Washington Journal of Environmental Law & Policy

Volume 11 | Issue 2

1-19-2021

Treading Water: How Citizens, States, and the Environmental Protection Agency Can Restore Proper Criminal Enforcement of the Clean Water Act's National Pollutant Discharge Elimination System

Marley Kimelman

WASHINGTON JOURNAL OF ENVIRONMENTAL LAW AND POLICY

JANUARY 2021

Volume 11, Issue 2

TREADING WATER: HOW CITIZENS, STATES, AND THE ENVIRONMENTAL PROTECTION AGENCY CAN RESTORE PROPER CRIMINAL ENFORCEMENT OF THE CLEAN WATER ACT'S NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

Marley Kimelman*

11 WASH. J. ENV'T. L. & POL'Y 173 (2021)

ABSTRACT

Upon the passage of the Clean Water Act ("CWA") in 1972, primary responsibility for protecting the United States' water quality and preventing water pollution shifted from the states to the Environmental Protection Agency ("EPA"). The program at the heart of the Clean Water Act, the National Pollutant Discharge Elimination System ("NPDES"), requires anyone who discharges pollutants into the waters of the United States to abide by the terms of a permit issued under the program. If a discharge occurs in violation of the permit or without a permit, and prosecutors are able to prove the responsible party acted with ordinary negligence, criminal charges can be brought under the statute. Forty-

* Marley Kimelman is a third-year law student at The George Washington University Law School, class of 2021, focused on environmental enforcement and protection. Marley graduated from Northeastern University in 2017 with a B.S. in Environmental Studies and International Affairs and a minor in Global Social Entrepreneurship.

seven states have been authorized by the EPA to run and enforce an NPDES permit program within their own borders. Instead of adopting an intent standard of ordinary negligence as the federal statute and regulations require, many states have been authorized to run their programs with "gross" or "criminal" negligence intent standards. Litigation over Idaho's recent program approval could force the EPA to assume responsibility over all approved state programs that are out of compliance with the CWA and the EPA's regulations. This outcome could overload the EPA and put the NPDES program in jeopardy of complete failure. But, with a few regulatory changes, the EPA can prevent further litigation, comply with its non-discretionary duties laid out in the CWA, and ensure the proper level of criminal deterrence needed to protect water quality.

INTRODUCTION

It was just past midnight on March 24, 1989. The captain of the *Exxon Valdez*, Joseph Hazelwood, had been drinking and was away from his controls. His ship propelled along the jagged coast of Alaska.[1] The pitch-black waves of the Prince William Sound pounded relentlessly on the sides of the massive oil tanker. That morning, the *Exxon Valdez,* carrying over fifty-three million gallons of crude oil, collided with Bligh Reef about 1.5 miles off the coast of Tatitlek, Alaska, spilling its contents into the Sound.[2] Before the flow could be stopped, over ten million gallons of crude oil contaminated one of the most ecologically sensitive and remote locations in the United States.[3] Countless mammals, birds, and fish were killed or harmed, and thousands of people's livelihoods were destroyed.[4]

In 1997, the Alaska Supreme Court upheld misdemeanor charges against Cpt. Hazelwood under Alaska state law.[5] The eight-year criminal court battle and Cpt. Hazelwood's eventual conviction on criminal charges turned on the court's interpretation of a single word in the statute: negligence.[6] The question before the court was whether Cpt. Hazelwood could be charged criminally for mere ordinary negligence,[7]

[1] *See Exxon Valdez Oil Spill*, HISTORY (Aug. 21, 2018), https://www.history.com/topics/1980s/exxon-valdez-oil-spill.
[2] *See id.*
[3] *See id.*
[4] *See id.*
[5] *See* Alaska Stat. Ann. § 46.03.790; State v. Hazelwood, 946 P.2d 875, 885 (Alaska 1997).
[6] *See Hazelwood*, 946 P.2d at 885.
[7] *Negligence*, BLACK'S LAW DICTIONARY (9th ed. 2009).

or was a form of heightened or "gross" negligence[8] needed?[9] Ultimately, the Alaska Supreme court held that ordinary negligence was enough for criminal charges.[10]

The criminal case against Cpt. Hazelwood was decided in *State v. Hazelwood*.[11] Cpt. Hazelwood was not prosecuted under the Clean Water Act (CWA).[12] Rather, it was the ordinary "negligence" intent standard, or mens rea, in the Alaskan statute that gave the state prosecutors the ability to bring criminal charges.[13] Without this ordinary negligence mens rea,[14] Cpt. Hazelwood's actions would not have resulted in any type of criminal penalty under the state statute. This same mens rea is found in the CWA, giving federal prosecutors the ability to bring misdemeanor criminal charges against negligent violators of the CWA.[15] While state prosecutors should have this same ability to prosecute criminally under an ordinary negligence standard,[16] many states have intentionally stripped themselves of this power with the consent of the EPA, undermining their ability to properly enforce criminal violations of the CWA.

Because state environmental agencies and the EPA have differing capacities, resources, and expertise, the CWA is designed to utilize both in its effort to control water pollution. One of the most important aspects of the CWA, and a clear example of cooperative federalism, is the National Pollutant Discharge Elimination System ("NPDES").[17] The NPDES program requires dischargers of pollutants into jurisdictional waters to obtain and comply with an NPDES permit outlining their

[8] *Gross Negligence*, BLACK'S LAW DICTIONARY (9th ed. 2009).
[9] *See Hazelwood*, 946 P.2d at 885.
[10] *See id.*
[11] *See Exxon Valdez Oil Spill, supra* note 1.
[12] *See* State v. Hazelwood, 946 P.2d 875, 885 (Alaska 1997).
[13] *See id.*
[14] *See Mens Rea*, Legal Information Institute, https://www.law.cornell.edu/wex/mens_rea (last visited Dec. 7, 2020). Mens rea refers to the state of mind statutorily required in order to convict a particular defendant of a particular crime. Establishing the mens rea of an offender is usually necessary to prove guilt in a criminal trial.
[15] *See* Federal Water Pollution Control Act (Clean Water Act) § 309, 33 U.S.C. § 1319 (2019).
[16] 40 C.F.R. § 123.27(b)(2) ("The burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraph (a)(3) of this section shall be no greater than the burden of proof or degree of knowledge or intent EPA must provide when it brings an action under the appropriate Act.").
[17] *See* Friends of the Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210, 1225 (11th Cir. 2009) (hailing the NPDES program as the centerpiece of the Clean Water Act).

respective pollution allowances before discharging.[18] Violators can be punished with civil penalties, criminal penalties, or both.[19]

In order to preserve the cooperative federalism goal, the CWA allows a state to assume its respective NPDES program from the EPA, including enforcement power.[20] This transfer is not automatic though, and is governed by regulations to ensure that states properly and effectively maintain the same standards as the EPA.[21] The EPA's regulations require that state criminal intent standards, or mens rea, be no stricter than the federal standard.[22] As previously mentioned, the CWA contains an ordinary negligence criminal intent standard.[23] A "stricter" mens rea standard would require more egregious actions on the part of the defendant in order to be charged and convicted under the applicable statute.[24]

If a state would like to assume its own NPDES program, it must submit an application to the EPA that lays out the proposed program.[25] The proposed program must meet the mens rea requirements along with eight additional listed criteria in CWA § 402(b)(1)-(9)[26] and 40 C.F.R. § 123.27.[27] The EPA has a non-discretionary duty to authorize that state to run its own NPDES program if all criteria are met.[28] The nine criteria are meant to ensure state NPDES programs are adequate and will not undermine water quality preservation and enforcement capabilities.[29]

In 1987, Congress strengthened the CWA by permitting misdemeanor criminal prosecutions for a defendant who "negligently" violates the statute and felony prosecutions for "knowingly" violating the statute.[30] This was a change from the unified and weaker "willfully or

---

[18] Clean Water Act of 1977, 33 U.S.C. § 402 (this section includes industrial wastewater, municipal wastewater, Concentrated Animal Feeding Operations (CAFOs), among others).
[19] *See* Clean Water Act of 1977, 33 U.S.C. § 309(b)-(c).
[20] *See id.* § 402(b).
[21] *See* 40 C.F.R. § 123.27(b)(2).
[22] *See id.*
[23] *See* Clean Water Act of 1977, 33 U.S.C. § 309(c)(1).
[24] *See Mens Rea, supra* note 14.
[25] *See* 40 CFR § 123.21(a).
[26] *See* Clean Water Act of 1977, 33 U.S.C. § 402(b)(1)-(9).
[27] *See* 40 C.F.R. § 123.27(b)(2).
[28] *See* Clean Water Act of 1977, 33 U.S.C. § 402(b).
[29] *See* RANDOLPH L. HILL, THE CLEAN WATER ACT HANDBOOK 74 (Mark A. Ryan, ed. 4th ed. 2018).
[30] Clean Water Act of 1977, 33 U.S.C. § 309(c)(1)-(2) ((1) "Negligent Violations: 1 year and/or $2,500 - 25,000 per day; Subsequent convictions 2 years and/or $50,000 per day. (2) Knowing Violations: 3 years and/or $5,000 - 50,000 per day; Subsequent convictions 6 years and/or $100,000 per day").

negligently" criminal intent standard found in the original adoption of the CWA.[31] Case law that followed the 1987 amendments upheld misdemeanor criminal penalties for "ordinary negligence," not requiring heightened "criminal" or "gross negligence."[32] Since 1972, forty-seven states have been approved to take over NPDES authority from the EPA,[33] Idaho being the most recent.[34] Of these forty-seven states, thirty-three require an intent standard for criminal enforcement that is stricter than the CWA allows.[35] Further, fourteen states that criminalize ordinary negligence have not updated their programs to include the 1987 felony amendment.[36] In order to comply with the language and intent of the CWA and its own regulations, while also ensuring sufficient deterrence, avoiding future litigation, and preventing withdrawal of dozens of authorized state NPDES programs, the EPA should promulgate new CWA regulations.

These regulations should define "negligently," outlined in the CWA's criminal penalties section, 33 U.S.C. § 1319(c)(1), as ordinary negligence, eliminate the note contained under 40 C.F.R. § 123.27(a)(3)(ii)[37] to bring the regulation into compliance with the 1987 CWA amendments and prevent contradiction of the clear meaning of 40

---

[31] *See* Brief for Appellant, Idaho Conservation League v. EPA, No. 18-72684 (9th Cir. Oct. 2, 2018).
[32] United States v. Hanousek, 176 F.3d 1116, 1121 (9th Cir. 1999).
[33] *National Pollutant Discharge Elimination System (NPDES) State Program Authority*, ENV'T PROT. AGENCY (Dec. 2, 2019), https://www.epa.gov/npdes/npdes-state-program-authority (reporting that the only states not approved are Massachusetts, New Hampshire and New Mexico).
[34] *See* Brief for Appellant, *supra* note 31.
[35] *See e.g.,* Alabama, ALA. CODE § 22-22-14 (1975) (criminal penalties for willful or gross negligence); Colorado, COLO. REV. STAT. § 25-8-609 (2020) (criminal penalties for reckless, knowing, intentional, and criminal negligence violations); Connecticut, CONN. GEN. STAT. § 22a-438 (2013) (criminal penalties for criminal negligence and knowing violations); Florida, FLA. STAT. § 403.161 (2020) (criminal penalties for willfulness, reckless indifference, and gross careless disregard); and Maine, ME. REV. STAT. ANN. tit. 38, § 349 (2019) (criminal penalties for intentionally, knowingly, recklessly, or with criminal negligence violations).
[36] *See e.g.,* Arizona, ARIZ. REV. STAT. § 49-263(B) (2018); Arkansas, ARK. CODE ANN. § 8-4-103 (1987); California, CAL. WATER CODE § 13387(b) (2011); Delaware, DEL. CODE ANN. tit. 7, § 6013(a) (2008); Hawaii, HAW. REV. STAT. § 342D-32(1) (2020); Iowa, IOWA CODE § 39-117(1) (2020); Louisiana, LA. REV. STAT. ANN. § 2076.2A (2000); Minnesota, MINN. STAT. § 115.071(2)(a) (2011); Montana, MONT. CODE ANN. § 75-5-632 (2019); New Jersey, N.J. STAT. ANN. § 58:10A-10f(3) (2016); Oklahoma, OKLA. STAT. tit. 27A, § 2-6-206(G)(1)(2020); Virginia, VA. CODE ANN. § 62.1-44.32(b) (2013); West Virginia, W. VA. CODE § 22-11-24(c) (2009); Wisconsin, WIS. STAT. § 283.91(3).
[37] 40 C.F.R. § 123.27(a)(3)(ii) ("States which provide the criminal remedies based on 'criminal negligence,' 'gross negligence' or strict liability satisfy the requirement of paragraph (a)(3)(ii) of this section.").

C.F.R. § 123.27(b)(2), and identify the states that have been authorized to run their own NPDES programs with illegal heightened mens rea standards for misdemeanor offenses. Further, the EPA should provide for a period of two years from the issuance of the final rule for those states to make the necessary legislative changes to their programs and re-submit them to the EPA for re-approval. Finally, the new regulations should specify that if a state does not make the necessary changes in time, the EPA has a non-discretionary duty to withdraw the prior approval of that state's NPDES authorization and take back program authority under 33 U.S.C. § 1342(c)(3).

This Note will examine the CWA statutory and regulatory provisions that establish the NPDES permit program requirements that a state must meet in order to assume permitting and enforcement authority from the EPA, specifically regarding criminal intent standards. It will expose a multitude of issues arising from the failure of the EPA to update its regulations to match CWA statutory changes, the EPA's illegal approval of multiple state NPDES permit programs, the consequences of these approvals on state NPDES enforcement, and the impending crisis of the NPDES program as a whole as it currently stands.

I. LEGAL AND FACTUAL BACKGROUND

The background sections that follow highlight the CWA, its purpose, its structure, and its objectives. It features an in-depth look at the relevant statutory provisions and accompanying EPA regulations that inform how the CWA is to be carried out and enforced. Finally, it examines the litigation arising from the EPA's approval of Idaho's NPDES permit program and how this might affect the NPDES program as a whole.

A. *The Failure of State Water Pollution Control*

By the mid-1960s, every state in the country had some type of public agency responsible for monitoring and minimizing pollution to protect water quality.[38] Unfortunately, most state water pollution laws were generally weak, and tough enforcement was essentially non-existent against even the most blatant polluters.[39] State agencies were reluctant to take enforcement actions against polluting industries and individuals in

[38] *See* N. William Hines, *History of the* 1972 *Clean Water Act: The Story Behind How the 1972 Act Became the Capstone on a Decade of Extraordinary Environmental Reform*, 4 GEO. WASH. J. ENERGY & ENVTL. L. 80, 81-82 (2013).
[39] *See id*.

their own states, instead pursuing a strategy of voluntary compliance and non-legal persuasion.[40]

In 1971, the Senate Committee on Public Works concluded that "the national effort to abate and control water pollution has been inadequate in every vital aspect."[41] The report focused mostly on the lack of enforcement, citing the fact that only one enforcement action under the Federal Water Pollution Control Act had been brought as of 1971.[42]

B. *The Federal Government Takes Action: The Environmental Protection Agency and the Clean Water Act*

On December 4, 1970, President Nixon created the EPA through executive order.[43] One of the EPA's first major responsibilities would be to clean up and protect the nation's waters.[44] Taking advantage of the broad public support and momentum around environmental issues, Congress decided to make sweeping amendments to the Federal Water Pollution Control Act of 1948.[45] These amendments became commonly known as the Clean Water Act.[46] Section 101(a) of the CWA specifically states that the goal of the act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and attain "water quality which provides for the protection and propagation of fish, shellfish and wildlife and provides for recreation."[47]

The CWA gave the EPA broad jurisdiction to regulate discharges into "navigable waters."[48] Section 301(a) of the CWA prohibits the

---

[40] *See* N. William Hines, *A Decade of Nondegradation Policy in Congress and the Courts: The Erratic Pursuit of Clear Air and Clean Water*, 62 IOWA L. REV. 643, 643 (1977) (outlining state sanitary engineer's attitude towards water quality and enforcement: "Dilution is the solution to pollution.").

[41] S. REP. No. 92-414, at 7 (1971), *as reprinted* in 1972 U.S.C.C.A.N 3668, 3674.

[42] *See id.*

[43] H.R. DOC. NO. 91-366, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES RELATIVE TO REORGANIZATION PLANS NOS. 3 and 4 of 1970 (July 9, 1970).

[44] *See id*.

[45] *See History of the Clean Water Act,* EPA (2019), https://www.epa.gov/laws-regulations/history-clean-water-act (last visited Oct. 20, 2020); *see generally* Hines, *supra* note 38. Congress overwhelmingly passed the amendments in the form of a bill on October 4, 1972. President Nixon delayed for as long as he could before formally vetoing it, citing too many federal dollars spent on the grant program. The next day, both chambers of Congress easily overrode the President's veto. The amendments became law on October 18, 1972.

[46] *See History of the Clean Water Act*, *supra* note 45.

[47] Clean Water Act of 1977, 33 U.S.C. § 101(a).

[48] *Id.* § 502(7) (defining navigable waters as "the waters of the United States, including the territorial seas"); *see generally* Donna M. Downing, *Scope of "The Waters of the United States" Protected by the Clean Water Act, in* THE CLEAN WATER ACT HANDBOOK

"discharge of any pollutant" by any "person" from any "point source" into "navigable waters," except as in compliance with sections 302, 306, 307, 318, 402, and 404 of the Act.[49] Section 402, NPDES, is the main program that issues allowances in the form of permits to point source discharges,[50] and thus is at the heart of the Clean Water Act.

C. The Structure of the Clean Water Act

1. National Pollutant Discharge Elimination System

To achieve the goals set out in section 301, the CWA sets liquid waste (known as "effluent") limitations to constrain the amount of a pollutant that any point source can legally discharge.[51] To properly and uniformly implement these effluent limitations, the CWA established the NPDES permit program.[52] The NPDES program requires all point source discharges of pollutants into waters of the United States to obtain a section 402 permit before discharging.[53] The program covers a broad and extensive list of point source dischargers.[54] Overall, the NPDES program ensures compliance with the CWA and the EPA's requirements that dischargers receive a permit.[55] Individual NPDES permits include effluent limitations and monitoring and reporting requirements, among other standard conditions.[56]

---

13 (Mark A. Ryan ed., 4th ed. 2018) ("Whether a particular body of water is jurisdictional as a 'water of the United States' is a key threshold question for determining whether a discharge is into a water will require a permit under the CWA.").

[49] Clean Water Act of 1977, 33 U.S.C. § 301(a); *see also id.* § 502(12) (defining "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source, and any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft."); *id.* § 502(14) (a "point source" refers to "any discernible, confined and discrete conveyance...from which pollutants are or may be discharged").

[50] Clean Water Act of 1977, 33 U.S.C. § 402.

[51] *See id.* § 301; Kyle W. Robisch, *Getting to the (Non)Point: Private Governance as a Solution to Nonpoint Source Pollution,* 67 VAND. L. REV. 539, 540, (2014).

[52] *See* Clean Water Act of 1977, 33 U.S.C. § 402.

[53] *See id.*; Hines, *supra* note 38, at 81-82 (explaining that the NPDES permit program resembles the Refuse Act of 1899's prohibition of all industrial discharges to navigable waters).

[54] *See, e.g.*, 40 C.F.R. § 411 (cement manufacturing), §406 (grain mills), §412 (concentrated animal feeding operations).

[55] *See* Karen M. McGaffey et al., *Water Pollution Control Under the National Pollutant Discharge Elimination System*, *in* THE CLEAN WATER ACT HANDBOOK 42 (Mark A. Ryan ed., 4th ed. 2018).

[56] *See id.* at 42-43.

Technology-based effluent limitations are promulgated nationally by the EPA and place limitations on the discharge of different types of pollutants[57] based solely on the availability and cost of pollution control measures rather than on the impact the pollutants will have on the receiving water.[58] If the EPA has promulgated a guideline for an industry to which a discharging facility belongs, the NPDES permit for that discharger will incorporate those limits directly, with exceptions only in extremely limited and defined circumstances.[59] In addition to the technology based standard, NPDES permit contains water-quality based effluent limitations in order to maintain compliance with water quality standards set by the EPA and the respective state where the facility is located.[60] These limitations are based solely on the impact of the discharge on the receiving waters.[61]

Monitoring and reporting requirements are another important part of a discharger's NPDES permit. Permit holders are required to monitor their own discharges and report the results to the proper permitting authority in that state, either state or federal.[62] These reports are called discharge monitoring reports (DMRs).[63] DMRs are one of the most important tools used in enforcement actions against facilities that violate their permits, in addition to random, periodic inspections of facilities carried out by enforcement authorities.[64]

Anyone who discharges or proposes to discharge pollutants from a point source to water of the United States must apply for and receive an NPDES permit. If the terms of a permit are not complied with, or an entity discharges pollutant without a proper permit, the CWA authorizes

---

[57] *See id.*

[58] *See Industrial Effluent Guideline*, EPA (Dec. 2019), https://www.epa.gov/eg/industrial-effluent-guidelines; CWA §§ 301, 306. These provisions establish four different types of technology-based standards. They include: "best available technology economically achievable," "best practicable control technology currently available," "best conventional pollutant control technology," and "best available demonstrated control technology." Each of these standards are based on the performance of other facilities in the industry, the type of pollutants discharged, and when the facility was constructed. They can be based on the average of the best performing facilities, the single best operating facility, or even the best demonstrated technology in a laboratory. A set of effluent guidelines for an industry can include many or all of the different technology-based guidelines mentioned.

[59] *See* Clean Water Act of 1977, 33 U.S.C. § 301(b), (n) (outlines the "fundamentally different factor" variance for technology-based effluent guidelines).

[60] McGaffey et al., *supra* note 55, at 51.

[61] Clean Water Act of 1977, 33 U.S.C. §§ 301(b)(1)(C), 302(a), 303(e)(3)(A).

[62] *See* 40 C.F.R. § 122.41(1)(4).

[63] *See id.*

[64] *See* McGaffey et al., *supra* note 55, at 43.

civil and criminal enforcement.[65]

2. Cooperative Federalism

While the history of the failure of state authority over water quality was well-documented at the time of the CWA's passage, Congress nevertheless preserved a vital role for states in the CWA.[66] Section 402(b) of the CWA authorizes the EPA to delegate its inherent NPDES permitting authority to a state for facilities discharging to waters within that respective state.[67] This delegation to states by the EPA is governed meticulously by CWA provisions and EPA regulations. When a state opts to seek NPDES permitting authority from the EPA, it must first prepare and submit a Memorandum of Agreement (MOA) to the EPA regional administrator.[68] The proposed NPDES program "must contain adequate authority for the states to issue permits, ensure the public and any affected state receives notice for each application, provide an opportunity for public comment and hearing on permit decisions, abate permit violations, and provide for appropriate civil and criminal penalties."[69] The EPA cannot approve a state program if it does not meet the nine requirements set out in the statute,[70] but has a non-discretionary duty to approve the program if it does.[71] One of those nine criteria is "adequate authority" to "abate violations of the permit or permit program, including civil and criminal penalties and other ways and means of enforcement."[72]

Even after being granted the NPDES permitting authority, states are still subject to EPA oversight over most permitting decisions.[73] In short, the CWA and EPA regulations set "a solid federal floor for state program integrity" before the EPA can relinquish its authority to issue permits and

[65] *See* Clean Water Act of 1977, 33 U.S.C. § 309.
[66] *See* 40 C.F.R. § 131.6; McGaffey et al., *supra* note 55, at 52. States are in charge of setting the water quality standards for waters within their borders. This includes designating use or uses for each body of water, the water quality criteria needed to protect those uses, and an anti-degradation policy.
[67] *See* Clean Water Act of 1977, 33 U.S.C. § 402(b).
[68] *See* 40 C.F.R. §123.21(a)(4).
[69] *See* Clean Water Act of 1977, 33 U.S.C. § 401(b)(1); 40 C.F.R. § 123.25; HILL, *supra* note 29, at 75.
[70] Clean Water Act of 1977, 33 U.S.C. § 402(b)(1)-(9).
[71] Clean Water Act of 1977, 33 U.S.C. § 402(b) (EPA "shall approve" a state's application "unless [EPA] determines that adequate authority does not exist").
[72] Clean Water Act of 1977, 33 U.S.C. § 402(b)(7).
[73] *See* 33 U.S.C. §1342(b); HILL, *supra* note 29, at 77. This power allows EPA to "veto" a permit without stripping the state of its program entirely.

enforce violations.[74] As of the writing of this Note, forty-seven states have been authorized to administer their own NPDES program, the majority of which were approved within five years of 1972.[75]

While it may seem that the ability to delegate is unnecessary, the burden of issuing NPDES permits is enormous and would be impractical for the EPA to take on alone. The EPA's own data shows that there are currently more than 51,000 facilities in the United States with an active or pending state issued NPDES permit or permit application in forty-seven states that have assumed their own permitting program from the EPA.[76] That number is roughly fifty times the number of facilities with an EPA issued permit or pending permit.[77] Since 2010, Congress has decreased the EPA's budget by $1.4 billion dollars, down to $8.8 billion, and, since 1999, the number of EPA employees has declined by roughly twenty-three percent.[78] By contrast, California's most recent budget proposal included $11.3 billion for their state Natural Resource and Environmental Protection agencies[79] and New York allocated $1.8 billion for their Department of Environmental Conservation.[80] With the lack of funding and staff at the federal level compared to many states, state control of local NPDES permitting and enforcement is essential. But, while state power over their own programs has increasingly become a necessity, the sufficiency and integrity of their programs have increasingly come into question—especially in regard to criminal enforcement.

3. Clean Water Act Criminal Enforcement

---

[74] Hines, *supra* note 38, at 99.
[75] *See* NPDES State Program Information, EPA (Dec. 2, 2019), https://www.epa.gov/npdes/npdes-state-program-information. The "Authority" button on this EPA webpage shows the year in which each of the forty-seven states was authorized to administer the CWA.
[76] *ECHO*, EPA, https://echo.epa.gov/facilities/facility-search/results. EPA's Enforcement and Compliance History Online (ECHO) tool can be used to search for the total number NPDES permits issued in each state by all non-federal permitting authorities. These include states, municipalities, and tribal agencies. The total number is 51,011 facilities.
[77] *See id.*
[78] *See EPA's Budget and Spending*, EPA, https://www.epa.gov/planandbudget/budget (last updated June 24, 2020).
[79] *See* Gabriel Petrek, *The 2019-20 Budget: Natural Resources and Environmental Protection*, LEG. ANALYST'S OFFICE (Feb. 14, 2019), https://lao.ca.gov/Publications/Report/3933.
[80] *See* DIVISION OF THE BUDGET, NEW YORK STATE, https://www.budget.ny.gov/pubs/archive/fy20/exec/agencies/appropData/EnvironmentalConservationDepartmentof.html (last updated Jan. 1, 2019).

Throughout the 1980s, Congress became increasingly committed to stronger criminal enforcement for CWA violations.[81] In 1982, the EPA hired its first criminal investigators "in recognition that criminal penalties had the potential for greater general deterrence than the more traditional civil or administrative remedies."[82] That same year, the Department of Justice (DOJ) established an Environmental Crimes Unit to deal with the increased prosecution load.[83]

From the passage of the CWA in 1972 until 1987, the EPA was given the authority to bring only misdemeanor criminal charges against a defendant who "willfully or negligently" violated enumerated sections of the CWA, including the NPDES program.[84] "Willfully or negligently" was a conjunctive standard, allowing for some discretion in levying criminal penalties against violators for differing levels of mens rea that fell between negligence and willfulness.[85] In 1987, Congress amended the enforcement provisions of the statute in order to add a felony provision and provide for harsher criminal penalties,[86] but the EPA failed to update the accompanying regulation to reflect those changes.[87] The statutory amendments divided the CWA criminal provision § 309(c)(1) into two distinct subsections: a "negligent" misdemeanor,[88] and a

---

[81] *See* Christine L. Wettach, *Mens Rea and the Heightened Criminal Liability Imposed on Violators of the Clean Water Act*, 15 STAN. ENVTL. L. J. 377, 383 (1996).
[82] Helen J. Brunner, *Environmental Criminal Enforcement: A Retrospective View*, 22 ENVTL. L 1315 (1992).
[83] *See Historical Development of Environmental Criminal Law*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/enrd/about-division/historical-development-environmental-criminal-law (last updated May 13, 2015).
[84] *See* Clean Water Act of 1977, 33 U.S.C. § 309(c)(1) (1972) ("Any person who willfully or negligently violates section 801, 302, 306, 307, or 308 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator or by a State, shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.").
[85] *See* Wettach, *supra* note 81, at 382.
[86] *See id.* at 381.
[87] *See* 40 C.F.R. § 123.27(a)(3)(ii) ("Criminal fines shall be recoverable against any person who willfully or negligently violates any applicable standards or limitations; any NPDES permit condition; or any NPDES filing requirement. These fines shall be assessable in at least the amount of $10,000 a day for each violation. Note: States which provide the criminal remedies based on 'criminal negligence,' 'gross negligence' or strict liability satisfy the requirement of paragraph (a)(3)(ii) of this section.").
[88] Clean Water Act of 1977, 33 U.S.C. § 309(c)(1) ("Any person who--(A) negligently violates…any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State…shall be

"knowing" felony.[89] In effect, the amended § 309(c)(1) and new § 309(c)(2) give the EPA the authority to bring misdemeanor criminal charges if they can establish that the defendant acted negligently, and felony charges if a defendant acted knowingly.[90] The amendments raised the penalties for violations significantly,[91] and only a few years after the amendments went into effect, between 1992 and 1993, the number of federal environmental criminal cases doubled.[92] While the statutory meaning of the "knowingly" standard has been the subject of some dispute, litigation over the federal "negligently" standard, and specifically what level of negligence states must adopt when they are authorized to administer their own NPDES programs, has raised serious questions about criminal enforcement of the CWA. This has put the entire NPDES program at risk.

D. *Ordinary vs. Criminal Negligence*

While § 309(c)(1) of the CWA does not specifically define the word "negligently," either in its original form or after the 1987 amendments,[93] there is definitive and mounting case law that speaks to what type of negligence applies. As of the writing of this Note, three United States

---

punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.").

[89] *Id.* § 309(c)(2) ("Any person who--(A) knowingly violates…any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State…shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.").

[90] *See* Clean Water Act of 1977, 33 U.S.C. § 309(c)(1)-(2).

[91] *See* James D. Oesterle, *Enforcement: Sections 309 and 505, in* THE CLEAN WATER ACT HANDBOOK 310 (Mark A. Ryan ed., 4th ed. 2018); Clean Water Act of 1977, 33 U.S.C. § 309(c)(2) (Those who "knowingly" discharge a pollutant from a point source into a water of the United States without an NPDES Permit or in violation of a permit "shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.").

[92] *See* Wettach, *supra* note 81, at 383.

[93] Clean Water Act of 1977, 33 U.S.C. § 309(c)(1).

Circuit Courts of Appeals have held that the common law "ordinary" or "simple" negligence standard applies to § 309(c)(1) and not a heightened "gross" or "criminal" negligence standard.[94] While the debate about which form of negligence is required by § 309(c)(1) continues in academic circles,[95] neither the courts nor the EPA have shown any appetite for reconsidering their interpretations of the standard.

Black's Law Dictionary defines negligence as "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation.[96] Gross negligence is defined as "[a] lack of even slight diligence or care…[a] conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party, who may typically recover exemplary damages."[97] The difference between the lower ordinary negligence standard and the higher criminal negligence standard can be significant and lies "in their descriptions of the relevant unobserved risk."[98]

This distinction between levels of negligence is critically important because when a state assumes NPDES authority, they are also assuming the criminal enforcement authority from the EPA. The EPA's regulations plainly require that state criminal intent standards be "no greater" than federal standards.[99] Because the EPA and the courts have established that §309(c)(1) refers to "ordinary" negligence and not some heightened "gross" or "criminal" negligence,[100] it follows that state criminal intent standards can be no higher than "ordinary" negligence. While the regulations are clear, thirty-three states have NPDES programs with

---

[94] *See e.g.,* United States v. Hanousek, 176 F.3d 1116, 1120-22 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102, 1121 (2000) (explaining that if Congress intended to prescribe a heightened negligence standard, it could have done so explicitly as it did elsewhere in the statute); United States v. Ortiz*,* 427 F.3d 1278, 1279 (10th Cir. 2005) (stating "the Clean Water Act...criminalizes any act of ordinary negligence that leads to the discharge of a pollutant into the navigable waters of the United States."); United States v. Pruett, 681 F.3d 232, 243 (5th Cir. 2012) ("This subsection [CWA § 309(c)(1)(a)] imposes an ordinary negligence standard.").

[95] *See* David E. Roth, Stephen R. Spivack, Joseph G. Block, *The Criminalization of Negligence Under the Clean Water Act*, CRIM. JUST., Winter 2009, at 4, 9 (advocating for either Congress or the Supreme Court to intervene and make clear that mere civil negligence should not be punished as criminal conduct under the CWA).

[96] *Negligence,* BLACK'S LAW DICTIONARY (11th ed. 2019).

[97] *Gross Negligence,* BLACK'S LAW DICTIONARY (11th ed. 2019).

[98] *See* Common Issues, 2 STATE ENVTL. L. § 16:56 (2019); State v. Hazelwood, 946 P.2d 875, 885 (Alaska 1997).

[99] 40 C.F.R. § 123.27(b)(2) ("The burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraph (a)(3) of this section shall be no greater than the burden of proof or degree of knowledge or intent EPA must provide when it brings an action under the appropriate Act.").

[100] *Hanousek*, 176 F.3d at 1120-22.

heightened intent standards, in clear violation of the CWA and the EPA's regulations.[101] This issue was recently in front of the Ninth Circuit Court of Appeals, stemming from a challenge to the EPA's 2018 approval of Idaho's NPDES program application.[102]

E. Idaho Conservation League v. EPA*: Challenging Idaho's NPDES Program and the Ninth Circuit's Opinion*

In 2018, Idaho became the forty-seventh, and latest, state to have its own NPDES program authorized by the EPA – the Idaho Pollutant Discharge Elimination System (IPDES). The IDPES criminal penalty provision does directly cover "negligent" misdemeanors,[103] but the state's criminal code states that "[i]n every crime or public offense there must exist a union, or joint operation, of act and intent, or *criminal negligence*."[104] In other words, Idaho's IDPES enforcement law requires a heightened or "gross" negligence standard for criminal prosecutions. Neither Idaho nor the EPA disputed that contention.[105] While the EPA and Idaho were both in support of the IPDES program authorization, this was not always the case.

Idaho first applied for authorization in August of 2016 but was denied for the exact reason stated above. In a response letter to the Idaho Department of Environmental Quality, the EPA stated:

> The Clean Water Act (CWA) criminal intent standard for negligence is simple negligence. As described in the submitted Attorney General's Statement, the State of Idaho's criminal intent standard for negligent violations is gross negligence. 40 CFR 123.27(b)(2) requires states

---

[101] *See e.g.*, ALA. CODE § 22-22-14 (1975) (criminal penalties for willful or gross negligence); COLO. REV. STAT. § 25-8-609 (2017) (criminal penalties for reckless, knowing, intentional, and criminal negligence violations); CONN. GEN. STAT. § 22a-438 (2013) (criminal penalties for criminal negligence and knowing violations); FLA. STAT. § 403.161 (2019) (criminal penalties for willfulness, reckless indifference, and gross careless disregard); ME. REV. STAT. ANN. tit. 38, § 349 (2019) (criminal penalties for intentionally, knowingly, recklessly, or with criminal negligence violations); N.Y. COMP. CODES R. & REGS. tit. 6, § 750-2.4(b) (2019) (criminal penalties for criminal negligence).
[102] *See generally* Brief for Appellant, Idaho Conservation League v. EPA, No. 18-72684 (9th Cir. Oct. 2, 2018).
[103] *See* IDAHO CODE ANN. § 39-117 (2020) ("Any person who willfully or negligently violates any Idaho national pollutant discharge elimination system (NPDES) standard or limitation, permit condition or filing requirement shall be guilty of a misdemeanor…").
[104] IDAHO CODE ANN. § 18-114 (2020) (emphasis added).
[105] *See* Response Brief for Appellee at 8-9, Idaho Conservation League v. EPA, No. 18-72684 (9th Cir. Oct. 2, 2018).

> to have criminal intent standards that may not be greater than the standards which apply to the EPA. Since the CWA and federal courts have defined the CWA's negligence standard as ordinary or simply negligence, an approvable State NPDES program must have a criminal negligence standard that does not require a greater burden of proof than this intent standard. A gross negligence standard does not meet this requirement. As such, Idaho will need to adequately address this criminal negligence standard issue in order for EPA to approve the IPDES program.[106]

In the letter, the EPA correctly identified that Idaho's proposed criminal intent standard, gross negligence, was greater than the CWA's ordinary negligence standard in section 309(c)(1), and thus not in compliance with 40 CFR 123.27(b)(2).[107] The EPA clearly communicated to Idaho that until this situation was addressed, it could not approve the IDPES program.[108] On June 5, 2018, the EPA, under a new presidential administration and EPA Administrator, approved the IPDES program despite Idaho's refusal to make any changes to its "gross" negligence standard.[109] Idaho Conservation League (ICL) brought suit against the EPA for their approval of the IPDES program, citing the exact criminal mens rea issue outlined by the EPA itself.[110]

In response, the brief filed by the EPA in *Idaho Conservation League v. EPA* (*ICL v. EPA*) put forth a two-part main argument to counter the claim that the IPDES program contains insufficient criminal enforcement authority. First, the EPA argued that the note contained in 40 C.F.R. § 123.27(a)(3)(ii), that says "[s]tates which provide the criminal remedies based on 'criminal negligence,' 'gross negligence' or strict liability satisfy the requirement of paragraph (a)(3)(ii) of this section", would "control the more general language in 40 C.F.R. § 123.27(b)(2)."[111] Second, the EPA argued that the "cross-referenced

---

[106] *See* Letter from Dennis J. McLearran, Regional Administrator, EPA, to John Trippets, Director, IDAHO DEP'T OF ENVTL. QUALITY (Sept. 30, 2016), https://www.epa.gov/sites/production/files/2017-08/documents/ipdes-correspondence-completeness-finding-09302016.pdf.
[107] *See id.*
[108] *See id.*
[109] Brief for Appellant at 38, Idaho Conservation League v. EPA, No. 18-72684 (9th Cir. Oct. 2, 2018).
[110] *See id.* at 1.
[111] *See* Response Brief for Appellee at 16, Idaho Conservation League v. EPA, No. 18-72684 (9th Cir. Oct. 2, 2018); 40 C.F.R. § 123.27(b)(2) ("The burden of proof and degree

language in the two regulatory provisions, 40 C.F.R. § 123.27(a)(3) and (b)(2), creates ambiguity" and that the agency's interpretation of a regulation that "points in more than one direction" is entitled to deference under *Kisor v. Wilkie,* 139 S. Ct. 2400, 2414-2418 (2019), Supreme Court precedent reinforcing that courts should defer to an agency's interpretation of its own regulations if they are genuinely ambiguous.[112]

ICL asked the court to remand the case without vacatur of the entire IPDES program.[113] As mentioned previously, the importance of state delegated NPDES programs is undeniable, and ICL's remedy sought would preserve the IPDES program as a whole, but require Idaho to fix the criminal intent standards in the program and then re-submit for approval within two years.[114] Idaho would have to pass amendments to the IPDES program or their criminal code through their state legislature before resubmitting.[115]

II. ANALYSIS

On September 10, 2020, in an unpublished opinion, the Ninth Circuit dismissed both of the EPA's arguments, holding that the Idaho state plan must employ a standard "'no greater than' simple negligence."[116] According to the court, the EPA's assertion that the agency may approve states' NPDES program applications that employ "gross" or "criminal" negligence mens rea standards stands against both the plain reading of its

---

of knowledge or intent required under State law for establishing violations under paragraph (a)(3) of this section, shall be no greater than the burden of proof or degree of knowledge or intent EPA must provide when it brings an action under the appropriate Act.").

[112] *See* Response Brief for Appellee at 30, 34-35, Idaho Conservation League v. EPA, No. 18-72684 (9th Cir. Oct. 2, 2018) (citing Kisor v. Wilkie, 139 S. Ct. 2400, 2414-2418 (2019)) ("To garner deference, the agency's interpretation must be: (1) "reasonable" and of "the character and context" to support deference based on whether the interpretation is the agency's official position; (2) within the agency's substantive expertise; and (3) reflective of the agency's "fair and considered judgement" while taking into account reliance interests and avoiding "unfair surprise to the regulated parties." If an agency's interpretation is entitled to deference, then the applied deference "gives an agency significant leeway to say what its own rules mean.").

[113] *See* Brief for Appellant at 38, Idaho Conservation League v. EPA, No. 18-72684 (9th Cir. Oct. 2, 2018).

[114] *See id.*

[115] *See id.*

[116] *See* Idaho Conservation League v. EPA, No. 18-72684, 2020 WL 5422448, at *1 (9th Cir. Sept. 10, 2020) ("Under § 123.27(b)(2), a state plan must employ a standard "no greater than" simple negligence, such as strict liability or simple negligence.").

own regulations and the wording of the statute itself.[117] As a remedy, the court granted ICL's request, and remanded without vacatur for the EPA to promptly address the deficiency with respect to the mens rea standard.[118]

While the opinion is unpublished, and intended only for precedent in the Ninth Circuit, the opinion is the first and only time a United States Circuit Court of Appeals has ruled on the state mens rea issue. Future appellants will undoubtedly rely on and cite to *ICL v. EPA* and other jurisdictions will undoubtedly seek guidance from the opinion. The ramifications of the Ninth Circuit's ruling beyond Idaho are substantial and raise a host of unanswered questions and problems for the EPA. Could other state NPDES programs be subject to litigation by citizens groups similar to ICL if they have similar issues with the criminal intent standards? What statutory power or obligations does the EPA have to remedy these programs, and how should they go about exercising that power? What is the best solution in order to preserve the integrity of the NPDES program? These are all questions that need to be answered in light of the Ninth Circuit's decision.

A. *Federal Legal Requirements for Corrective Action*

In 33 U.S.C. § 1342(c)(3), the CWA provides that, where the EPA determines that a state is not administering its program in a manner that conforms to the Act, the EPA must inform the state, request corrective action, and proceed with withdrawing approval of the state program if corrective action is not taken within ninety days of the EPA's request.[119] "Whenever the Administrator determines . . . that a State is not administering a program . . . in accordance with requirements of this section, [they] *shall* so notify the State and, if appropriate corrective action is not taken . . . the Administrator *shall* withdraw approval of such program."[120] There is case law to suggest that § 1342(c)(3) places a non-discretionary duty upon the Administrator of the EPA to withdraw a state program that does not take the corrective action required.[121] When the EPA learns that state practices do not conform to federal law, it has an

[117] *See id.*
[118] *See id.*
[119] 33 U.S.C. § 1342(c)(3).
[120] *Id.* (emphasis added).
[121] *See generally,* Askins v. Ohio Dep't of Agric., 809 F.3d 868, 870 (6th Cir. 2016) ("[W]hen a state fails to administer properly a state-NPDES program, the CWA requires the EPA to withdraw approval of the state-NPDES program after a hearing, notice, and time to cure…").

obligation to make findings and demand corrective action.[122] Courts have also found that the EPA has a non-discretionary duty to act, enforceable under 33 U.S.C. § 1365(a)(2), the CWA's citizen suit provision.[123] In order to alert the Administrator to deficiencies in a state program, citizens may file withdrawal petitions with the EPA.[124]

III. SOLUTION

A. *How the EPA Should Address Inadequate State NPDES Programs*

Now that the Ninth Circuit has ruled on the Idaho Program, the EPA has a non-discretionary duty to demand that the thirty-three states with inadequate programs take corrective action to address their mens rea standards.[125] The EPA will most likely receive withdrawal petitions from citizens' groups, identifying the mens rea issue in their respective states, and demanding that the EPA remedy the program in cooperation with the state, or terminate the program. In reality though, with the EPA's relative lack of resources, the prospect of the termination of dozens of states' authorizations and the subsequent assumption by the EPA would create serious problems for the efficacy and efficiency of the NPDES program. Further, withdrawal petitions filed as far back as 1997 are still officially pending with the EPA, showing that the withdrawal process is painfully slow and mostly ineffective at addressing major issues with state plans.[126] Because both the EPA and states know that the agency does not have the practical ability to take back state NPDES programs, the EPA has very little motivation or leverage to engage meaningfully with states.

While voluntary state action is extraordinarily unlikely, especially in states that do not prioritize environmental protection, the new political climate in Washington provides a rare opportunity for EPA to take action on this issue. Under the out-going Trump Administration, the EPA approved Idaho's inadequate program after previously denying the same program during the Obama Administration. But, with a new Administration and a Congress more inclined to put pressure on the EPA

---

[122] Save the Valley, Inc. v. U.S. Envtl. Prot. Agency, 99 F. Supp. 2d 981, 985 (S.D. Ind. 2000).
[123] Save the Valley, Inc. v. U.S. Envtl. Prot. Agency (*Save the Valley II*), 223 F. Supp. 2d 997, 1007 (S.D. Ind. 2002).
[124] *NPDES State Program Withdrawal Petitions*, EPA (Sept. 1, 2020), https://www.epa.gov/npdes/npdes-state-program-withdrawal-petitions.
[125] 33 U.S.C. § 1342(c)(3).
[126] *NPDES State Program Withdrawal Petitions*, EPA (Nov. 13, 2020), https://www.epa.gov/npdes/npdes-state-program-withdrawal-petitions.

to protect the environment and restore a functioning Clean Water Act, the actions suggested below can and should be pursued immediately.

In order to remedy the state program situation without endangering the NPDES program and water quality, the EPA should promulgate new CWA regulations. These regulations should first, define "negligently," outlined in the CWA's criminal penalties section 33 U.S.C. § 1319(c)(1), as ordinary negligence in order to prevent any further litigation under the NPDES program or other CWA permitting programs, such as section 404 discharge of dredged or fill material. The regulations will also serve to reduce confusion among states and regulated entities. Additionally, the EPA should eliminate the outdated note contained under 40 C.F.R. § 123.27(a)(3)(ii)[127] bringing the regulation into compliance with the 1987 CWA amendments and preventing the contradiction of the clear meaning of 40 C.F.R. § 123.27(b)(2). Further, the EPA should identify the states that have been authorized to run their own NPDES programs with illegal heightened mens rea standards for misdemeanor offenses, and provide for a period of two years from the issuance of the final rule for those states to make the necessary legislative changes to their programs and re-submit them to the EPA for re-approval. Finally, the new regulations should specify that if a state does not make the necessary changes in time, the EPA has a non-discretionary duty to withdraw the prior approval of that state's NPDES authorization and take back program authority under 33 U.S.C. § 1342(c)(3).

1. *The EPA's non-discretionary duties under 33 U.S.C. § 1342(c)(3)*

The proper outcome of *ICL v. EPA* will force the EPA to identify and provide notice to the thirty-three states with non-compliant NPDES programs under 33 U.S.C. § 1342(c)(3). If the EPA fails to perform the non-discretionary duties outlined in § 1342(c)(3), the agency will avail itself to suits filed pursuant to the CWA's citizen suit provision, 33 U.S.C.A. § 1365(a)(2), which states that "any citizen may commence a civil action on his own behalf—(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator."[128] The only way to avoid these inevitable citizen suits from arising across the country, is to send notice to all states that have NPDES programs not in

[127] 40 C.F.R. § 123.27(a)(3)(ii) ("States which provide the criminal remedies based on 'criminal negligence,' 'gross negligence' or strict liability satisfy the requirement of paragraph (a)(3)(ii) of this section.").
[128] 33 U.S.C. § 1365(a)(2).

compliance with CWA § 309(c)(1)'s ordinary negligence requirement,[129] and demand corrective action. The most efficient way to accomplish this is by adopting new and revised CWA regulations.

2. Adopting new CWA regulations

The EPA should first, define "negligently," in the CWA's criminal penalties section CWA § 309(c)(1),[130] as ordinary negligence in order to prevent any further litigation and reduce confusion among states and regulated entities. Second, the EPA should eliminate the note contained under 40 C.F.R. § 123.27(a)(3)(ii),[131] remove the outdated "willfully or negligently" language in (a)(3)(ii),[132] and replace it with the current CWA disjunctive "negligently"[133] or "knowingly"[134] mens rea standards. These changes would bring the regulation into compliance with the 1987 CWA amendments, and prevent the contradiction of the clear meaning of 40 C.F.R. § 123.27(b)(2), which prevents the states from having stricter mens rea standards than the EPA.[135] Further, the EPA will prevent litigation in likely all thirty-three of the non-compliant states, and future litigation over approval of states' section 404 state programs.[136] Additionally, while § 1342 (c)(3) serves as a mandate on the EPA to take back programs if the changes have not been made in ninety days,[137] states will need more than roughly three months to make the legislative changes required to keep their programs. Giving states two years to amend their programs will allow for state legislatures to make the necessary statutory changes. The threat of losing permitting authority over their own industries to the federal government should incentivize many states to take the corrective action needed quickly. Finally, the new regulations should specify that if a state does not make the necessary changes in time, the EPA has a non-discretionary duty to withdraw the prior approval of that state's NPDES authorization and take back program authority under 33 U.S.C. § 1342(c)(3). This addition should ensure that states comply with the new regulations or face removal of

[129] Clean Water Act of 1977, 33 U.S.C. § 309(c)(1).
[130] *Id.*
[131] 40 C.F.R. § 123.27(a)(3)(ii) ("States which provide the criminal remedies based on 'criminal negligence,' 'gross negligence' or strict liability satisfy the requirement of paragraph (a)(3)(ii) of this section.").
[132] *Id.*
[133] Clean Water Act of 1977, 33 U.S.C.§ 309(c)(1).
[134] *Id.* § 309(c)(2).
[135] 40 C.F.R. § 123.27(b)(2).
[136] Idaho Conservation League v. EPA, No. 18-72684, 36 (9th Cir. Oct. 2, 2018).
[137] 33 U.S.C. § 1342(c)(3).

their programs.

CONCLUSION

When it comes to protecting the safety and quality of water, the United States has an undoubtedly long and complex history. From the turn of the twentieth century all the way until 1972, the United States' water pollution control policies focused on giving states broad and supreme power to both set water quality standards and enforce violations as they saw fit. The results of those policies were devastating and led to the passage of the Clean Water Act in 1972, giving the federal government the chief authority to set water quality standards and enforce violations, with the ability to delegate some of this power to states. This balance of power between the EPA and the states is vital to the success of the CWA and specifically the NPDES program. Almost fifty years after passage of the CWA, states and the EPA have strayed dangerously far from its statutory requirements.

With thirty-three states demanding a heightened negligence standard in order to bring misdemeanor charges for violations of their NPDES programs, and a recent Ninth Circuit ruling that unequivocally calls for state programs to employ ordinary negligence mens rea, the NPDES program as currently instituted is in jeopardy of failing. In order to preserve the program, increase its efficacy, and comply with statutory requirements, the EPA should promulgate new CWA regulations, remove the outdated note in 40 C.F.R. § 123.27(a)(3)(ii), notify the states that's are not in compliance, and prepare to remove state authorizations if necessary.

Overall, the fate of the NPDES program is in doubt. But, with a few pointed regulatory changes, the EPA can prevent further litigation, comply with its non-discretionary duties laid out in the CWA, and ensure the proper level of criminal deterrence needed to protect water quality.