the Illinois groundwater regulations so there is no reason to expand the CWA, much less to undermine Illinois law.

Third, to the extent federal law has a role here at all, RCRA and not the CWA governs. The two other courts of appeals that have considered this precise issue have reached the same conclusion, and no court has decided it differently. That is for good reason. It is undisputed that coal ash is a solid waste falling squarely within RCRA and that the CCR Rule promulgated by EPA pursuant to RCRA squarely regulates groundwater associated with coal ash impoundments. And

RCRA specifically defines the term "solid waste" to exclude point source discharges regulated by the CWA. As recognized by the Fourth and Sixth Circuits, this direct conflict requires a choice between RCRA and CWA jurisdiction—both cannot regulate the same conduct. And Congressional intent makes clear that RCRA, not the CWA, regulates the alleged groundwater impacts here.

Fourth, as for Count 2, it fails with Count 1. This is because Count 2 is also predicated on 33 U.S.C. § 1311(a) and exclusively concerns the same groundwater discharges at issue under Count 1. To sustain a claim under 33 U.S.C. § 1311(a), the plaintiff must establish a discharge subject to CWA jurisdiction. Here, the only discharges alleged by the Compliant – diffuse groundwater discharges – are outside of CWA jurisdiction for the reasons discussed above, and thus the predicate to 33 U.S.C. § 1311(a) is not present. Accordingly, Count 2 cannot survive independently of Count 1.

Standard of Review

This Court reviews *de novo* a final judgment granting a motion to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). *Thompson v. Cope*, 900 F.3d 414, 426 (7th Cir. 2018). Standing is also reviewed *de novo*. *See Brown v. Disciplinary Comm. of the Edgerton Volunteer Fire Dept.*, 97 F.3d 969, 972 (7th Cir. 1996). This Court may affirm the judgment "for any valid reason based on the evidence . . . ." *Reinstine v. Rosenfield*, 111 F.2d 892, 894 (7th Cir. 1940); *see also Resolution Tr. Corp. v. Juergens*, 965 F.2d 149, 151 (7th Cir. 1992) ("[w]e may of course affirm on any ground that finds support in the record."); *Box v. A & P Tea Co.*, 772 F.2d 1372, 1376 (7th Cir. 1985) (affirming summary judgment on alternate grounds when the court's consideration of those alternate grounds did not deprive a party of an evidentiary opportunity) (citing *Hoffa v. Fitzsimmons,* 673 F.2d 1345, 1362 (D.C. Cir. 1982) and *SEC v. Sw. Coal & Energy Co.*, 624 F.2d 1313, 1317 (5th Cir. 1980)).

Argument

I. PRN Lacks Standing

PRN has failed to demonstrate that at least one of its members has individual standing, and therefore it lacks organizational standing. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). To establish standing for one of its members, PRN must show an "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotations and citations omitted); *see* PRN Br. at 11. The Supreme Court has categorically rejected the contention that mere "generalized harm to the forest or the environment" supports Article III standing. *Summers v. Earth Island Inst.,* 555 U.S. 488, 494 (2009). Because the Complaint fails to allege any specific injury in fact to any of PRN's individual members, PRN lacks standing.[3]

In environmental cases, "[t]he relevant showing . . . is not injury to the environment but *injury to the plaintiff.*" *Friends of the Earth*, 528 U.S. at 181 (2000) (emphasis added); *see Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972) ("[T]he 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."). To show an injury, a plaintiff must allege that it uses the portion of the environment allegedly

[3] While the district court did not dismiss on standing grounds, this Court will "consider the issue of standing, like any other question implicating our Article III jurisdiction, whether or not the parties have raised it." *Brown v. Disciplinary Comm. of the Edgerton Volunteer Fire Dept.*, 97 F.3d 969, 972 (7th Cir. 1996)

threatened by the defendant's action (or otherwise has geographic proximity to the alleged harm), and that the defendant's action affects the plaintiff's use of the environment. People "who use portions of an ecosystem not perceptibly affected by the unlawful action in question" do not have standing to challenge that action. *Lujan*, 504 U.S. at 565. For example, in *Sierra Club v. Morton*, the Supreme Court held that a nonprofit lacked standing when it "failed to allege that it or its members would be affected in any of their activities or pastimes by the [defendant's proposed] development." 406 U.S. at 735. Similarly, in *Summers*, the Supreme Court found that the plaintiff lacked standing because the complaint's allegations failed "to allege that any particular timber sale or other project claimed to be unlawfully subject to the regulations [would] impede a *specific and concrete* plan of [its members] to enjoy the national forests." 555 U.S. at 495 (emphasis added). It held that use of an area "roughly in the vicinity" of the challenged activity was insufficient. *Id.* at 499.

Focusing in on these decisions, this Court requires specific allegations of harm to establish standing. In *Pollack v. DOJ*, for example, this Court held that a CWA plaintiff lacked standing because he did not plead a specific connection between himself and alleged pollution of Lake Michigan. 577 F.3d 736, 741–43 (7th Cir. 2009). Although the plaintiff in *Pollack* alleged that he recreated along the Illinois shore, ate freshwater fish, and drank water from the lake, the plaintiff never specified, *inter alia*, "where along th[e] shoreline he visits." *Id.* at 743. His "generalized statements" were insufficient to establish standing. *Id.*

The law in other circuits is the same. The Fifth Circuit has held that "[w]ithout a geographic nexus, [a plaintiff's] members cannot suffer an injury in fact. To show that nexus, Petitioners must point to evidence. Courts cannot simply presume pollution discharged in one place will affect would-be plaintiffs everywhere." *Ctr. for Biological Diversity v. EPA*, 937 F.3d 533, 538–40 (5th Cir. 2019) (plaintiff lacked standing when there was no allegation that member actually viewed alleged pollution and that "someone who goes looking for pollution cannot claim an aesthetic injury in fact from seeing it.").[4]

Similarly, in *Protecting Air for Waterville v. Ohio Environmental Protection Agency*, the Sixth Circuit held that the plaintiff organization lacked standing when "unidentified members" were exposed to toxic emissions; the plaintiff's "bare allegations . . . failed to provide evidence that any individual members . . . [would] be harmed . . . ." 763 F. App'x 504, 508 (6th Cir. 2019); s*ee also N.M. Off-Highway Vehicle All. v. U.S. Forest Serv.*, 645 F. App'x 795, 802 (10th Cir. 2016) (noting that a plaintiff is not required "to allege that he has traversed each bit of land that will be affected by the designation process," but must, at a minimum, "show that he has visited a *particular* site affected by the Forest Service's actions" (internal quotation omitted) (emphasis in original)); *Wilderness Soc'y, Inc. v. Rey*, 622 F.3d 1251, 1256–57 (9th Cir. 2010) (finding no standing because plaintiff failed to allege "that his future enjoyment [was] in any way threatened by" the challenged activity; no

[4] *See also Envt. Tex. Citizen Lobby v. ExxonMobil Corp.*, No. 17-20545, 2020 WL 4345337, at *7 (5th Cir. July 29, 2020) ("Plaintiffs must demonstrate the existence of a specific geographic or other causative nexus such that the violation could have affected their members." (internal quotation omitted)).

indication that the activity "would . . . impact his personal recreational or aesthetic interests in the land").

Here, PRN's Complaint includes one paragraph purporting to establish its members' "injury in fact." Compl. ¶ 13, APP0024. But that scant paragraph provides only vague, conclusory statements about "harm" to itself and its members, an allegation insufficient to support Article III standing. PRN alleges that its members "live near, study, work, and recreate in and around the Middle Fork, including in the vicinity of the Vermilion Power Station," and that its members "use and enjoyment of the Middle Fork is harmed." *Id.* Critically absent is any connection between its members and the alleged discharges.

For example, PRN does not allege that its members have traveled the river adjacent to the Vermilion Power Station; that they have made physical contact with allegedly affected waters or have been exposed to contamination in any way; that they have seen the allegedly discolored areas; or that they are even aware of the alleged contamination. The Complaint does not allege any facts to show *how* PRN's members' "use and enjoyment" has been harmed. Nor does it allege that PRN's members have reduced the frequency of their recreation along the Middle Fork, limited the scope of their visits, or even are concerned about alleged contamination.

At best, the Complaint alleges that unidentified PRN members merely frequent the area "roughly in the vicinity" of the alleged discharges. As the Supreme Court has held, that is insufficient. *Summers*, 555 U.S. at 499. Nor do PRN's allegations establish that its members have been "perceptibly affected" by

the alleged discharges, *Lujan*, 504 U.S. at 566, and thus its "generalized statements" of harm are insufficient to create an injury in fact, *Pollack*, 577 F.3d at 743. In the absence of any specific allegations of nexus, this Court "cannot simply presume" that PRN's members have suffered an injury in fact. *Ctr. for Biological Diversity*, 937 F.3d at 538.

PRN's opening brief does not rely on the Complaint to establish standing, but on declarations presented for the first time to this Court. PRN Br. at 11–14. But PRN's last-minute, post-judgment declarations cannot establish standing at this stage of the litigation. PRN's so-called "Motion for Leave to File" these declarations (ECF No. 20-1) fails to meet (or even purport to meet) the requirements of Federal Rule of Appellate Procedure 10(e), and it should be denied on that basis alone, as explained in Dynegy's opposition (ECF No. 25).

Further, a plaintiff must establish standing at each stage of the litigation, and "[w]here, as here, a case is at the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each [standing] element." *Spokeo Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). On its face, PRN's Complaint in this case fails to *allege* facts necessary to demonstrate an injury in fact to support its standing, and therefore dismissal of PRN's Complaint should be affirmed for lack of jurisdiction. *See Shila v. ACT Inc.*, 807 F.3d 169, 173 (7th Cir. 2015) ("[A] facial challenge [to standing] argues that the plaintiff has not sufficiently *alleged* a basis of subject matter jurisdiction." (internal quotation omitted) (emphasis in original)); *see also N.M. Off-Highway Vehicle All.*, 645 F.

App'x at 802 ("[I]n an attempt to rectify the failings of its original standing affidavit, NMOHVA submitted a supplemental standing affidavit with its opening appellate brief. This affidavit, however, was not presented to the district court; consequently, we will not consider it.").

II. *County of Maui* Requires Affirmance, Not Remand

PRN incorrectly argues that *County of Maui*, 140 S. Ct. 1462, 1477 (2020), requires summary reversal and remand "so that the district court can find the facts and apply this new test in the first instance." PRN Br. at 9. The opposite is true. *County of Maui* supports affirmance of the judgment as a matter of law without any further fact finding by the district court. *County of Maui* considered whether alleged groundwater discharges to the Pacific Ocean from wastewater injection wells are subject to regulation under the CWA. The Supreme Court's analysis did *not* conclude that they were. Nor did the Supreme Court decide that *all* groundwater that is "hydrologically connected" to surface water is regulated by the CWA (which was PRN's position before the district court, and which it continues to press[5]). Instead, as explained below, the Supreme Court found that Congress intended the CWA to regulate *some* groundwater and provided guidance for courts to use to identify the groundwater subject to CWA regulation. Under *County of Maui*, then, the groundwater at issue in this case should remain subject only to

[5] Plaintiff's Resp. in Opp'n to Mot. to Dismiss at APP0087 ("[D]ischarges to surface water that are conveyed via hydrologically connected groundwater, as in this case, are within the CWA's jurisdiction and properly adjudicated in federal district courts.").

Illinois law, without the need for any additional fact finding by the district court as requested by PRN.

County of Maui has two primary findings, both important here. First, the Supreme Court considered the CWA's structure and legislative history and concluded that "Congress left general groundwater regulatory authority to the States; its failure to include groundwater in the general EPA permitting provision was deliberate." 140 S. Ct. at 1472.[6] This determination mirrors this Court's holding in *Village of Oconomowoc Lake v. Dayton Hudson Corp.,* 24 F.3d 962 (7th Cir. 1994) ("*Oconomowoc*"), relied upon by the district court below. Order at APP0013. Specifically, this Court held in *Oconomowoc* that "[t]he omission of ground waters from the [CWA] was not an oversight," and "Congress elected to leave the subject [of groundwater regulation] to state law . . . ." 24 F.3d at 965.[7]

Second, after recognizing Congress's intent to leave groundwater regulation to the States, the Supreme Court expressed serious concern with what it perceived to be a "large and obvious" potential "loophole" in the CWA's permitting regime if the regime were interpreted to categorically exclude all groundwater. 140 S. Ct. at 1473. Specifically, the Court was concerned with the possibility of a discharger

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[6] *See also County of Maui*, 140 S. Ct. at 1471 ("[T]he structure of the [CWA] indicates that, as to groundwater pollution and nonpoint source pollution, Congress intended to leave substantial responsibility and autonomy to the States.").

[7] PRN's suggestion that *Oconomowoc* did not address the issues here is based on the mistaken premise that *Oconomowoc* entailed "no specific allegation of a point source discharge to navigable waters through hydrologically connected groundwater . . . ." PRN Br. at 19. But that premise is demonstrably incorrect, as the pleadings in *Oconomowoc* included that specific allegation. Reply in Supp. of Def.'s Mot. to Dismiss at APP0095–96.

seeking to avoid regulation by intentionally manipulating the location of its discharge away from a surface waterbody "perhaps only a few yards, so that the pollution must travel through at least some groundwater before reaching the sea." *Id.*[8] Concluding that Congress could not have intended this regulatory gap, the Court announced its gap-filling "functional equivalent of a direct discharge" test for lower courts to apply to certain discharges to groundwater. *Id.* at 1476.[9] In doing so, the Court reiterated and emphasized that application of its new test should not "undermin[e] state regulation of groundwater." *Id.* at 1476.

Consistent with both *County of Maui*'s and *Oconomowoc*'s acknowledgement of state authority over groundwater, the State of Illinois decades earlier enacted the Illinois Groundwater Protection Act (415 Ill. Comp. Stat. 55/1 *et seq.*) ("IGPA"). Through this 1987 legislation, the Illinois General Assembly recognized the "essential and pervasive role of groundwater" and that "groundwaters differ in many important respects from surface waters." *Id.* at 55/2(b), 55/8(b)(1). The Illinois Pollution Control Board ("Board") subsequently conducted an exhaustive, three-year rulemaking to implement the IGPA. *See In the Matter of: Groundwater*

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[8] During oral agument, justices expressed alarm with the potential for such manipulation, noting they did not wish to provide a "road map" for those wishing to evade regulation. Transcript of Oral Argument at 9:15–10:5, 26:16–21, *County of Maui*, 140 S. Ct. 1462 (2020) (No. 18-260) (questioning by Breyer, J. & Kagan, J.), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-260_8mjp.pdf (last visited Aug. 31, 2020).

[9] *Oconomowoc* is also consistent with this second primary finding of *County of Maui* asserting CWA jurisdiction over some groundwater in that this Court in *Oconomowoc* expressly stated that its analysis could differ if the CWA or its regulations were altered to assert a "claim of authority over artificial ponds that drain into ground waters." 24 F.3d at 966.

Quality Standards: 35 Ill. Adm. Code 303, 616, 620, R1989-14(A)-(C). After considering an extensive record, the Board promulgated "comprehensive water quality standards which are specifically for the protection of groundwater," codified at 35 Ill. Adm. Code § 620.105–615 ("Part 620"). *See In the Matter of: Groundwater Quality Standards: 35 Ill. Adm. Code §§ 303, 616, 620*, R1989-14(A)&(B), Second Notice Opinion and Order of the Board at 2 (Ill. Pol. Control Bd. July 25, 1991), https://pcb.illinois.gov/documents/dsweb/Get/Document-22668 (last visited Aug. 31, 2020).

In relevant part, Part 620 classifies all groundwaters in Illinois (based on their resource value), 35 Ill. Adm. Code § 620.105; prohibits any person from "caus[ing], threaten[ing] or allow[ing] the release of any contaminant to a resource groundwater," *id.* at § 620.301(a); establishes groundwater quality standards and criteria for each classification, *id.* at §§ 620.201, 620.401; and prescribes procedures for Illinois' management and protection of groundwater, *id.* at § 620.105. This robust state regulatory regime fully addresses the Supreme Court's threshold concern in *County of Maui* because it prevents a discharger in Illinois from evading regulation by moving its discharge location to the ground.[10]

PRN has conceded the lack of a regulatory gap here by pursuing duplicative state litigation against Dynegy, contending that the same alleged discharges to groundwater violate Illinois groundwater law. PRN filed that action on March 29, 2019, and it is pending before the Board. In that action, PRN seeks civil penalties

[10] Nor has PRN alleged such an attempt to avoid regulation at Vermilion.

and injunctive relief, just as it does here. Compl. at 15, *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, PCB 2019-093, (Ill. Pol. Control Bd. Mar. 29, 2019), https://pcb.illinois.gov/documents/dsweb/Get/Document-99972 (last visited Aug. 31, 2020). Given this Illinois construct, it is unnecessary to apply *County of Maui*'s "functional equivalent of a direct discharge" test to the allegations in this case as PRN requests, and it would be inconsistent with the Supreme Court's decision to do so.

Moreover, extending CWA jurisdiction to include the state-regulated groundwater discharges alleged by PRN would run afoul of the Supreme Court's direction for lower courts to avoid applying the "functional equivalent" test when it would "create serious risks . . . of undermining state regulation of groundwater." *County of Maui*, 140 S. Ct. at 1477. Serious risks, including direct conflicts, would arise and undermine the Illinois groundwater regime if CWA jurisdiction were to apply here.[11]

For example, extending CWA jurisdiction over the Illinois groundwater at issue would require application of *surface water* quality standards to the *groundwater* at issue, in direct contravention of Illinois groundwater law. In Illinois, like many states, federally enforceable NPDES permits are issued by the

[11] Indeed, extending CWA jurisdiction to groundwater may raise issues of conflict or obstacle preemption with respect to Illinois groundwater regulations. The Supreme Court has long held that courts should not read federal statutes in a manner that may preempt state law, "unless that was the clear and manifest purpose of Congress." *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

State, pursuant to a state regulatory program approved by EPA.[12] That regulatory program establishes surface water quality standards at 35 Ill. Adm. Code § 302, Subpart B (which is part of 35 Ill. Adm. Code Subtitle C[13]) for general use waters, including the Middle Fork at issue here, and PRN's Complaint alleges violations of these standards.[14] These surface water quality standards are central to the Illinois CWA NPDES permitting program (which PRN contends apply here) and establish "the beginning point for determining limits in [NPDES] discharge permits."[15]

But Illinois' groundwater law specifically *rejects* applying the surface water quality standards (35 Ill. Adm. Code § 302, Subpart B) to groundwater. *See* 35 Ill. Adm. Code § 620.130 ("Groundwater is not required to meet the general use standards . . . of 35 Ill. Adm. Code 302.Subparts B and C."). When the Board adopted Illinois' original groundwater regulations, it "observed at length that groundwaters differ in important regards from surface waters, and that standards based on surface water considerations (as are the Subtitle C standards) often have

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[12] EPA approved the Illinois NPDES program on October 23, 1977. *NPDES State Program Authority*, U.S. EPA, https://www.epa.gov/npdes/npdes-state-program-authority (last visited Aug. 31, 2020). Illinois' federally-approved state regulations are codified at 35 Ill. Adm. Code § 301.101 *et seq*.

[13] The Illinois Administrative Code is organized by titles, subtitles, chapters, parts, subparts and sections. Environmental regulations concerning water pollution are within Subtitle C (Water Pollution) of Title 35. Specifically, Subtitle C includes 35 Ill. Adm. Code §§ 301.101-399.140. The Subpart B referenced here includes 35 Ill. Adm. Code §§ 302.201–213.

[14] The Complaint alleges the water quality standards of 35 Ill. Adm. Code §§ 302.201–213 are applicable to the Middle Fork of the Vermilion River. Compl. ¶ 49, APP0031–32.

[15] *In the Matter of: Triennial Water Quality Review Amendments to 35 Ill. Adm. Code 302.202, 302.212, 302.213, 304.122, AND 304.301 (Ammonia Nitrogen)*, R91-1(B), Final Opinion and Order of the Board, 1996 WL 33408308 at *5 (Ill. Pollution Control Bd. Dec. 19, 1996).

no basis in groundwater consideration." *In the Matter of: Groundwater Quality Standards: 35 Ill. Adm. Code §§ 303, 616, 620*, R1989-14(C), Final Opinion and Order of the Board at 8 (Ill. Pollution Control Bd. Sept. 3, 1992), https://pcb.illinois.gov/documents/dsweb/Get/Document-21395 (last visited Aug. 31, 2020). Further, the Board explained that "[s]ome of the Subtitle C standards, if applied to underground waters, would have fully unacceptable consequences." *Id.* at 9 (noting, for example, that subjecting groundwater to the ammonia standards applicable to surface waters could threaten use of ammonia fertilizer).

In sum, not only is there no regulatory gap in Illinois law as to the alleged discharges here, but PRN's attempt to require an NPDES permit for such discharges is also directly contrary to Illinois law because extending CWA jurisdiction over the Illinois groundwater at issue would result in requiring the application of surface water quality standards to groundwater. Applying *County of Maui*'s "functional equivalent" test under these circumstances would do more than "*create serious risks* . . . of undermining state regulation of groundwater," *County of Maui*, 140 S. Ct. at 1477 (emphasis added), it would directly undermine it. *County of Maui's* "functional equivalent of a direct discharge" test does not apply here by its own terms so there is no need for the Court to remand. The district court's judgment dismissing this action should be affirmed on this basis.

III. Dismissal is Required Because RCRA Regulation Precludes the CWA Regulation Sought by the Complaint

The Court may also properly affirm the judgment on the independent ground that Congress clearly intends for RCRA, and not the CWA, to regulate the specific

groundwater discharges alleged here. This conclusion is necessitated by (i) Congress's recent amendments to RCRA to mandate compliance with the requirements of the federal CCR Rule; and (ii) a longstanding prohibition against conflicting regulation. Although this Court has yet to directly address the interplay between RCRA, the CCR Rule, and the CWA with respect to groundwater, two other circuit courts of appeals have, and both have concluded that RCRA, not the CWA, applies.[16]

A. RCRA Regulates What PRN Contends Are Point Source Discharges From Coal Ash Impoundments

"RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste," *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483, (1996).[17] It is undisputed that RCRA regulates coal ash (or "CCR", the term used in the federal CCR Rule) as a "solid waste." CCR Rule, 80 Fed. Reg. 21,302, 21,303 (Apr. 17, 2015) ("EPA is promulgating this final rule to regulate the disposal of CCR as solid waste under subtitle D of RCRA."). RCRA also

[16] PRN's Complaint is directed solely at alleged discharges to groundwater from three coal ash impoundments at Dynegy's Vermilion Power Station. Compl. ¶¶ 53–55, APP0032–33; Order at APP0018. Although PRN's Brief does not appear to dispute (nor could it) that discharges to groundwater from coal ash impoundments are already subject to RCRA regulation under the CCR Rule, the Complaint nonetheless seeks to have these same alleged groundwater discharges also regulated under CWA § 1342. Order at APP0007.

[17] *See* 42 U.S.C. § 6903 (incorporating the term "solid waste" into many of RCRA's key defined terms); *id.* at § 6903(5) (defining "hazardous waste" to mean "a solid waste, or combination of solid wastes, which . . . cause, or significantly contribute to an increase in mortality or . . . pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.").

regulates groundwater impacted by coal ash impoundments under its definition of "disposal":

> [T]he discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof *may . . . be . . . discharged into any waters, including ground waters*.

42 U.S.C. § 6903(3) (emphasis added) (included in Dynegy's Fed. R. App. P. 28(f) Appendix ("Rule 28(f) Appendix") at SUPP_APP001–03). Mindful of this construct, the EPA finalized the CCR Rule in 2015, which imposes substantial and detailed regulatory requirements concerning discharges to groundwater from coal ash impoundments—including the development and installation of monitoring well networks, determinations of background concentrations, ongoing sampling for an extensive suite of chemical parameters, the application of specific concentration standards, and requirements for corrective measures—"to ensure that groundwater contamination at new and existing CCR units will be detected and cleaned up as necessary to protect human health and the environment." 80 Fed. Reg. at 21,396 (explaining provisions codified at 40 C.F.R. §§ 257.90–257.98).

The CCR Rule applies to over 1,000 coal ash impoundments and landfills operated by the electric power industry[18] (almost all of which are proximate to a navigable water due to power plant water demands);[19] involves an estimated cost of

[18] 80 Fed. Reg. at 21,309.
[19] *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925, 938 (6th Cir. 2018), *abrogated in part, on other grounds*, by *County of Maui*, 140 S. Ct. 1462 (2020).

more than $23 billion;[20] and has been the subject of many years of litigation, including a suit brought by PRN before the D.C. Circuit in 2018.[21]

Importantly, the CCR Rule has been explicitly embraced by Congress. Congress amended RCRA § 6945 in 2016 to include, as relevant here, a new subsection (d) requiring operators of coal ash impoundments to obtain permits and comply with the CCR Rule.[22]

B. If Groundwater Discharges From Coal Ash Impoundments Are Regulated By CWA § 1342 as Plaintiff Argues, Then They Would No Longer Be Regulated Under RCRA

Despite advocating for a comprehensive CCR Rule before the D.C. Circuit,[23] PRN here pursues conflicting CWA regulation of groundwater discharges from coal

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[20] 80 Fed. Reg. at 21,459 (estimating the present value of coal ash pollution control costs at a 3% discount rate).

[21] In *Utility Solid Waste Activities Group v. EPA*, 901 F.3d 414 (D.C. Cir. 2018), the D.C. Circuit generally upheld the CCR Rule. At the urging of PRN and other environmental group petitioners, though, the court required further rulemaking by EPA to specifically include coal ash impoundments at inactive facilities, like those alleged by PRN in this case. EPA has issued its initial notice of that rulemaking and recently announced an intention to issue a proposed rule by July 2021. RIN 2050-AH14, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202004&RIN=2050-AH14 (last visited on Aug. 31, 2020).

[22] 42 U.S.C. § 6945(d)(3) ("The applicable criteria for coal combustion residuals units under part 257 of title 40, Code of Federal Regulations (or successor regulations promulgated pursuant to sections 6907(a)(3) and 6944(a) of this title), shall apply to each coal combustion residuals unit in a State unless— (A) a permit under a State permit program or other system of prior approval and conditions approved by the Administrator under paragraph (1)(B) is in effect for the coal combustion residuals unit; or (B) a permit issued by the Administrator in a State in which the Administrator is implementing a permit program under paragraph (2)(B) is in effect for the coal combustion residuals unit.").

[23] *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d at 425 ("Environmental Petitioners are an assortment of environmental groups . . . . They generally claim that EPA did not go far enough to protect the public and the environment from the harms of Coal Residual disposal.").

ash impoundments which would, as the Sixth Circuit recognized, "gut" and "effectively nullify" the CCR Rule. *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d at 938. This is so because RCRA cannot regulate industrial point source discharges subject to regulation by CWA § 1342.[24]

While RCRA defines "solid waste" rather broadly, it specifically *exempts* industrial point source discharges regulated by CWA § 1342:

> The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material . . . *but does not include* solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or *industrial discharges which are point sources subject to permits under section 1342 of Title 33* . . . .

42 U.S.C. § 6903(27) (emphasis added). Given this statutory text, it is clear that any (1) industrial discharge (2) from a point source (3) subject to regulation under CWA § 1342 cannot also be subject to RCRA regulation as a solid waste (the "Point Source Exclusion"). As this Court explained in *Inland Steel Co. v. EPA*, RCRA applies only to "disposals that are not discharges [of pollutants to navigable waters from point sources]." 901 F.2d 1419, 1422 (7th Cir. 1990).

Accepting PRN's theory of the case, there is no question that the alleged groundwater discharges at issue would be exempt from regulation under RCRA due

[24] Dynegy disputes that the Impoundments are "point sources." Dynegy's Statement of Position 7 n.8, ECF No. 16. But on appeal from a dismissal on the pleadings, the allegations of the Complaint are accepted as true. Dynegy agrees with PRN that "this Court need not reach the issue of whether the Vermilion coal ash impoundments are point sources in order to resolve this appeal." PRN Br. at 22.

to the Point Source Exclusion.[25] Any alleged discharges to groundwater from the Impoundments are "industrial," because they are associated with the former power plant, as PRN acknowledges.[26] And PRN's theory of the case necessarily assumes the Impoundments are "point sources," as only point sources require NPDES permits.[27] The remaining question, then, is whether the alleged discharges to groundwater from the Impoundments are subject to regulation under CWA § 1342, as PRN argues here.[28] If they are, then they would no longer be subject to regulation under RCRA.

The two circuit courts that have considered this same issue have found against CWA regulation, under these circumstances. The Sixth Circuit comprehensively considered the issue in *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, 905 F.3d at 937–38. There, in considering a substantively identical CWA claim concerning alleged discharges to groundwater from coal ash impoundments,[29] the Sixth Circuit held that "[r]eading the CWA to cover

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[25] (1) industrial discharges, (2) from a point source, (3) subject to permits under CWA § 1342. 42 U.S.C. § 6903(27).

[26] *See* Dynegy's Mem. in Supp. of its Mot. to Dismiss at 4 n.4, APP0059 (quoting an EPA statement that "CCR is one of the largest industrial waste streams"); PRN Response in Opp'n to Mot. to Dismiss at 9, APP0079 ("Indeed, numerous courts have recognized that coal ash impoundments and other industrial waste impoundments" are regulated by the CWA.).

[27] PRN Br. at 20, PRN Resp. in Opp'n to Mot. to Dismiss at 8, APP0078 (both asserting that "[PRN] pleaded sufficient facts to establish that the [Impoundments] at [Vermilion] are 'point source[s]' that are discharging pollutants . . . .").

[28] PRN Br. at 17.

[29] Indeed, the complaint in *Kentucky Waterways Alliance* (filed by PRN's counsel here) includes similar, and often identical, CWA claims as the Complaint in this case. Compl., *Ky. Waterways All. v. Ky. Utils. Co.*, 303 F. Supp. 3d 530 (E.D. Ky. July 12, 2017) (No. 17-cv-00292).

groundwater pollution like that at issue in this case would upend the existing regulatory framework. RCRA explicitly exempts from its coverage any pollution that is subject to CWA regulation." *Id.* at 937 (citing 42 U.S.C. § 6903(27)). The court went on to explain:

> *In that way, RCRA and the CWA are mutually exclusive—if certain conduct is regulated under the CWA and requires an NPDES permit, RCRA does not apply.* Were we to read the CWA to cover KU's conduct here, KU's coal ash treatment and storage practices would be exempted from RCRA's coverage. But coal ash is solid waste, and RCRA is specifically designed to cover solid waste. *See* [42 U.S.C.] § 6902(a)(1). Reading the CWA so as to remove solid waste management practices from RCRA's coverage is thus problematic.
>
> What is more problematic, though, is the fact that, pursuant to RCRA, the EPA has issued a formal rule that specifically covers coal ash storage and treatment. *See* 80 Fed. Reg. 21,302 (Apr. 17, 2015) (the "CCR Rule"). . . . Yet because the EPA issued the CCR Rule under RCRA, reading the CWA to cover coal ash ponds would gut the rule. Adopting Plaintiffs' reading of the CWA would mean that any coal ash pond with a hydrological connection to a navigable water would require an NPDES permit, thus removing it from RCRA's coverage and, with it, the CCR Rule. . . . *We decline to interpret the CWA in a way that would effectively nullify the CCR Rule and large portions of RCRA.*

905 F.3d at 937–38 (emphasis added, citations omitted). Accordingly, the Sixth Circuit declined to find CWA jurisdiction. *Id.* at 938. Consistent with this rationale, the Fourth Circuit similarly declined to extend CWA jurisdiction to include groundwater pollution associated with discharges from coal ash impoundments regulated by RCRA because doing so "would . . . upend this regulatory scheme." *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403, 415 (4th Cir. 2018), *abrogated in part, on other grounds, by County of Maui*, 140 S. Ct. 1462 (2020).

PRN denies that a conflict exists, but it ignores plain statutory language in doing so. PRN Br. at 28. It asserts that the "Vermilion coal ash impoundments are subject to regulation *both* under the [CWA] for their point source discharges to surface waters, *and* under RCRA, because they are waste storage and *disposal* sites." *Id.* at 28–29 (third emphasis added). But that cannot be. Given that RCRA's definition of "disposal" specifically encompasses discharges to groundwater, the CCR Rule already regulates the activity for which PRN seeks conflicting regulation under the CWA.[30]

PRN also relies on a *comment* within EPA's RCRA regulations at 40 C.F.R. § 261.4(a)(2), which states that the regulatory definition of "solid waste" excludes industrial point source discharges regulated by the CWA. PRN Br. at 29. But a plain reading of that comment supports Dynegy's position, as well as that of the Sixth and Fourth Circuits:

> This exclusion applies only to the actual point source discharge. It does not exclude industrial wastewaters while they are being *collected, stored or treated before discharge*, nor does it exclude sludges that are generated by industrial wastewater treatment.

[30] PRN's reliance (PRN Br. at 28) on *Goldfarb v. Mayor & City Counsil of Baltimore*, 791 F.3d 500 (4th Cir. 2015); *Electric Edison Institute v. EPA*, 996 F.2d 326 (D.C. Cir. 1993); and *Ecological Rights Foundation v. P&GE Co.*, 874 F.3d 1083 (9th Cir. 2017) is misplaced too. Those decisions stand only for the general proposition that regulated entities must comply with all requirements of all statutes absent a direct conflict. Here, there is a direct conflict. *See supra* Argument Section III.A; *see also Coon ex. rel. Coon v. Willett Dairy, LP*, 536 F.3d 171, 174 (2d Cir. 2008) (affirming dismissal on the basis of RCRA's anti-duplication provision where the RCRA claim was "based on the same activities and substances that the CWA covers.").

40 C.F.R. § 261.4(a)(2) cmt. (emphasis added).[31] Dynegy agrees that industrial wastewater *collected*, *stored* or *treated* within a coal ash impoundment is not excluded from the definition of solid waste under RCRA's Point Source Exclusion. But the Point Source Exclusion attaches when the wastewater is discharged (i.e. disposed) from those impoundments and regulated under the CWA, as PRN claims should be the case here.

Nor does the 1995 memo by EPA cited by PRN avoid a RCRA-CWA conflict here. PRN Br. at 29 n.9. That memo states the agency's pre-*County of Maui* view that the Point Source Exclusion "covers a subset of point sources regulated under the CWA," i.e., only those from "traditional pipe outfall-type" point sources.[32] This view is directly contrary to the plain language of RCRA and out of step with *County of Maui*.[33] The text of the Point Source Exclusion is clear—it applies to discharges from all point sources subject to permits under 33 U.S.C. § 1342. *See* 42 U.S.C. § 6903(27). Any attempt to apply the Point Source Exclusion more narrowly than

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[31] The preamble to this regulation further confirms that "[t]he obvious purpose of the industrial point source discharge exclusion in section [6903(27)] was to avoid duplicative regulation of point source discharges under RCRA and the [CWA]. Without such a provision, the discharge of wastewater into navigable waters would be 'disposal' of solid waste, and potentially subject to regulation under both the [CWA] and [RCRA]." 45 Fed. Reg. 33,084, 33,098 (May 19, 1980).

[32] EPA, Interpretation of Industrial Wastewater Discharge Exclusion from the Definition of Solid Waste at 2–3 (1995), https://www.epa.gov/npdes/pubs/owm607.pdf (last visited Aug. 31, 2020).

[33] The 1995 memo is premised on the "direct hydrological connection" theory of CWA groundwater jurisdication which was expressly rejected by the Supreme Court in its vacature of *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 206 L. Ed. 2d 916 (May 4, 2020), following *County of Maui*. *See* EPA, Interpretation of Industrial Wastewater Discharge Exclusion from the Definition of Solid Waste at 3 (1995).

its plain text must therefore be rejected. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). In any event, this purported distinction is irrelevant here, where PRN alleges that the Impoundments are "point sources" without qualification.[34]

PRN's reliance on *United States v. Dean*, 969 F.2d 187 (6th Cir. 1992); *Little Hocking Water Ass'n v. E.I. du Pont Nemours & Co.*, 91 F. Supp. 3d 940 (S.D. Ohio 2015), and *Inland Steel Co.*, for the purported "longstanding dual scheme" of RCRA and CWA regulation, does not dictate a different result. PRN Br. at 29. *Dean* discussed the "solid waste" definition's exemption for industrial point source

[34] Relatedly, and also pre-*County of Maui*, EPA repeated the incorrect view of the 1995 memo in a FAQ on its website, stating that "[f]or purposes of the [Point Source Exclusion], EPA considers the 'actual point source discharge' to be the point at which a discharge reaches the jurisdictional waters, and not in the groundwater or otherwise prior to the jurisdictional water." *See* EPA, Relationship Between the Resource Conservation and Recovery Act's Coal Combustion Residuals Rule and the Clean Water Act's National Pollutant Discharge Elimination System Permit Requirements (July 18, 2018), https://www.epa.gov/coalash/relationship-between-resource-conservation-and-recovery-acts-coal-combustion-residuals-rule (last visited Aug. 31, 2020). In addition to failing for the same reasons as the 1995 memo, the statement is unpersuasive because CWA requirements unmistakably apply at the point source, not to some diffuse release somewhere downstream. *Sierra Club v. Shell Oil Co.*, 817 F.2d 1169, 1173 (5th Cir. 1987) (holding that CWA permit requirements "are to be applied to all point sources of discharge at a facility" and explaining that "point source" "means the point of discharge of the pollutant-containing effluent."). *County of Maui* confirms this reading. The Court held that CWA jurisdiction exists only "when a point source *directly* deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means." 140 S. Ct. at 1476. This indicates that CWA jurisdiction attaches immediately when pollutants exit the point source, which PRN alleges are the Impoundments.

discharges regulated by the CWA in the context of a criminal charge regarding waste *within* a lagoon and not a discharge *from* the lagoon. 969 F.2d at 194. Because the charge in that case did not entail such a discharge, the Sixth Circuit concluded it was properly made under RCRA. *Id.*

In *Little Hocking*, the defendant argued that a RCRA citizen suit claim was precluded because the waste at issue was regulated as a point source discharge under the CWA and was thus not regulated as solid waste by RCRA. 91 F. Supp. 3d at 959–60. The court agreed, relying on this Court's opinion in *Inland Steel Co.*:

> The text of RCRA § 6903(27) and 40 C.F.R. § 261.4 state unambiguously that all point source discharges subject to regulation under section 402 of the CWA, regardless of whether there is a permit in place, cannot be considered solid waste under RCRA. *See Inland Steel Co. v. E.P.A.*, 901 F.2d 1419, 1422 (7th Cir.1990) (finding the exemption from the definition of solid waste under RCRA § 6903(27) "is for discharges subject to the permit requirements of section 402 of the [CWA], not for possession of a permit as such."). This Court concludes, therefore, that regardless of the content of the discharge and whether every substance released in the discharge is regulated under Section 402 of the CWA, such discharges in their entirety are not solid waste under RCRA if they are subject to the CWA NPDES permit scheme.

91 F. Supp. 3d at 959–60.[35] Thus, none of these cases supports PRN's position that alleged discharges from the Impoundments are properly regulated under both RCRA and the CWA.

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[35] Many other decisions also support application of the Point Source Exclusion for CWA regulated-discharges. For example, in *Coldani v. Hamm,* the plaintiff asserted RCRA and CWA claims which alleged that groundwater under its property was polluted by leaks and seepage of animal wastes from the Lima Ranch, an adjacent dairy farm deemed a point source as a "concentrated animal feeding operation." No. Civ. S-07-660, 2007 WL 2345016, at *1, *8. (E.D. Cal. Aug. 16, 2007). That polluted groundwater was alleged to migrate to a navigable water approximately a mile away. *Id.* at *1. Under those facts, the court "conclude[d] that because the animal waste discharged by Lima Ranch constitutes industrial

C. This Court Should Follow the Holdings of the Fourth and Sixth Circuits so as to Avoid a Circuit Split

Finally, PRN's attempts to avoid the same outcome as *Kentucky Waterways Alliance* and *Virginia Electric & Power Company* are unavailing, and the Court should reject them. First, PRN suggests that relevant aspects of *Kentucky Waterways Alliance* and *Virginia Electric & Power Company* are not good law after *County of Maui*. PRN Br. at 29–30. But *County of Maui* did nothing to abrogate *Kentucky Waterways Alliance's* or *Virginia Electric & Power Company's* analysis of RCRA, the CCR Rule, or their interplay with the CWA. Indeed, *County of Maui* makes no mention of the CCR Rule or RCRA, nor did that case involve coal ash impoundments. In all relevant respects, *Kentucky Waterways Alliance* and *Virginia Electric & Power Company* remain good law.[36] S*ee, e.g.*, *United States v. Harden*, 893 F.3d 434, 448 (7th Cir. 2018) (rejecting argument that precedents were abrogated in their entirety when the Supreme Court did not address the precise legal issue in dispute).

Second, PRN speculates that the Sixth Circuit in *Kentucky Waterways Alliance* did not consider the authorities PRN has cited. PRN Br. at 30. Regardless of whether that is true, none of PRN's stated authorities actually support dual

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discharge from a point source subject to NPDES permits under the CWA, it is excluded from the definition of "solid waste" under 42 U.S.C. § 6903(27). *Id.* at *10; *see also Williams Pipe Line Co. v. Bayer Corp.,* 964 F. Supp. 1300, 1328–29 (S.D. Iowa 1997) (dismissing plaintiff's RCRA claim on the basis of the Point Source Exclusion after finding that the spills to the ground from tanks (point sources) were subject to CWA permitting requirements).

[36] Because it entailed undisputed point sources (*Haw. Wildlife Fund v. County of Maui*, 24 F. Supp. 3d 980, 989 (D. Haw. 2014), *rev'd on other grounds* 140 S. Ct. 1462 (2020)), *County of Maui* also did nothing to abrogate *Virginia Electric & Power Company*'s point source determination.

RCRA/CWA regulation of the alleged Impoundment discharges at issue in this case, as discussed above.

Third, PRN attempts to brush aside *Virginia Electric & Power Company* by arguing that the decision entailed factual determinations allegedly different from the allegations of PRN's Complaint. PRN Br. at 30. But that argument fails to substantively address the Fourth Circuit's analysis of the *legal* conflict between RCRA and the CWA in the context of alleged discharges to groundwater from coal ash impoundments. *See Va. Elec. & Power Co.*, 903 F.3d at 413–15.

D. RCRA, Not the CWA, Regulates Groundwater Discharges From CCR Impoundments

In light of the irreconcilable conflict between RCRA and the CWA with respect to PRN's allegations, the Court should look to the plain language of both statutes and Congressional intent to decide which takes precedence. "The choice between two federal statutes requires an analysis of both, to see if they are indeed incompatible or if they can be harmonized, and if they are incompatible to decide which one Congress meant to take precedence." *Coker v. Trans World Airlines Inc.*, 165 F.3d 579, 583–84 (7th Cir 1999) (citing *United States v. Estate of Romani*, 523 U.S. 517, 534 (1998); *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994); *United States v. Fausto*, 484 U.S. 439, 451–55 (1988)). As explained below, Congressional intent dictates that RCRA takes precedence here. That outcome is consistent with the canons of construction requiring a specific statute to control over a general and that the more recent statute prevails over the older. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) ("[I]t is a

commonplace of statutory construction that the specific governs the general. That is particularly true where Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.") (internal citations omitted); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general."); *Quinn v. Gates*, 575 F.3d 651, 655 (7th Cir. 2009) ("It is common ground, or at least should be, that a later-enacted statute can confine the domain of an earlier one. To the extent of incompatibility, an old rule generally yields to a new one." (internal citations omitted)); *Bhd. of Maint. of Way Emps. v. CSX Transp., Inc.*, 478 F.3d 814, 817 (7th Cir. 2007); *Turner v. Sheriff of Marion Cty.*, 94 F. Supp. 2d 966, 985 (S.D. Ind. 2000) ("[W]hen there is an irreconcilable conflict between two statutes on the same subject matter passed at different sessions of the legislature, the later-enacted statute will prevail over the earlier-enacted statute.").

That Congress intended for RCRA to regulate groundwater discharges from coal ash impoundments is best demonstrated by Congress's 2016 amendment of RCRA § 6945 to include a new subpart (d). Water Infrastructure Improvements for the Nation Act, Pub. L. No. 114-322, § 2301, 130 Stat. 1628, 1736–37 (2016) (codified as amended at 42 U.S.C. § 6945(d)). Through that new legislation, Congress unequivocally intended the comprehensive regulation of groundwater discharges from coal ash impoundments to be handled under RCRA and the CCR Rule. *See* 40 C.F.R. §§ 257.90–257.98. Regulation of the same groundwater discharges by the older and more general CWA § 1342 would entirely thwart this

Congressional intent for this coal ash impoundment-specific RCRA regulation to govern in this precise instance.[37]

The Supreme Court considered the scope of the CWA as it relates to discharges to groundwater at length in *County of Maui*. Nothing in that discussion, however, indicates an intent to obviate Congress's recent specific decision to regulate discharges to groundwater *from coal ash impoundments* under RCRA. In fact, nothing in the CWA or *County of Maui* speaks to coal ash impoundments at all, much less to RCRA or discharges to groundwater regulated by RCRA.

Overlooking Congress's direction for RCRA regulation here, PRN attempts to save its CWA claims by arguing that the CWA controls over RCRA due to RCRA's anti-duplication provision. PRN Br. at 27–30. Not so. As the Sixth Circuit recognized, "RCRA and the CWA are mutually exclusive—if [a groundwater discharge from a coal ash impoundment] is regulated under the CWA and requires an NPDES permit, RCRA does not apply" due to the plain language of RCRA's solid waste definition at 42 U.S.C. § 6903(27). *Ky. Waterways All.*, 905 F.3d at 937. This straight-forward language of RCRA precludes duplicative regulation of the same groundwater discharges from coal ash impoundments by both RCRA and the CWA.

[37] The Sixth Circuit considered another canon of construction equally applicable here to reach this same conclusion. *Ky. Waterways All.*, 905 F.3d at 938 ("We decline to interpret the CWA in a way that would effectively nullify the CCR Rule and large portions of RCRA.") (citing *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." (internal quotation omitted)).

Because there is no duplication after application of the RCRA solid waste definition, the anti-duplication provision is inapplicable.

Moreover, even if RCRA's anti-duplication provision somehow applied, it would not support PRN's position because the provision's plain language is clear that RCRA should be interpreted to be consistent with the CWA "except to the extent that such application (or regulation) is not inconsistent with the requirements of [RCRA and the CWA]." 42 U.S.C. § 6905(a). That exception applies here—RCRA is not inconsistent with the CWA *unless the CWA is interpreted as PRN requests*. At the same time, applying the CWA to groundwater discharges from coal ash impoundments would be directly and wholly inconsistent with RCRA and Congress's 2016 amendment of RCRA. The anti-duplication provision therefore does not dictate that the CWA controls. Instead, Congress's specific recent statutory endorsement of the CCR Rule demonstrates its intent for RCRA, not the CWA, to regulate groundwater discharges from coal ash impoundments.

IV. Dynegy is Entitled to Judgment on Count 2

Count 2 concerns two "standard conditions" of the Permit. Dynegy is entitled to judgment on Count 2 because the violations alleged in that claim are derivative of those alleged in Count 1, and also beyond the jurisdiction of the CWA. Order at APP0018, Compl. ¶¶ 67–78, APP0035–36. This conclusion entails three steps.

First, because Count 2 (like Count 1), is exclusively predicated upon 33 U.S.C. § 1311(a) (included in Dynegy's Rule 28(f) Appendix at SUPP_APP004–13, PRN's Complaint must allege a discharge of a pollutant into navigable waters from

a point source. Order at APP0017–18 (quoting *Oconomowoc*, 24 F.3d at 963). Such is precisely what the CWA requires. Dynegy's Reply in Supp. of its Mot. to Dismiss at APP0098.

Second, as correctly determined by the district court, the *only* discharges alleged in Count 2 are the same as those alleged by Count 1—diffuse discharges to groundwater. Compl. ¶¶ 69–73, APP0035 (stating no discharges other than those alleged in Count 1); Dynegy's Reply in Supp. of its Mot. to Dismiss at APP0097. PRN's Brief does not (and cannot) point to any text of the Complaint which alleges a different discharge.[38]

Third, because there is no CWA jurisdiction over the only discharge asserted by the Complaint for Count 1 (as discussed above), Count 2 fails as well. Order at APP0018. In sum, Count 2 fails because it does not meet the jurisdictional requisite of 33 U.S.C. § 1311(a); it does not allege a discharge sufficient to confer CWA jurisdiction.

To try to save Count 2, PRN now claims that "[a]s long as Dynegy has an active NPDES permit . . . any and all violations of the permit are unlawful under the Clean Water Act." PRN Br. at 36. That claim does nothing to address the requisites of § 1311(a), which is the basis for PRN's Count 2.[39] The district court

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[38] While the Complaint states that there are nine permitted "external outfalls" at the now closed facility, from which discharges have been "authorize[d]," (*see, e.g.*, Compl. ¶ 37, APP0029), it *does not* allege that there have actually been any discharges from any of these outfalls.

[39] PRN's Count 1 and 2 arguments are logically inconsistent in that Count 1 alleges the groundwater discharges are unpermitted while Count 2 argues the Permit regulates those same discharges.

correctly observed that "a defendant polluter must have 'discharge[d]' a pollutant 'into navigable waters from a point source.'" Order at APP0017 (quoting *Oconomowoc*). Accordingly, PRN's assertion that "Dynegy has an active NPDES permit" does not supplant the need for PRN's Complaint to establish a jurisdictional discharge. PRN Br. at 36.[40]

PRN also cites case law that it alleges demonstrates the broad enforceability of NPDES permit conditions. PRN Br. at 33 n.13, 36. None of that authority, however, establishes that a §1311(a) claim may be brought in the absence of a discharge of a pollutant into navigable waters from a point source. In each enforcement and citizen suit cases cited by PRN, some jurisdictional "discharge" was established, undisputed, or assumed before a permit condition was enforced against the discharger. For example, in *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, the Fourth Circuit noted that "Gaston Copper treats contaminated storm water and releases it into . . . an impoundment" which then "discharge[s] into the environment by way of Boggy Branch, a tributary of Bull Swamp Creek." 204 F.3d 149, 152 (4th Cir. 2000). In *Northwest Environmental Advocates v. City of*

[40] A plaintiff suing under the CWA bears the burden of proof to show that, *inter alia*, a discharge has occurred. *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir. 2001). While an NPDES permit *authorizes* discharges, it does not *require* them. The mere fact that a defendant has sought, or received, approval to discharge wastewater does not prove that such a discharge has occurred. *Tex. Indep. Producers & Royalty Owners Ass'n v. EPA*, 410 F.3d 964, 973 (7th Cir. 2005) ("[T]he NOIs relied upon by the NRDC do not establish that any discharge has actually occurred into the water bodies."); *Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 430 F. Supp. 2d 996, 1010 (N.D. Cal. 2006) ("[I]t would be illogical to impose a rule holding a party conclusively liable for unpermitted point source discharges on the sole basis of statements it made in documents submitted to obtain permit coverage.").

Portland, the court noted that the sewer system at issue "discharged into the Columbia River through two outfalls," and also considered whether overflows from 54 other outfalls to two other rivers were authorized by the system's NPDES permit. 56 F.3d 979, 981, 985 (9th Cir. 1995). The same is true of each of the cases cited by PRN.[41] Because there was a clear "discharge" subject to CWA jurisdiction in each of the cases cited by PRN, they are clearly distinguishable from this case, where the district court found—in Count 1—that no such discharge existed.[42] And,

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[41] *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.*, 528 U.S. 167, 176 (2000) ("Once it received its permit, Laidlaw began to discharge various pollutants into the waterway; repeatedly . . . ."); *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009–10 (11th Cir. 2004) (determining that the alleged discharges were from "point sources within the meaning of the CWA" and into a "water of the United States" under the CWA before finding that permit conditions had been violated); *Roanoke River Basin Ass'n v. Duke Energy Progress, LLC*, No. 1:16cv607, 2017 WL 5654757, at *2 (M.D.N.C. Apr. 26, 2017) (alleging at the motion to dismiss phase that the permittee "violat[ed] prohibitions in its permit against direct and indirect discharges to Cruchfield Branch," a navigable water); *Harpeth River Watershed Ass'n v. City of Franklin, TN*, No. 3:14-1743, 2016 WL 827584, at *11 (M.D. Tenn. Mar. 3, 2016) (noting that Count 1 of the complaint "addresses actual discharges to waters of the U.S . . . ." (internal quotations omitted)); *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 437 (M.D.N.C. 2015) (noting, at the motion to dismiss phase, that "[b]eyond these authorized discharges, the Riverkeepers allege that Duke Energy is making additional, unpermitted discharges through engineered seeps, non-engineered seeps, and an unpermitted pipe" (emphasis added)); *Ohio Vally Envtl. Coal., Inc. v. Fola Coal Co.*, No. Civ. 2:12-3750, 2013 WL 6709957, at *2 (S.D.W.V. Dec. 19, 2013) ("Three outfalls discharge material from [the defendant's] operations . . . ."). Two additional cases cited by PRN—*Pymatuning Water Shed Citizens for a Hygienic Env't v. Eaton*, 506 F. Supp. 902 (W.D. Pa. 1980) and *American Canoe Ass'n, Inc. v. D.C. Water and Sewer Auth.*, 306 F. Supp. 2d 30 (D.D.C. 2004)—are also expected to be consistent with the above cases, based on the language of the published opinions, but docket records have not been made available from the Federal Records Center since PRN filed its brief.

[42] PRN attempts to distinguish two recent cases in which circuit courts declined to enforce permit conditions against operators of coal ash impoundments—*Tennessee Clean Water Network v. Tennessee Valley Authority*, 905 F.3d 436 (6th Cir. 2018)

more importantly, none supports the argument that an NPDES permit violation can be enforced under § 1311(a) in the absence of such a discharge.[43]

PRN also attempts to shift the focus away from § 1311(a), suggesting the Court focus instead on (1) the "plain language of the NPDES permit"; and (2) the text of § 1365(a), which it argues "authorizes enforcement of NPDES permit conditions." PRN Br. at 33–34. But these arguments cannot morph the cause of action alleged in Count 2 from a violation of § 1311(a) to a violation of § 1365(a) or merely a violation of an NPDES permit condition.[44] The dismissal of Count 2 should be affirmed, because, as plead by PRN, it is tethered to Count 1.[45]

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and *Sierra Club v. Virginia Electric & Power Co.*, 903 F.3d 403 (4th Cir. 2018). PRN's argument focuses on alleged contextual and textual differences between the permits at issue in those cases and the Permit here. Although Dynegy believes PRN is mistaken, the absence of the Permit from the case record prevents consideration of the argument here.

[43] In Section III.B. of its brief, PRN argues that permit provisions are enforceable even if they are not "directly tied to a discharger's point source discharges." PRN Br. at 37. This argument, however, misses the key point—there must be some jurisdictional discharge for § 1311(a) to apply. Because PRN has not alleged any discharge besides those listed in Count 1, Count 2 may not be enforced independently of Count 1.

[44] PRN conceded as much before the district court. PRN's Resp. in Opp'n to Dynegy's Mot. to Dismiss at APP0088 (stating with regard to Count 2 that "Plaintiff has asserted a viable claim that Dynegy's unauthorized discharges violate 33 U.S.C. § 1311(a) because the discharges violate the conditions of the permit.").

[45] If remanded, further proceedings would show that Count 2 will fail for additional reasons, including, for example, that Standard Conditions 23 and 25 are state-only and not federally enforceable (*see Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 358–60 (2d Cir. 1993)) and that the term "effluent" as used in the Standard Conditions and defined in Illinois law inplementing the CWA, does not include groundwater discharges from unlined coal ash impoundments. *Cent. Ill. Pub. Serv. Co. v. IEPA*, PCB 84-105, 1984 WL 37567, Opinion and Order of the Board, at *3 (Ill. Pollution Control Bd. Nov. 8, 1984). These issues, which may require extrinsic evidence, are not appropriately considered at this stage of the case.

Conclusion

For the reasons stated herein, the judgment should be affirmed.

Dated: August 31, 2020

Respectfully Submitted,

/s/ *Daniel J. Deeb*

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Certificate of Compliance

I hereby certify that this brief conforms to the type-volume limit of Circuit Rule 32(c) and the typeface requirements of Circuit Rule 32(b). This brief consists of 11,439 words, excluding those items noted in Fed. R. App. P. 32(f). This document was prepared using Microsoft Word 2013 and uses a proportional Century font with 12-point font in the text and 12-point font in the footnotes.

Dated: August 31, 2020.

/s/ *Daniel J. Deeb*
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Certificate of Service

I hereby certify that on August 31, 2020, I have served true and correct copies of the foregoing through the Court's Case Management and Electronic Filing System to all counsel of record.

/s/ *Daniel J. Deeb*
Daniel J. Deeb

No. 18-3644

United States Court of Appeals
for the Seventh Circuit

Prairie Rivers Network,

Plaintiff-Appellant

vs.

Dynegy Midwest Generation, LLC,

Defendant-Appellee

Appeal from the U.S. District Court for the Central District of Illinois
No. 18-CV-02148
Hon. Judge Colin S. Bruce

Defendant-Appellee Dynegy Midwest Generation, LLC's Federal Rule of Appellate Procedure 28(f) Appendix

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Volume I

management and resource conservation techniques, more effective organizational arrangements, and new and improved methods of collection, separation, and recovery, and recycling of solid wastes and environmentally safe disposal of nonrecoverable residues;

(10) promoting the demonstration, construction, and application of solid waste management, resource recovery, and resource conservation systems which preserve and enhance the quality of air, water, and land resources; and

(11) establishing a cooperative effort among the Federal, State, and local governments and private enterprise in order to recover valuable materials and energy from solid waste.

(b) National policy

The Congress hereby declares it to be the national policy of the United States that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment.

(Pub. L. 89–272, title II, §1003, as added Pub. L. 94–580, §2, Oct. 21, 1976, 90 Stat. 2798; amended Pub. L. 98–616, title I, §101(b), Nov. 8, 1984, 98 Stat. 3224.)

PRIOR PROVISIONS

Provisions similar to those in this section were contained in section 3251 of this title, prior to the general amendment of the Solid Waste Disposal Act by Pub. L. 94–580.

AMENDMENTS

1984—Subsec. (a). Pub. L. 98–616, §101(b)(1), designated existing provisions as subsec. (a).

Subsec. (a)(4) to (11). Pub. L. 98–616, §101(b)(2), struck out par. (4) which provided for regulating the treatment, storage, transportation, and disposal of hazardous wastes which have adverse effects on health and the environment, added pars. (4) to (7), and redesignated former pars. (5) to (8) as (8) to (11), respectively.

Subsec. (b). Pub. L. 98–616, §101(b)(1), added subsec. (b).

§ 6903. Definitions

As used in this chapter:

(1) The term ''Administrator'' means the Administrator of the Environmental Protection Agency.

(2) The term ''construction,'' with respect to any project of construction under this chapter, means (A) the erection or building of new structures and acquisition of lands or interests therein, or the acquisition, replacement, expansion, remodeling, alteration, modernization, or extension of existing structures, and (B) the acquisition and installation of initial equipment of, or required in connection with, new or newly acquired structures or the expanded, remodeled, altered, modernized or extended part of existing structures (including trucks and other motor vehicles, and tractors, cranes, and other machinery) necessary for the proper utilization and operation of the facility after completion of the project; and includes preliminary planning to determine the economic and engineering feasibility and the public health and safety aspects of the project, the engineering, architectural, legal, fiscal, and economic investigations and studies, and any surveys, designs, plans, working drawings, specifications, and other action necessary for the carrying out of the project, and (C) the inspection and supervision of the process of carrying out the project to completion.

(2A) The term ''demonstration'' means the initial exhibition of a new technology process or practice or a significantly new combination or use of technologies, processes or practices, subsequent to the development stage, for the purpose of proving technological feasibility and cost effectiveness.

(3) The term ''disposal'' means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

(4) The term ''Federal agency'' means any department, agency, or other instrumentality of the Federal Government, any independent agency or establishment of the Federal Government including any Government corporation, and the Government Publishing Office.

(5) The term ''hazardous waste'' means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

(6) The term ''hazardous waste generation'' means the act or process of producing hazardous waste.

(7) The term ''hazardous waste management'' means the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes.

(8) For purposes of Federal financial assistance (other than rural communities assistance), the term ''implementation'' does not include the acquisition, leasing, construction, or modification of facilities or equipment or the acquisition, leasing, or improvement of land.

(9) The term ''intermunicipal agency'' means an agency established by two or more municipalities with responsibility for planning or administration of solid waste.

(10) The term ''interstate agency'' means an agency of two or more municipalities in different States, or an agency established by two or more States, with authority to provide for the management of solid wastes and serving two or more municipalities located in different States.

(11) The term ''long-term contract'' means, when used in relation to solid waste supply, a contract of sufficient duration to assure the viability of a resource recovery facility (to the ex-

tent that such viability depends upon solid waste supply).

(12) The term ''manifest'' means the form used for identifying the quantity, composition, and the origin, routing, and destination of hazardous waste during its transportation from the point of generation to the point of disposal, treatment, or storage.

(13) The term ''municipality'' (A) means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law, with responsibility for the planning or administration of solid waste management, or an Indian tribe or authorized tribal organization or Alaska Native village or organization, and (B) includes any rural community or unincorporated town or village or any other public entity for which an application for assistance is made by a State or political subdivision thereof.

(14) The term ''open dump'' means any facility or site where solid waste is disposed of which is not a sanitary landfill which meets the criteria promulgated under section 6944 of this title and which is not a facility for disposal of hazardous waste.

(15) The term ''person'' means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body and shall include each department, agency, and instrumentality of the United States.

(16) The term ''procurement item'' means any device, good, substance, material, product, or other item whether real or personal property which is the subject of any purchase, barter, or other exchange made to procure such item.

(17) The term ''procuring agency'' means any Federal agency, or any State agency or agency of a political subdivision of a State which is using appropriated Federal funds for such procurement, or any person contracting with any such agency with respect to work performed under such contract.

(18) The term ''recoverable'' refers to the capability and likelihood of being recovered from solid waste for a commercial or industrial use.

(19) The term ''recovered material'' means waste material and byproducts which have been recovered or diverted from solid waste, but such term does not include those materials and byproducts generated from, and commonly reused within, an original manufacturing process.

(20) The term ''recovered resources'' means material or energy recovered from solid waste.

(21) The term ''resource conservation'' means reduction of the amounts of solid waste that are generated, reduction of overall resource consumption, and utilization of recovered resources.

(22) The term ''resource recovery'' means the recovery of material or energy from solid waste.

(23) The term ''resource recovery system'' means a solid waste management system which provides for collection, separation, recycling, and recovery of solid wastes, including disposal of nonrecoverable waste residues.

(24) The term ''resource recovery facility'' means any facility at which solid waste is processed for the purpose of extracting, converting to energy, or otherwise separating and preparing solid waste for reuse.

(25) The term ''regional authority'' means the authority established or designated under section 6946 of this title.

(26) The term ''sanitary landfill'' means a facility for the disposal of solid waste which meets the criteria published under section 6944 of this title.

(26A) The term ''sludge'' means any solid, semisolid or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility or any other such waste having similar characteristics and effects.

(27) The term ''solid waste'' means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923) [42 U.S.C. 2011 et seq.].

(28) The term ''solid waste management'' means the systematic administration of activities which provide for the collection, source separation, storage, transportation, transfer, processing, treatment, and disposal of solid waste.

(29) The term ''solid waste management facility'' includes—

(A) any resource recovery system or component thereof,

(B) any system, program, or facility for resource conservation, and

(C) any facility for the collection, source separation, storage, transportation, transfer, processing, treatment or disposal of solid wastes, including hazardous wastes, whether such facility is associated with facilities generating such wastes or otherwise.

(30) The terms ''solid waste planning'', ''solid waste management'', and ''comprehensive planning'' include planning or management respecting resource recovery and resource conservation.

(31) The term ''State'' means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(32) The term ''State authority'' means the agency established or designated under section 6947 of this title.

(33) The term ''storage'', when used in connection with hazardous waste, means the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste.

(34) The term ''treatment'', when used in connection with hazardous waste, means any method, technique, or process, including neutraliza-

tion, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.

(35) The term ''virgin material'' means a raw material, including previously unused copper, aluminum, lead, zinc, iron, or other metal or metal ore, any undeveloped resource that is, or with new technology will become, a source of raw materials.

(36) The term ''used oil'' means any oil which has been—

(A) refined from crude oil,

(B) used, and

(C) as a result of such use, contaminated by physical or chemical impurities.

(37) The term ''recycled oil'' means any used oil which is reused, following its original use, for any purpose (including the purpose for which the oil was originally used). Such term includes oil which is re-refined, reclaimed, burned, or reprocessed.

(38) The term ''lubricating oil'' means the fraction of crude oil which is sold for purposes of reducing friction in any industrial or mechanical device. Such term includes re-refined oil.

(39) The term ''re-refined oil'' means used oil from which the physical and chemical contaminants acquired through previous use have been removed through a refining process.

(40) Except as otherwise provided in this paragraph, the term ''medical waste'' means any solid waste which is generated in the diagnosis, treatment, or immunization of human beings or animals, in research pertaining thereto, or in the production or testing of biologicals. Such term does not include any hazardous waste identified or listed under subchapter III or any household waste as defined in regulations under subchapter III.

(41) The term ''mixed waste'' means waste that contains both hazardous waste and source, special nuclear, or by-product material subject to the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.).

(Pub. L. 89–272, title II, §1004, as added Pub. L. 94–580, §2, Oct. 21, 1976, 90 Stat. 2798; amended Pub. L. 95–609, §7(b), Nov. 8, 1978, 92 Stat. 3081; Pub. L. 96–463, §3, Oct. 15, 1980, 94 Stat. 2055; Pub. L. 96–482, §2, Oct. 21, 1980, 94 Stat. 2334; Pub. L. 100–582, §3, Nov. 1, 1988, 102 Stat. 2958; Pub. L. 102–386, title I, §§103, 105(b), Oct. 6, 1992, 106 Stat. 1507, 1512; Pub. L. 113–235, div. H, title I, §1301(b), Dec. 16, 2014, 128 Stat. 2537.)

REFERENCES IN TEXT

The Atomic Energy Act of 1954, referred to in pars. (27) and (41), is act Aug. 1, 1946, ch. 724, as added by act Aug. 30, 1954, ch. 1073, §1, 68 Stat. 919, which is classified principally to chapter 23 (§2011 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2011 of this title and Tables.

PRIOR PROVISIONS

Provisions similar to those in this section were contained in section 3252 of this title, prior to the general amendment of the Solid Waste Disposal Act by Pub. L. 94–580.

AMENDMENTS

1992—Par. (15). Pub. L. 102–386, §103, inserted before period at end ''and shall include each department, agency, and instrumentality of the United States''.

Par. (41). Pub. L. 102–386, §105(b), added par. (41).

1988—Par. (40). Pub. L. 100–582 added par. (40).

1980—Par. (14). Pub. L. 96–482, §2(a), defined ''open dump'' to include a facility, substituted requirement that disposal facility or site not be a sanitary landfill meeting section 6944 of this title criteria for prior requirement that disposal site not be a sanitary landfill within meaning of section 6944 of this title, and required that the disposal facility or site not be a facility for disposal of hazardous waste.

Par. (19). Pub. L. 96–482, §2(b), defined ''recovered material'' to cover byproducts, substituted provision for recovery or diversion of waste material and byproducts from solid waste for prior provision for collection or recovery of material from solid waste, and excluded materials and byproducts generated from and commonly reused within an original manufacturing process.

Pars. (36) to (39). Pub. L. 96–463, §3, added pars. (36) to (39).

1978—Par. (8). Pub. L. 95–609, §7(b)(1), struck out provision stating that employees' salaries due pursuant to subchapter IV of this chapter would not be included after Dec. 31, 1979.

Par. (10). Pub. L. 95–609, §7(b)(2), substituted ''management'' for ''disposal''.

Par. (29)(C). Pub. L. 95–609, §7(b)(3), substituted ''the collection, source separation, storage, transportation, transfer, processing, treatment or disposal'' for ''the treatment''.

CHANGE OF NAME

''Government Publishing Office'' substituted for ''Government Printing Office'' in par. (4) on authority of section 1301(b) of Pub. L. 113–235, set out as a note preceding section 301 of Title 44, Public Printing and Documents.

TRANSFER OF FUNCTIONS

Enforcement functions of Administrator or other official of Environmental Protection Agency related to compliance with resource conservation and recovery permits used under this chapter with respect to preconstruction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, eff. July 1, 1979, §§102(a), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102–486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

§ 6904. Governmental cooperation

(a) Interstate cooperation

The provisions of this chapter to be carried out by States may be carried out by interstate agencies and provisions applicable to States may apply to interstate regions where such agencies and regions have been established by the respective States and approved by the Ad-

(A) Not to exceed $250,000,000 for making grants to municipalities and municipal entities under subsection (a)(2) of this section, in accordance with the criteria set forth in subsection (b) of this section.

(B) All remaining amounts for making grants to States under subsection (a)(1) of this section, in accordance with a formula to be established by the Administrator, after providing notice and an opportunity for public comment, that allocates to each State a proportional share of such amounts based on the total needs of the State for municipal combined sewer overflow controls and sanitary sewer overflow controls identified in the most recent survey conducted pursuant to section 1375(b)(1) of this title.

(h) Administrative expenses

Of the amounts appropriated to carry out this section for each fiscal year—

(1) the Administrator may retain an amount not to exceed 1 percent for the reasonable and necessary costs of administering this section; and

(2) the Administrator, or a State, may retain an amount not to exceed 4 percent of any grant made to a municipality or municipal entity under subsection (a) of this section, for the reasonable and necessary costs of administering the grant.

(i) Reports

Not later than December 31, 2003, and periodically thereafter, the Administrator shall transmit to Congress a report containing recommended funding levels for grants under this section. The recommended funding levels shall be sufficient to ensure the continued expeditious implementation of municipal combined sewer overflow and sanitary sewer overflow controls nationwide.

(June 30, 1948, ch. 758, title II, § 221, as added Pub. L. 106–554, § 1(a)(4) [div. B, title I, § 112(c)], Dec. 21, 2000, 114 Stat. 2763, 2763A–225.)

INFORMATION ON CSOS AND SSOS

Pub. L. 106–554, § 1(a)(4) [div. B, title I, § 112(d)], Dec. 21, 2000, 114 Stat. 2763, 2763A–227, provided that:

''(1) REPORT TO CONGRESS.—Not later than 3 years after the date of enactment of this Act [Dec. 21, 2000], the Administrator of the Environmental Protection Agency shall transmit to Congress a report summarizing—

''(A) the extent of the human health and environmental impacts caused by municipal combined sewer overflows and sanitary sewer overflows, including the location of discharges causing such impacts, the volume of pollutants discharged, and the constituents discharged;

''(B) the resources spent by municipalities to address these impacts; and

''(C) an evaluation of the technologies used by municipalities to address these impacts.

''(2) TECHNOLOGY CLEARINGHOUSE.—After transmitting a report under paragraph (1), the Administrator shall maintain a clearinghouse of cost-effective and efficient technologies for addressing human health and environmental impacts due to municipal combined sewer overflows and sanitary sewer overflows.''

SUBCHAPTER III—STANDARDS AND ENFORCEMENT

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter 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 1314(b) of this title, 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 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title 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 1314(d)(1) of this title; 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 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(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 1314(b)(2) of this title, 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 1325 of this title), 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 1314(b)(2) of this title, 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 1317 of this title;

(B) Repealed. Pub. L. 97–117, § 21(b), Dec. 29, 1981, 95 Stat. 1632.

(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 1314(b) of this title, and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title 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 1314(b) of this title, 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 1314(b) of this title, 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 1314(a)(4) of this title shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(4) of this title; 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 1314(b) of this title, 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 1342(a)(1) of this title in a permit issued after February 4, 1987, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989.

(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 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

(f) Illegality of discharge of radiological, chemical, or biological warfare agents, high-level radioactive waste, or medical waste

Notwithstanding any other provisions of this chapter it shall be unlawful to discharge any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste, into the navigable waters.

(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) of this section) 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 dis-

charge 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

Upon 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 1314(a)(4) of this title, toxic pollutants subject to section 1317(a) of this title, 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 1317(a) of this title.

(iii) Listing as toxic pollutant

If the Administrator determines that the pollutant meets the criteria for listing as a toxic pollutant under section 1317(a) of this title, the Administrator shall list the pollutant as a toxic pollutant under section 1317(a) of this title.

(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 1314 of this title;

(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 1314 of this title.

(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 1342 of this title 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 1314(a)(6) of this title;

(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 1314(a)(1) of this title 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 1251(a)(2) of this title. 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 chapter 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 1342 of this title 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 February 4, 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 1281 of this title, section 1317 of this title, and such interim effluent limitations applicable to that treatment works as the Administrator determines are necessary to carry out the provisions of this chapter.

(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 chapter 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 1342 of this title to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after December 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 chapter.

(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 1284 of this title, 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 1317(a) and (b) of this title 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) of this section under subsection (h) of this section shall be filed not later that[1] the 365th day which begins after December 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) of this section, may apply for a modification of subsection (h) of this section in its own right not later than 30 days after February 4, 1987, and except as provided in paragraph (5);

(B) subsection (b)(2)(A) of this section as it applies to pollutants identified in subsection (b)(2)(F) of this section shall be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title or not later than 270 days after December 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 chapter, 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) of this section 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 chapter 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) of this section shall not stay the requirement that the person seeking such modification comply with all applicable effluent limitations under this chapter.

(4) DEADLINE FOR SUBSECTION (g) DECISION.—An application for a modification with respect to a pollutant filed under subsection (g) of this section 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 October 31, 1994, the city of San Diego, California, may apply for a modification pursuant to subsection (h) of this section of the requirements of subsection (b)(1)(B) of this section with respect to biological oxygen de-

[1] So in original. Probably should be ''than''.

mand 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.

(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 1342 of this title 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 1342 of this title, 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 industrywide 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 1317(a)(1) of this title.

(m) Modification of effluent limitation requirements for point sources

(1) The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this title which modifies the requirements of subsections (b)(1)(A) and (b)(2)(E) of this section, and of section 1343 of this title, 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 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) of this section and section 1343 of this title exceed by an unreasonable amount the benefits to be obtained, including the objectives of this chapter;

(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 1251(a)(2) of this title;

(G) the applicant accepts as a condition to the permit a contractural[2] 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 chapter 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,

[2] So in original. Probably should be ''contractual''.

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) of this section or section 1317(b) of this title 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 1314(b) or 1314(g) of this title 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 rulemaking 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 non-water 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 February 4, 1987, shall be treated as having been submitted to the Administrator on the 180th day following February 4, 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 1311 or 1314 of this title or any national categorical pretreatment standard under section 1317(b) of this title filed before, on, or after February 4, 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 sub-

sections (c), (g), (i), (k), (m), and (n) of this section, section 1314(d)(4) of this title, and section 1326(a) of this title. 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 1342(b) of this title, may issue a permit under section 1342 of this title 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 remining 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 1313 of this title.

(3) Definitions

For purposes of this subsection—

(A) Coal remining operation

The term ''coal remining operation'' means a coal mining operation which begins after February 4, 1987 at a site on which coal mining was conducted before August 3, 1977.

(B) Remined area

The term ''remined area'' means only that area of any coal remining operation on which coal mining was conducted before August 3, 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 [30 U.S.C. 1201 et seq.] to any coal remining operation, including the application of such Act to suspended solids.

(June 30, 1948, ch. 758, title III, § 301, as added Pub. L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 844; amended Pub. L. 95–217, §§ 42–47, 53(c), Dec. 27, 1977, 91 Stat. 1582–1586, 1590; Pub. L. 97–117, §§ 21, 22(a)–(d), Dec. 29, 1981, 95 Stat. 1631, 1632; Pub. L. 97–440, Jan. 8, 1983, 96 Stat. 2289; Pub. L. 100–4, title III, §§ 301(a)–(e), 302(a)–(d), 303(a), (b)(1), (c)–(f), 304(a), 305, 306(a), (b), 307, Feb. 4, 1987, 101 Stat. 29–37; Pub. L. 100–688, title III, § 3202(b), Nov. 18, 1988, 102 Stat. 4154; Pub. L. 103–431, § 2, Oct. 31, 1994, 108 Stat. 4396; Pub. L. 104–66, title II, § 2021(b), Dec. 21, 1995, 109 Stat. 727.)

REFERENCES IN TEXT

The Surface Mining Control and Reclamation Act of 1977, referred to in subsec. (p)(4), is Pub. L. 95–87, Aug. 3, 1977, 91 Stat. 445, as amended, which is classified generally to chapter 25 (§ 1201 et seq.) of Title 30, Mineral Lands and Mining. For complete classification of this Act to the Code, see Short Title note set out under section 1201 of Title 30 and Tables.

AMENDMENTS

1995—Subsec. (n)(8). Pub. L. 104–66 substituted ''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'' for ''Every 6 months after February 4, 1987, the Administrator shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Public Works and Transportation''.

1994—Subsec. (j)(1)(A). Pub. L. 103–431, § 2(1), inserted before semicolon at end '', and except as provided in paragraph (5)''.

Subsec. (j)(5). Pub. L. 103–431, § 2(2), added par. (5).

1988—Subsec. (f). Pub. L. 100–688 substituted '', any high-level radioactive waste, or any medical waste,'' for ''or high-level radioactive waste''.

1987—Subsec. (b)(2)(C). Pub. L. 100–4, § 301(a), struck out ''not later than July 1, 1984,'' before ''with respect'' and inserted ''as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989'' after ''of this paragraph''.

Subsec. (b)(2)(D). Pub. L. 100–4, § 301(b), substituted ''as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989'' for ''not later than three years after the date such limitations are established''.

Subsec. (b)(2)(E). Pub. L. 100–4, § 301(c), substituted ''as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989, compliance with'' for ''not later than July 1, 1984,''.

Subsec. (b)(2)(F). Pub. L. 100–4, § 301(d), substituted ''as expeditiously as practicable but in no case'' for ''not'' and ''and in no case later than March 31, 1989'' for ''or not later than July 1, 1984, whichever is later, but in no case later than July 1, 1987''.

Subsec. (b)(3). Pub. L. 100–4, § 301(e), added par. (3).

Subsec. (g)(1). Pub. L. 100–4, § 302(a), substituted par. (1) for introductory provisions of former par. (1) which read as follows: ''The Administrator, with the concurrence of the State, shall modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge of any pollutant (other than pollutants identified pursuant to section 1314(a)(4) of this title, toxic pollutants subject to section 1317(a) of this title, and the thermal component of discharges) from any point

source upon a showing by the owner or operator of such point source satisfactory to the Administrator that—''. Subpars (A) to (C) of former par. (1) were redesignated as subpars. (A) to (C) of par. (2).

Subsec. (g)(2). Pub. L. 100–4, § 302(a), (d)(2), inserted introductory provisions of par. (2), and by so doing, redesignated subpars. (A) to (C) of former par. (1) as subpars. (A) to (C) of par. (2), realigned such subpars. with subpar. (A) of par. (4), and redesignated former par. (2) as (3).

Subsec. (g)(3). Pub. L. 100–4, § 302(a), (d)(1), redesignated former par. (2) as (3), inserted heading, and aligned par. (3) with par. (4).

Subsec. (g)(4), (5). Pub. L. 100–4, § 302(b), added pars. (4) and (5).

Subsec. (h). Pub. L. 100–4, § 303(d)(2), (e), in closing provisions, inserted provision defining ''primary or equivalent treatment'' for purposes of par. (9) and provisions placing limitations on issuance of permits for discharge of pollutant into marine waters and saline estuarine waters and prohibiting issuance of permit for discharge of pollutant into New York Bight Apex.

Subsec. (h)(2). Pub. L. 100–4, § 303(a), substituted ''the discharge of pollutants in accordance with such modified requirements will not interfere, alone or in combination with pollutants from other sources,'' for ''such modified requirements will not interfere''.

Subsec. (h)(3). Pub. L. 100–4, § 303(b)(1), inserted '', 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'' before semicolon at end.

Subsec. (h)(6) to (9). Pub. L. 100–4, § 303(c), (d)(1), added par. (6), redesignated former pars. (6) and (7) as (7) and (8), respectively, substituted semicolon for period at end of par. (8), and added par. (9).

Subsec. (i)(1). Pub. L. 100–4, § 304(a), substituted ''February 4, 1987'' for ''December 27, 1977''.

Subsec. (j)(1)(A). Pub. L. 100–4, § 303(f), inserted before semicolon at end '', 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) of this section, may apply for a modification of subsection (h) of this section in its own right not later than 30 days after February 4, 1987''.

Subsec. (j)(2). Pub. L. 100–4, § 302(c)(1), substituted ''Subject to paragraph (3) of this section, any'' for ''Any''.

Subsec. (j)(3), (4). Pub. L. 100–4, § 302(c)(2), added pars. (3) and (4).

Subsec. (k). Pub. L. 100–4, § 305, substituted ''two years after the date for compliance with such effluent limitation which would otherwise be applicable under such subsection'' for ''July 1, 1987'' and inserted ''or (b)(2)(E)'' after ''(b)(2)(A)'' in two places.

Subsec. (*l*). Pub. L. 100–4, § 306(b), substituted ''Other than as provided in subsection (n) of this section, the'' for ''The''.

Subsecs. (n), (*o*). Pub. L. 100–4, § 306(a), added subsecs. (n) and (*o*).

Subsec. (p). Pub. L. 100–4, § 307, added subsec. (p).

1983—Subsec. (m). Pub. L. 97–440 added subsec. (m).

1981—Subsec. (b)(2)(B). Pub. L. 97–117, § 21(b), struck out subpar. (B) which required that, not later than July 1, 1983, compliance by all publicly owned treatment works with the requirements in section 1281(g)(2)(A) of this title be achieved.

Subsec. (h). Pub. L. 97–117, § 22(a) to (c), struck out in provision preceding par. (1) ''in an existing discharge'' after ''discharge of any pollutant'', struck out par. (8), which required the applicant to demonstrate to the satisfaction of the Administrator that any funds available to the owner of such treatment works under subchapter II of this chapter be used to achieve the degree of effluent reduction required by section 1281(b) and (g)(2)(A) of this title or to carry out the requirements of this subsection, and inserted in provision following par. (7) a further provision that a municipality which applies secondary treatment be eligible to receive a permit which modifies the requirements of subsec. (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 and that no permit issued under this subsection authorize the discharge of sewage sludge into marine waters.

Subsec. (i)(1), (2)(B). Pub. L. 97–117, § 21(a), substituted ''July 1, 1988,'' for ''July 1, 1983,'' wherever appearing. Par. (2)(B) contained a reference to ''July 1, 1983;'' which was changed to ''July 1, 1988;'' as the probable intent of Congress in that reference to July 1, 1983, was to the outside date for compliance for a point source other than a publicly owned treatment works and subpar. (B) allows a time extension for such a point source up to the date granted in an extension for a publicly owned treatment works, which date was extended to July 1, 1988, by Pub. L. 97–117.

Subsec. (j)(1)(A). Pub. L. 97–117, § 22(d), substituted ''that the 365th day which begins after December 29, 1981'' for ''than 270 days after December 27, 1977''.

1977—Subsec. (b)(2)(A). Pub. L. 95–217, § 42(b), substituted ''for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph'' for ''not later than July 1, 1983''.

Subsec. (b)(2)(C) to (F). Pub. L. 95–217, § 42(a), added subpars. (C) to (F).

Subsec. (g). Pub. L. 95–217, § 43, added subsec. (g).

Subsec. (h). Pub. L. 95–217, § 44, added subsec. (h).

Subsec. (i). Pub. L. 95–217, § 45, added subsec. (i).

Subsec. (j). Pub. L. 95–217, § 46, added subsec. (j).

Subsec. (k). Pub. L. 95–217, § 47, added subsec. (k).

Subsec. (*l*). Pub. L. 95–217, § 53(c), added subsec. (*l*).

Change of Name

Committee on Public Works and Transportation of House of Representatives treated as referring to Committee on Transportation and Infrastructure of House of Representatives by section 1(a) of Pub. L. 104–14, set out as a note preceding section 21 of Title 2, The Congress.

Effective Date of 1987 Amendment

Section 302(e) of Pub. L. 100–4 provided that:

''(1) General rule.—Except as provided in paragraph (2), the amendments made by this section [amending this section] shall apply to all requests for modifications under section 301(g) of the Federal Water Pollution Control Act [33 U.S.C. 1311(g)] pending on the date of the enactment of this Act [Feb. 4, 1987] and shall not have the effect of extending the deadline established in section 301(j)(1)(B) of such Act.

''(2) Exception.—The amendments made by this section shall not affect any application for a modification with respect to the discharge of ammonia, chlorine, color, iron, or total phenols (4AAP) under section 301(g) of the Federal Water Pollution Control Act pending on the date of the enactment of this Act; except that the Administrator must approve or disapprove such application not later than 365 days after the date of such enactment.''

Section 303(b)(2) of Pub. L. 100–4 provided that: ''The amendment made by subsection (b) [amending this section] shall only apply to modifications and renewals of modifications which are tentatively or finally approved after the date of the enactment of this Act [Feb. 4, 1987].''

Section 303(g) of Pub. L. 100–4 provided that: ''The amendments made by subsections (a), (c), (d), and (e) of this section [amending this section] shall not apply to an application for a permit under section 301(h) of the Federal Water Pollution Control Act [33 U.S.C. 1311(h)] which has been tentatively or finally approved by the Administrator before the date of the enactment of this Act [Feb. 4, 1987]; except that such amendments shall apply to all renewals of such permits after such date of enactment.''

Section 304(b) of Pub. L. 100–4 provided that: ''The amendment made by subsection (a) [amending this sec-

tion] shall not apply to those treatment works which are subject to a compliance schedule established before the date of the enactment of this Act [Feb. 4, 1987] by a court order or a final administrative order.''

EFFECTIVE DATE OF 1981 AMENDMENT

Section 22(e) of Pub. L. 97–117 provided that: ''The amendments made by this section [amending this section] shall take effect on the date of enactment of this Act [Dec. 29, 1981], except that no applicant, other than the city of Avalon, California, who applies after the date of enactment of this Act for a permit pursuant to subsection (h) of section 301 of the Federal Water Pollution Control Act [33 U.S.C. 1311(h)] which modifies the requirements of subsection (b)(1)(B) of section 301 of such Act [33 U.S.C. 1311(b)(1)(B)] shall receive such permit during the one-year period which begins on the date of enactment of this Act.''

REGULATIONS

Section 301(f) of Pub. L. 100–4 provided that: ''The Administrator shall promulgate final regulations establishing effluent limitations in accordance with sections 301(b)(2)(A) and 307(b)(1) of the Federal Water Pollution Control Act [33 U.S.C. 1311(b)(2)(A), 1317(b)(1)] for 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 which are discharged from the categories of point sources in accordance with the following table:

''Category	Date by which the final regulation shall be promulgated
Organic chemicals and plastics and synthetic fibers	December 31, 1986.
Pesticides	December 31, 1986.''

PHOSPHATE FERTILIZER EFFLUENT LIMITATION

Amendment by section 306(a), (b) of Pub. L. 100–4 not to be construed (A) to require the Administrator to permit the discharge of gypsum or gypsum waste into the navigable waters, (B) to affect the procedures and standards applicable to the Administrator in issuing permits under section 1342(a)(1)(B) of this title, and (C) to affect the authority of any State to deny or condition certification under section 1314 of this title with respect to the issuance of permits under section 1342(a)(1)(B) of this title, see section 306(c) of Pub. L. 100–4, set out as a note under section 1342 of this title.

DISCHARGES FROM POINT SOURCES IN UNITED STATES VIRGIN ISLANDS ATTRIBUTABLE TO MANUFACTURE OF RUM; EXEMPTION FROM FEDERAL WATER POLLUTION CONTROL REQUIREMENTS; CONDITIONS

Pub. L. 98–67, title II, § 214(g), Aug. 5, 1983, 97 Stat. 393, as amended by Pub. L. 99–514, § 2, Oct. 22, 1986, 100 Stat. 2095, provided that: ''Any discharge from a point source in the United States Virgin Islands in existence on the date of the enactment of this subsection [Aug. 5, 1983] which discharge is attributable to the manufacture of rum (as defined in paragraphs (3) of section 7652(c) of the Internal Revenue Code of 1986 [formerly I.R.C. 1954]) [26 U.S.C. 7652(c)(3)] shall not be subject to the requirements of section 301 (other than toxic pollutant discharges), section 306 or section 403 of the Federal Water Pollution Control Act [33 U.S.C. 1311, 1316, 1343] if—

''(1) such discharge occurs at least one thousand five hundred feet into the territorial sea from the line of ordinary low water from that portion of the coast which is in direct contact with the sea, and

''(2) the Governor of the United States Virgin Islands determines that such discharge 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 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.''

CERTAIN MUNICIPAL COMPLIANCE DEADLINES UNAFFECTED; EXCEPTION

Section 21(a) of Pub. L. 97–117 provided in part that: ''The amendment made by this subsection [amending this section] shall not be interpreted or applied to extend the date for compliance with section 301(b)(1)(B) or (C) of the Federal Water Pollution Control Act [33 U.S.C. 1311(b)(1)(B), (C)] beyond schedules for compliance in effect as of the date of enactment of this Act [Dec. 29, 1981], except in cases where reductions in the amount of financial assistance under this Act [Pub. L. 97–117, see Short Title of 1981 Amendment note set out under section 1251 of this title] or changed conditions affecting the rate of construction beyond the control of the owner or operator will make it impossible to complete construction by July 1, 1983.''

TERRITORIAL SEA AND CONTIGUOUS ZONE OF UNITED STATES

For extension of territorial sea and contiguous zone of United States, see Proc. No. 5928 and Proc. No. 7219, respectively, set out as notes under section 1331 of Title 43, Public Lands.

§ 1312. Water quality related effluent limitations

(a) Establishment

Whenever, in the judgment of the Administrator or as identified under section 1314(*l*) of this title, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 1311(b)(2) of this title, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

(b) Modifications of effluent limitations

(1) Notice and hearing

Prior to establishment of any effluent limitation pursuant to subsection (a) of this section, the Administrator shall publish such proposed limitation and within 90 days of such publication hold a public hearing.

(2) Permits

(A) No reasonable relationship

The Administrator, with the concurrence of the State, may issue a permit which modifies the effluent limitations required by subsection (a) of this section for pollutants other than toxic pollutants if the applicant demonstrates at such hearing that (whether or not technology or other alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the benefits to be ob-