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United States v. Metropolitan Dist. Com.

United States District Court for the District of Massachusetts

September 5, 1985

Civil Action No. 85-0489-MA; Civil Action No. 83-1614-MA

Reporter
1985 U.S. Dist. LEXIS 16232 *; 16 ELR 20621; 23 ERC (BNA) 1350

UNITED STATES OF AMERICA, Plaintiff Vs. METROPOLITAN DISTRICT COMMISSION, ET AL., Defendants; CONSERVATION LAW FOUNDATION OF NEW ENGLAND, INC., Plaintiff Vs. METROPOLITAN DISTRICT COMMISSION, ET AL., Defendants

Subsequent History: Reserved by, in part *United States v. Metro. Dist. Comm'n, 1985 U.S. Dist. LEXIS 12401, 23 Env't Rep. Cas. (BNA) 1350, 16 Envtl. L. Rep. 20621 (D. Mass., Dec. 23, 1985)*

Later proceeding at *United States v. Metropolitan Dist. Com., 1987 U.S. Dist. LEXIS 1307 (D. Mass., Feb. 2, 1987)*

Later proceeding at *United States v. Metro. Dist. Comm'n, 2021 U.S. Dist. LEXIS 7 (D. Mass., Jan. 3, 2021)*

Later proceeding at *United States v. Metro. Dist. Comm'n, 2022 U.S. Dist. LEXIS 29442, 2022 WL 521782 (D. Mass., Feb. 18, 2022)*

Core Terms

violations, limits, Harbor, secondary, sludge, effluent, discharges, pollutants, Island, defendants', regulation, sewage, permittee, facilities, parties, upset, partial summary judgment, compliance, deadline, self-monitoring, non-compliance, modified, plant, modification, federal law, municipalities, bacteria, coliform, monthly, environmental protection agency

Case Summary

Procedural Posture
The United States District Court for the District of Massachusetts consolidated environmental cases brought by plaintiff citizens' group and the United States, Environmental Protection Agency (EPA), against defendants, state and municipal water authorities, to compel the clean-up of a harbor. Both filed motions for partial summary judgment.

Overview

The EPA claimed that the water authorities repeatedly violated a National Pollutant Discharge Elimination System (NPDES) permit, an administrative order, and the Federal Clean Water Act (FCWA), *33 U.S.C.S. § 1251 et seq.* It claimed that the authorities discharged pollutants into navigable waters without authorization. The authority argued that it should have had another chance to seek a voluntary solution. The court held that the EPA made out a prima facie case for summary judgment because there was no adequate assurance that the harbor would have been protected if the parties were left to their own devices. The citizens' motion for summary judgment as to other claims was inappropriate because the parties in their rush to reach the core violations, of which the parties' focus on those violations was understandable, cursorily treated those issues. The court held that the state authority should have been joined as a successor in interest to another violator because it was clear that the transfer of control of the physical treatment plants was a transfer of a sufficient interest to satisfy the rather minimal requirements of the joinder.

Outcome
The court granted summary judgment to the EPA against the state and municipal water authorities for their statutory and administrative violations. The motion of the citizens group to join the state water authority was granted. The EPA was dismissed as a defendant in the citizens' suit.

LexisNexis® Headnotes

Administrative Law > Governmental Information > Freedom of Information > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Environmental Law > Assessment & Information Access > Public Participation

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

Environmental Law > Water Quality > Clean Water Act > Recordkeeping & Reporting
Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Recordkeeping & Reporting

HN1 **Governmental Information, Freedom of Information**

The Federal Clean Water Act (FCWA), 33 U.S.C.S. § 1251 et seq., as amended establishes a complex system regulating all discharges of pollutants into the navigable waters of the country. The principal method of regulating such discharges is the National Pollutant Discharge Elimination System (NPDES). Under this system, the administrator of the Environmental Protection Agency (EPA) issues an NPDES permit to an individual discharger that sets specific effluent limits for that discharger. All permit holders are required to self-monitor their compliance with the permit by maintaining and transmitting to the administrator discharge monitoring reports (DMRs). 33 U.S.C.S. § 1318. By statute, DMRs are available to the public. 33 U.S.C.S. § 1318(b).

Administrative Law > Judicial Review > Reviewability > Standing

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Environmental Law > ... > Clean Water Act > Enforcement > Civil Penalties
Business & Corporate Compliance > ... > Clean Water Act > Enforcement > Civil Penalties

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

Environmental Law > ... > Clean Water Act > Enforcement > General Overview

HN2 **Reviewability, Standing**

Discharges of pollutants into the navigable waters made in violation of a permit under the National Pollutant Discharge Elimination System (NPDES) violate the Federal Clean Water Act (FCWA), 33 U.S.C.S. § 1251 et seq. 33 U.S.C.S. § 1311(a). The district courts have jurisdiction to enforce permit limits, to assess civil penalties not to exceed $ 10,000 per day of violation, and to order the administrator of the Environmental Protection Agency (EPA) to perform non-discretionary duties. 33 U.S.C.S. §§ 1319, 1365. Pursuant to 33 U.S.C.S. § 1319, the administrator of the EPA has authority to enforce the limits set by an NPDES permit. Affected citizens are also given standing to enforce a permit or the FCWA if the EPA fails to do so. 33 U.S.C.S. § 1365.

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Environmental Law > Water Quality > General Overview

HN3 **Discharge Permits, Effluent Limitations**

All publicly owned treatment works (POTWs) are to achieve "secondary treatment" effluent limits, a more sophisticated and effective method of removing pollutants that remain in sewage after the most basic, or "primary," treatment. The Federal Clean Water Act (FCWA), 33 U.S.C.S. § 1311(b)(1)(B).

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Real Property Law > Water Rights > Nonconsumptive Uses > General Overview

Administrative Law > Agency Adjudication > Informal Agency Action

Environmental Law > Natural Resources & Public Lands > General Overview

Environmental Law > Water Quality > General Overview

HN4[] Discharge Permits, Effluent Limitations

Two ways in which the Federal Clean Water Act (FCWA), 33 U.S.C.S. § 1251 et seq., permits a publicly owned treatment works (POTW) to avoid the secondary treatment deadline are the POTW can apply for a time extension in order to complete a necessary construction project so long as construction will be completed by July 1, 1983, 33 U.S.C.S. § 1311(i)(1), or the POTW can apply to the Environmental Protection Agency (EPA) for a secondary treatment waiver, pursuant to 33 U.S.C.S. § 1311(b). In order to obtain such a waiver, the applicant must demonstrate to the EPA that any modification of a National Pollutant Discharge Elimination System (NPDES) permit will not interfere 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. 33 U.S.C.S. § 1311(h)(2).

Administrative Law > Separation of Powers > Legislative Controls > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Environmental Law > Water Quality > General Overview

HN5[] Separation of Powers, Legislative Controls

No permit issued under the Federal Clean Water Act (FCWA), 33 U.S.C.S. § 1311(h), shall authorize the discharge of sewage sludge into marine waters. 33 U.S.C.S. § 1311(h).

Administrative Law > Agency Adjudication > Informal Agency Action

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN6[] Agency Adjudication, Informal Agency Action

A National Pollutant Discharge Elimination System (NPDES) permit sets forth effluent limits of pollutants into the navigable waters. The permit also contains numerous other special conditions, on which authorization to discharge is made expressly conditional. Completion of secondary treatment projects and primary and secondary sludge management construction projects are required and discharge of sludge is prohibited upon completion of the sludge management facilities.Any discharge in excess of the effluent levels listed constitutes a violation of the permit. Succeeding owners or controllers shall be bound by all the conditions of the permit, unless and until a new or modified permit is obtained.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

HN7[] Summary Judgment, Entitlement as Matter of Law

The standards for evaluating motions for summary judgment require that the record must be viewed in the light most favorable to the party opposing the motion. All inferences must be drawn in favor of the opposing party. Nonetheless, it is the function of summary judgment to pierce formal allegations of facts in the pleadings and to determine whether further exploration of the facts is necessary.

Administrative Law > Judicial Review > Standards of Review > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Environmental Law > Water Quality > Clean Water Act > Recordkeeping & Reporting
Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Recordkeeping & Reporting

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN8 **Judicial Review, Standards of Review**

A reviewing court, presented with alleged violations, need not inquire into the wisdom of particular effluent limits or other conditions of a National Pollutant Discharge Elimination System (NPDES) permit. A court need only ascertain that a permit has issued, and then compare the quantities of pollutants permitted by the permit with those listed on the administrator discharge monitoring reports (DMRs) of the Environmental Protection Agency. A violation of an NPDES permit condition is a violation of the Federal Clean Water Act (FCWA), *33 U.S.C.S. § 1251 et seq.*

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > Public Participation

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN9 **Agency Rulemaking, Rule Application & Interpretation**

The Code of Federal Regulations sets out extensive regulatory procedures that must be followed before a National Pollutant Discharge Elimination System (NPDES) permit can be modified. 40 C.F.R. § 122.15 et seq. For example, the Environmental Protection Agency must prepare a fact sheet and draft permit and allow for a period of public comment. *40 C.F.R. §§ 124.6*, *124.8*, *124.10*. Where none of these steps are followed an administrative order can not properly modify a permit's limits.

Administrative Law > Agency Adjudication > Informal Agency Action

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Real Property Law > Zoning > Variances
Business & Corporate Compliance > Real Property > Zoning > Variances

Environmental Law > Water Quality > General Overview

HN10 **Agency Adjudication, Informal Agency Action**

To the extent that municipal applicants are not in compliance with the secondary treatment deadline of the Federal Clean Water Act (FCWA), *33 U.S.C.S. § 1311(h)*, it is the responsibility of the municipalities, not the administrator of the Environmental Protection Agency (EPA). The administrator's regulations do not encourage non-compliance. Non-complying municipalities may apply for a variance, but the ultimate responsibility for statutory compliance rests on the municipal applicant. The statutory deadline is not extended unless an application is granted.

Administrative Law > Agency Adjudication > Informal Agency Action

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Environmental Law > Water Quality > General Overview

HN11 **Agency Adjudication, Informal Agency Action**

With regard to the secondary treatment deadline, the pendency of a waiver application under the Federal Clean Water Act (FCWA), *33 U.S.C.S. § 1311(h)*, does not shield an applicant from liability for violations of the FCWA's otherwise applicable secondary treatment standards.

Environmental Law > Water Quality > Clean Water Act > Recordkeeping & Reporting
Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Recordkeeping & Reporting

Evidence > Inferences & Presumptions > General Overview

Environmental Law > Water Quality > General Overview

Evidence > Relevance > Relevant Evidence

HN12[] Clean Water Act, Recordkeeping & Reporting

A publicly owned treatment works' (POTW) self-monitoring reports may be used to establish liability for violations of a National Pollutant Discharge Elimination System (NPDES) permit under the Federal Clean Water Act (FCWA), 33 U.S.C.S. § 1251 et seq.A permittee cannot avoid liability by arguing that the self-monitoring reports are inaccurate, since submission of inaccurate monitoring reports is, in itself, a violation of the FCWA.

Administrative Law > Separation of Powers > Legislative Controls > General Overview

Environmental Law > ... > Clean Water Act > Enforcement > General Overview

Environmental Law > Water Quality > General Overview

HN13[] Separation of Powers, Legislative Controls

An administrative order can not legally vary the requirements of the Federal Clean Water Act (FCWA), 33 U.S.C.S. § 1251 et seq.

Environmental Law > ... > Clean Water Act > Enforcement > General Overview

Torts > Public Entity Liability > Liability > General Overview

Environmental Law > Water Quality > General Overview

HN14[] Clean Water Act, Enforcement

Intent and good faith are irrelevant to the existence of violations of the Federal Clean Water Act (FCWA), 33 U.S.C.S. § 1251 et seq., since National Pollutant Discharge Elimination System (NPDES) permit enforcement actions are based on strict liability.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN15[] Agency Rulemaking, Rule Application & Interpretation

The temporary "upset" regulation forgives temporary non-compliance with a National Pollutant Discharge Elimination System (NPDES) permit issued under the Federal Clean Water Act (FCWA), 33 U.S.C.S. § 1251 et seq., due to extraordinary circumstances. An "upset" is defined asan exceptional incident in which there is unintentional and temporary non-compliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittees. An upset does not include non-compliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation. 40 C.F.R. § 122.41(n)(1).Environmental Protection Agency (EPA) regulations clearly place the burden of proof for establishing an upset on the permittees. 40 C.F.R. § 122.41(n)(4). There are detailed notice requirements with which a permittee must comply in order to establish the existence of an upset.

Civil Procedure > Parties > Substitution > General Overview

Mergers & Acquisitions Law > Sales of Assets > General Overview

Civil Procedure > Parties > Joinder of Parties > Permissive Joinder

HN16[] Parties, Substitution

In cases of any transfer of interest, an action may be continued by or against an original party, unless a court upon motion directs a person to whom the interest is transferred to be substituted in the action or joined with an original party.Fed. R. Civ. P. 25(c).

Environmental Law > ... > Clean Water Act > Coverage & Definitions > General Overview

Torts > Vicarious Liability > Corporations > Predecessor & Successor Corporations

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Enforcement > Citizen Suits > General Overview

Environmental Law > ... > Enforcement > Citizen Suits > Grounds for Citizen Suits

Governments > Local Governments > Administrative Boards

HN17[] Clean Water Act, Coverage & Definitions

It does not matter for purposes of an analysis of liability that a publicly owned treatment works (POTW) is a state created authority rather than a private corporation. The Federal Clean Water Act (FCWA), 33 U.S.C.S. § 1251 et seq.,specifically authorizes citizen suits against any person, and "person" is defined to include government instrumentalities or agencies. 33 U.S.C.S. § 1365(a)(1)(ii).

Trademark Law > Trademark Cancellation & Establishment > Conveyances > Valid Transfers
Business & Corporate Compliance > ... > Trademark Cancellation & Establishment > Conveyances > Valid Transfers

Mergers & Acquisitions Law > Liabilities & Rights of Successors > Mere Continuation

Torts > Vicarious Liability > Corporations > Predecessor & Successor Corporations

Mergers & Acquisitions Law > General Business Considerations > General Overview

Mergers & Acquisitions Law > Sales of Assets > General Overview

Trademark Law > Conveyances > General Overview

HN18[] Conveyances, Valid Transfers

A successor corporation is liable for acts of a predecessor corporation when a transfer includes assets, trademarks, customer lists, and good will, and a successor company continues to produce same product as the predecessor. A plaintiff should be allowed to pursue his claim even though his course of pursuit may lead him through that dark and dismal forest known to all as the corporate reshuffle.The question is whether the transferee is a mere continuation or reincarnation of the old corporation.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

Environmental Law > Federal Versus State Law > Federal Preemption

Torts > Procedural Matters > Preemption > General Overview

Civil Procedure > Pleading & Practice > Motion Practice > General Overview

Civil Procedure > Pleading & Practice > Motion Practice > Opposing Memoranda

Governments > State & Territorial Governments > Claims By & Against

Torts > Public Entity Liability > Immunities > General Overview

HN19[] Imposition of Sentence, Factors

Section 4(f) of the Enabling Act, 1984 Mass. Acts ch. 372, § 4(f), provides that no liability in tort, or for water pollution under a statutory or other basis, arising prior to

July first, 1985, shall be imposed upon the Massachusetts Water Resources Authority and this sentence shall apply to all actions or proceedings, including those commenced prior to the effective date of this act.

Constitutional Law > Supremacy Clause > General Overview

Governments > Legislation > Interpretation

HN20 **Constitutional Law, Supremacy Clause**

A state can not limit liability for violations of federal law by shuffling responsibility among different state agencies. The state cannot sanctify what Congress prohibits.

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

Environmental Law > ... > Emission Standards > Stationary Emission Sources > Hazardous Pollutants

Environmental Law > Water Quality > General Overview

HN21 **Enforcement, Discharge Permits**

40 C.F.R. § 122.61 provides that any National Pollutant Discharge Elimination System (NPDES) permit may be automatically transferred to a new permittee if (1) a current permittee notifies the director of the Environmental Protection Agency (EPA) at least 30 days in advance of the proposed transfer date and (2) the notice includes a written agreement between the existing and new permittees containing a specific date for transfer of permit responsibility, coverage, and liability between them.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Emission Standards > Stationary Emission Sources > Hazardous Pollutants

HN22 **Agency Rulemaking, Rule Application & Interpretation**

40 C.F.R. § 122.61 does not allow a permittee that has flagrantly violated the Federal Clean Water Act (FCWA), 33 U.S.C.S. § 1251 et seq.,to rid itself of all liability for those violations by undergoing what is basically cosmetic surgery. As a matter of law, this regulation cannot be interpreted to wipe a publicly owned treatment works slate clean of its predecessor's violations.

Opinion by: **[*1]** MAZZONE

Opinion

MEMORANDUM AND ORDER

Mazzone, D.J.

I. *INTRODUCTION*

At the heart of this case lies a fifty square mile expanse of water known as Boston Harbor. It is the largest harbor serving a major city on the East Coast, and is of unique historical, natural, and recreational significance. It was the site of the Boston Tea Party shortly before the birth of this Nation; it was the home for much of the fledgling Nation's merchant marine; it has always been the home port for what is not the oldest ship still commissioned in the United States Navy whose copper fittings were hammered by Paul Revere. Today, it serves millions of citizens who swim, sail, and fish in and around the Harbor. It boasts 15 virtually undeveloped islands; thousands of acres of marshes, tidelands, and fishbed; and many beaches, rivers, and inlets. The Harbor is used by the largest tankers and container ships as well as the smallest pleasure boats. The importance of this precious natural resource has been recognized by parties on both sides of this lawsuit:

Overall, this mix of islands and sea, of buildings and vegetation, of commerce and recreation, of sky and water creates a landscape that **[*2]** is never without new interest, that is never without great beauty, and that is never without a variety of recreational opportunities for the literally millions of people who live within a few miles of its shores. Boston Harbor, both its islands and its waters, is an economic and esthetic resource whose present value and future potential to the surrounding

region cannot be overestimated.

Metropolitan District Commission, Summary of Supplemental Draft Environmental Impact Statement on Sitting of Wastewater-Treatment Facilities in Boston Harbor (signed Dec. 28 and 31, 1984 by representatives of the Metropolitan District Commission and the Environmental Protection Agency) at 1.

Over the past several decades, however, the Harbor has become increasingly polluted. These consolidates cases involve efforts by the United States and the Conservation Law Foundation (CLF) to compel the clean up of the Harbor. Both plaintiffs have filed motions for partial summary judgment. Some description of the procedural posture of the cases is necessary before I turn to the motions presently before the Court.

On June 7, 1983 CLF filed suit against the Metropolitan District Commission (MDC), William **[*3]** Geary in his capacity as Chairman of the MDC, the United States Environmental Protection Agency (EPA), William S. Ruckelshaus in his capacity as Administrator of the EPA, and Paul G. Keough in his capacity as Region I Administrator of the EPA. The core allegations of that complaint were (1) that the MDC, which controlled the sewage treatment system for Metropolitan Boston, had systematically and illegally discharged billions of gallons of improperly treated and raw sewage into Boston Harbor for more than a decade; and (2) the EPA had failed to perform its non-discretionary duties under the Federal Clean Water Act, *33 U.S.C. § 1251 et seq.* (the Act), to require the MDC to comply with the substantive requirements of the Act. In October, 1983, CLF filed a motion for partial summary judgment as to liability only. On March 27, 1984, this Court stayed proceedings in the *CLF* case due to the existence of a related case, *Quincy* v. *MDC, et al.,* C.A. No. 138477, pending in Massachusetts Superior Court. [1] Despite various voluntary cooperative efforts in the *Quincy* case, the parties failed to reach an enforceable agreement setting a definite schedule for the clean up of **[*4]** the Harbor.

On January 31, 1985, the United States filed a separate suit (the *EPA* suit) at the request of the Administrator of the EPA. The complaint alleges violations of the Act, the defendants' federal permits, and certain EPA administrative orders. It names four defendants: the Commonwealth of Massachusetts; the MDC; the Massachusetts Water Resources Authority (MWRA), a newly created, autonomous authority which took over control of the metropolitan sewage system from the MDC on July 1, 1985; and the Boston Water and Sewer Commission, which controls certain of the combined sewage overflows alleged to further pollute the Harbor. The decision to file this federal suit was based on the growing conviction that the Harbor clean up could not be accomplished through voluntary cooperation with the defendants. The suit seeks both injunctive relief and civil penalties.

On May 22, 1985, after briefing and oral argument, this Court lifted the stay in the *CLF* case, denied a motion to stay the *EPA* case, consolidated the two cases, and granted the motion of the City of Quincy to intervene. The Town of Winthrop **[*5]** was granted leave to intervene on July 10, 1985.

On June 17, 1985, the United States filed a motion for partial summary judgment against the MDC and the Commonwealth as to liability. This Court heard oral argument on this motion and CLF's long pending motion for partial summary judgment on August 8, 1985.

II. *STATUTORY FRAMEWORK*

HN1[↑] The purpose of the Act, as amended is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *33 U.S.C. § 1251(a)*. It established a complex system regulating all discharges of pollutants into the navigable waters of this country. The principal method of regulating such discharges relevant in these cases is the National Pollutant Discharge Elimination System (NPDES). *See generally 33 U.S.C. § 1342*. Under this system, the Administrator of the EPA issues an NPDES permit to an individual discharger. The permit sets specific effluent limits for that discharger. All permit holders are required to self-monitor their compliance with the permit by maintaining and transmitting to the Administrator discharge monitoring reports (DMRs). *33 U.S.C. § 1318*. By statute, DMRs are available to the public. *33 **[*6]** U.S.C. § 1318(b)*.

HN2[↑] Discharges made in violation of an NPDES permit violate the Act. *33 U.S.C. § 1311(a)*. The district courts have jurisdiction to enforce permit limits, to assess civil penalties not to exceed $10,000 per day of violation, and to order the Administrator to perform non-discretionary duties. *33 U.S.C. §§ 1319*, *1365*. Pursuant to *section 1319*, the Administrator of the EPA has authority to enforce the limits set by an NPDES permit. Affected citizens are also given standing to enforce a permit or the Act if the EPA has failed to do

[1] The EPA participated as an *amicus* in the *Quincy* case.

so. 33 U.S.C. § 1365.

As amended, the Act specifies that HN3[↑] all publicly owned treatment works (POTWs) are to achieve "secondary treatment" effluent limits by July 1, 1977. 33 U.S.C. § 1311(b)(1)(B). Secondary treatment, colloquially speaking, is a more sophisticated and effective method of removing pollutants that remain in sewage after the most basic, or "primary," treatment. *See generally,* Office of Water Programs Operations, United States Environmental Protection Agency, *Primer for Wastewater Treatment* (1980) at 5-6; 33 U.S.C. § 1314(d); 40 C.F.R. Part 133. While secondary treatment is far more effective than primary **[*7]** treatment, it is usually far more expensive. In this case, the parties appear to agree that the cost of constructing secondary treatment plants for Boston Harbor would reach several billion dollars.

There are HN4[↑] two ways in which the Act permits a POTW to avoid the July 1, 1977 secondary treatment deadline: first, the POTW can apply for a time extension in order to complete a necessary construction project so long as construction will be completed by July 1, 1983. [2] 33 U.S.C. § 1311(i)(1). Second, the POTW can apply to the EPA for a secondary treatment waiver, pursuant to 33 U.S.C. § 1311(b) [hereinafter referred to as a section 1311(b) waiver]. In order to obtain wuch a waiver, the applicant must demonstrate to the EPA, *inter alia,* that any modification of an NPDES permit "will not interfere 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." 33 U.S.C. § 1311(h)(2). The legislative history and purpose of the section 1311(h) waiver provision is discussed **[*8]** at length, *infra.*

Finally, Congress amended section 1311(h) to include the direction HN5[↑] "No permit issued under this subsection shall authorize the discharge of sewage sludge into marine waters." 33 U.S.C. § 1311(h). With this statutory framework in mind, I turn to the facts of this case.

III. *FACTUAL BACKGROUND*

On August 12, 1976, the EPA issued NPDES permit number MA0102351 (the Permit) to "the Commonwealth of Massachusetts, Metropolitan District Commission." Although the Permit states that it expires on May 1, 1981, it remains in effect and enforceable until a new permit is issued. 5 U.S.C. § **[*9]** 558(c); 40 C.F.R. § 122.6. The Permit limits the volume of pollutants that the defendants [3] may discharge at Deer and Nut Islands (the sites of two principal treatment facilities for Boston Harbor). At these two treatment plants, incoming sewage and storm water receives only "primary" treatment. First, large solid objects such as sticks and stones and other wastes such as rags and sanitary napkins are sifted out. The effluent is then resifted for smaller particles such as grit and sand. Next, the sewage flows into large holding tanks and is allowed to settle. The surface of these tanks is skimmed to remove floating debris such as small sticks and human waste. The waste that settles to the bottom of these large vats is called sludge. The sludge remains in the holding tanks when the liquid sewage that remains after skimming is drawn off. That liquid is then chlorinated and released into the Harbor through a series of outfall pipes. Additionally, the sludge itself (which is simply the filth that settled out of the incoming raw sewage) is discharged into the Harbor twice a day at high tide.

[*10] The average length of time that sewage is held in the holding tanks at Nut Island is 90 minutes. Marcham Affidavit at 4. During heavy rain storms, however, the holding time decreases because the capacity of the plant is inadequate to handle an increased load: rather than discharge raw sewage directly into the Harbor, the plant is run at a faster rate, which therefore treats the incoming sewage less thoroughly. The affidavit submitted by the Superintendent of the Deer Island plant does not indicate the average holding time at that plant; the affidavit does make clear that during rain storms, that plant is also forced to operate at an increased flow rate. Kruger Affidavit at 3-6.

The Permit that governs these plants specifically limits

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[2] No application for such an extension in this case has ever been filed with or granted by the EPA. As amended, section 1311(i)(1) currently forbids any municipal time extension that would entail a completion date of later than July 1, 1988. At this late date, it is apparent that such a completion deadline is not feasible in this case. *See* Massachusetts Water Resources Authority, *The Clean Up of Boston Harbor, A Status Report* (May 30, 1985) at 15. This exception to the Act's secondary treatment deadline therefore is not available as a defense in this case.

[3] Except where indicated otherwise, the term "defendants" used in this Memorandum refers to both the Commonwealth and the MDC, since the Permit was issued to both of them jointly.

the following pollutants, *inter alia:* biochemical oxygen demand ("BOD"), total suspended solids ("TSS"), settleable solids ("SS"), fecal coliform bacteria, and total coliform bacteria. [4]

[*11] HN6[↑]

The Permit sets forth two different sets of effluent limits. One set of limits applies to discharges occurring before July 1, 1977, and the other applies to all discharges occurring after July 1, 1977. The second set of limits is, of course, the more strict.

The Permit also contains numerous other special conditions, on which authorization to discharge is made expressly conditional. Permit at 2. The following special conditions are particularly pertinent to this case. Conditions II(B)(5)(a)-(e) and (n) require completion of secondary treatment projects at Nut and Deer Islands and primary and secondary sludge management construction projects by July 1, 1977. Discharge of sludge is prohibited from either Island upon completion of the sludge management facilities. Permit II(A)(1)(a)(5), II(A)(3)(c).

As part of the General Conditions section of the Permit, the permittee is specifically notified that any discharge in excess of the effluent levels listed constitutes a violation of the Permit; and that "succeeding owners or controllers shall be bound by all the conditions of the Permit, unless and until a new or modified permit is obtained." Permit III(D).

In September, 1978 **[*12]** the MDC filed a preliminary application for a section 1311(h) waiver of secondary treatment requirements. It filed a formal application for a waiver on September 13, 1979.

On August 8, 1980, the EPA issued an administrative order (the 1980 AO) pursuant to 33 U.S.C. § 1319, finding that the MDC had violated the construction requirements of the Permit by failing to complete secondary treatment and sludge management facilities. The order specifically noted the pendency of the secondary treatment waiver application, but nonetheless ordered the permittee to comply with a detailed implementation schedule designed "to bring all discharges of wastewater combined wastewater/stormwater into compliance with the Act, [and] with the interim effluent limitations set forth [in the 1980 AO]." 1980 AO at 2. The 1980 AO set an interim "implementation schedule" for construction projects and set out various effluent limitations for Deer and Nut Islands. [5] Section VI of the 1980 AO, entitled "General Provisions" specifically notes that "[v]iolation of any of

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[4] The technical definition and significance of these characteristics of the effluent are described generally in the *Primer for Wastewater Treatment, supra,* and the June 17, 1985 affidavit of Richard P. Kotelly at 3-4, n.1-5. Their effect is well known to every citizen who seeks to swim or sail in Boston Harbor and to every school child who visits the Harbor displays at the New England Aquarium.

"BOD" is a measure of the oxygen requirement exerted by micro-organisms to stabilize organic matter. Wastewater entering the Harbor exerts an oxygen demand thereby depleting the amount of oxygen available for use by fish and plants. Without adequate oxygen, fish and plants die, eventually choking the Harbor.

"TSS" is an indication of the physical quality of water. Very high levels of suspended solids can afffect the ecology of the Harbor by inhibiting light transmission needed for photosynthesis, by which plant life survives.

"SS" is a measure of the volume of settleable matter in wastewater. It is used as an indicator of the effectiveness of treatment plant clarifiers and also as an indicator of the degree of sedimentation that may occur in the Harbor. Settleable wastewater solids in the Harbor may exert an oxygen demand which may reduce fish and plant life. Settleable solids also may adversely affect the habitat of fish and plant life.

"Fecal coliform bacteria" is a type of bacteria associated with the digestive tracts of warm-blooded mammals, including humans. Fecal coliform in itself is not harmful but is used as an indicator of other bacteria, including pathogenic organisms which can cause diseases such as typhoit fever, sysentery, diarrhea, and cholera.

"Total coliform bacteria" is a measure of both fecal and non-fecal coliform bacteria. Like fecal coliform bacteria, it is used as an indicator of the presence of harmful bacteria.

Kotelly Affidavit at 3-4, n.1-5; *Primer for Wastewater Treatment, supra.*

[5] The effluent limits set forth in the 1980 AO are virtually identical to the first set of limits contained in the Permit, i.e., the pre-July 1, 1977 limits. *Compare* Permit II(A)(1)(a) with 1980 AO II(A)(1) (same limits for Deer Island for flow, BOD, TSS, fecal coliform bacteria, total coliform bacteria, and PH; limit for SS reduced from 1.5 ml/L to 1.0 ml/L; decrease in 12 consecutive monthly concentration for BOD and TSS from 74% to 58%, respectively, to 70% and 50%, respectively). *Compare* Permit II(A)(3)(a) with 1980 AO II(B)(1) (same limit for Nut Island for flow, BOD, TSS, fecal coliform bacteria, total coliform bacteria, and PH; limit for SS increased to 2.0 ml/L from 1.0 ml/L; increase in 12 consecutive monthly average concentration of BOD from 78% to 82%.

the terms of this Order shall subject the permittee to further enforcement action under . . . 33 U.S.C. § 1319 . . ." and that "this **[*13]** Administrative Order does not preclude the initiation of any action, pursuant to Section 505 of the Act, by a third person other than the Agency to enforce the Permit's requirements to achieve the limitations by July 1, 1977." 1980 AO VI(B) and (C).

In June, 1983, the EPA tentatively denied the MDC's waiver application. Pursuant to C.F.R. § 125.59(d), the MDC was entitled to file an amended application **[*14]** for a waiver, which it did in October, 1984.

Another administrative order was issued in July 1984 (the 1984 AO) citing violations of the sludge limits set by the permit, of the sludge management schedule set by the 1980 AO, and of the effluent levels of the Permit. The 1984 AO orders the MDC to comply with the 1980 AO effluent limits until construction of facilities capable of complying with the Permit limits. The 1984 AO also sets out an interim schedule for pre-construction facilities planning. It notes, however, that "[c]ompliance with such interim requirements, however, does not amount to compliance with the MDC's permit or the Clean Water Act and shall not preclude additional enforcement action by EPA. Any language in the August 9, 1980 Administrative Order which could be read as an authorization for the MDC to violate its permit or the Clean Water Act is rescinded." 1980 AO at 6.

On March 29, 1985, the EPA tentatively re-denied the waiver application. Until the EPA issues a new NPDES permit, the MDC cannot administratively appeal the tentative denial of the waiver. The procedure for issuing a new NPDES permit is governed by 40 C.F.R. § 122.15 *et seq.,* and is **[*15]** both complex and time consuming.

IV. *MOTION OF THE UNITED STATES FOR PARTIAL SUMMARY JUDGMENT*

I turn first to the motion of the United States for partial summary judgment because it seems more appropriate to consider first the argument of the government agency entrusted with enforcing the Act. CLF's motion is addressed later in this memorandum.

The United States has moved for partial summary judgment as to liability, claiming that the defendants' own self-monitoring reports indicate repeated and serious violations of the Permit, the 1980 AO, and the Act's sludge discharge prohibitions at both the Deer and Nut Island facilities. Its claim is simple: the MDC is a person within the meaning of the Act; the MDC has discharged pollutants into navigable waters from a point source; and those discharges were not authorized.

The defendants argue that the Court should not reach this claim at all, for the following reasons. First, this Court should allow the parties yet another chance to seek a voluntary solution to the problem. This argument was briefed and argued extensively at the time I lifted the stay in the *CLF* case. I will not repeat now what I said at that time, other **[*16]** than to reiterate that without a decision as to liability, if any, the Court is entirely dependent upon the voluntary efforts of the parties. While I commend and encourage the worthy progress that has been made since the lifting of the stay, I simply do not have any adequate assurance that the community's federally guaranteed right to a clean harbor will be protected if the parties are left to their own devices.

The defendants' second threshold argument -- that they should be allowed more time to prepare their defense -- is discussed, and rejected, below. Finally, the defendants argue that this Court should not rule on the motions for partial summary judgment since "piecemeal summary judgment on a narrow range of issues would not enhance the Court's remedial authority." Defendants' Memorandum of Law in Opposition to Motions for Partial Summary Judgment at 28 [hereinafter cited as Defendants' Brief]. This argument appears to have two prongs. The first is that even if this Court were to find liability, it would lack the power to enter an equitable decree requiring compliance with a federal statute. *See* Defendants' Brief at 28-30. I respectfully disagree. The second prong **[*17]** appears to be that because it would be so difficult to enter a thorough, appropriate decree, this Court should deny the motions. *See* Defendants' Brief at 30-31. I again must disagree. The fact that the case may present difficult and complex issues should not affect the right of the plaintiffs to obtain any justified relief.

Having disposed of the defendants' initial objections to proceeding with motions, I turn to the well established **HN7**[↑] standards for evaluating motions for summary judgment. The record must be viewed "in the light most favorable to . . . the party opposing the motion." Poller v. Columbia Broadcasting System, 368 U.S. 464, 473 (1962). All inferences must be drawn in favor of the opposing party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Nonetheless, it is the function of summary judgment to ""pierce formal allegations of facts in the pleadings . . ." and to determine whether further exploration of the facts is necessary." Hahn v. Sargent,

523 F.2d 461, 464 (1st Cir. 1975), *cert. denied, 425 U.S. 904 (1976)*, quoting Schreffler v. Bowles, 153 F.2d 1, 3 (10th Cir. 1946).

The NPDES system and the Act's self-monitoring **[*18]** requirements establish a simple and expedient enforcement scheme. HN8[↑] A reviewing court, presented with alleged violations, need not inquire into the wisdom of particular effluent limits or other conditions of an NPDES permit. Student Public Interest Research Group of New Jersey v. Monsanto, 600 F.Supp. 1479, 1485 (D.N.J. 1983) [hereinafter cited as *SPIRG* v. *Monsanto*]. The court need only ascertain that a permit has issued, and then compare the quantities of pollutants permitted by the permit with those listed on the DMRs. *Id.* A violation of an NPDES permit condition is a violation of the Act. Natural Resources Defense Council v. Costle, 568 F.2d 1369, 1374-77 (D.C. Cir. 1977).

In this case, there is no dispute that the defendants are persons within the meaning of 33 U.S.C. § 1362(5), and that they operate or have operated the Deer and Nut Island sewage treatment plants. There is no dispute that discharges from those plants were originally regulated by NPDES permit No. MA0102351, and that the Permit has not been revoked or reissued. At oral argument, defense counsel admitted the authenticity of the four volumes of monthly summaries of the DMRs submitted **[*19]** as exhibits to the Pitt Affidavit. The Court's task, therefore, is to compare the figures contained in the monthly summaries with the permitted effluent levels and determine whether there are any violation.

The first legal question is thus to determine what effluent standard currently governs discharges made into Boston Harbor. The United States argues that the Permit controls; the defendants argue that the 1980 AO controls. For the following reasons, I find that the Permit sets the enforceable effluent levels.

First, it is undisputed that the Permit remains in effect until revoked, modified, or reissued. The Permit has not been revoked or reissued, so the question becomes whether it has been modified. HN9[↑] The Code of Federal Regulations sets out extensive regulatory procedures that must be followed before a permit can be modified. 40 C.F.R. § 122.15 *et seq.* For example, the EPA must prepare a fact sheet and draft permit and allow for a period of public comment. 40 C.F.R. §§ 124.6, 124.8, 124.10. There is no dispute that none of these steps were followed in this case. The 1980 AO, then, could not properly modify the Permit limits since the proper regulatory steps were **[*20]** not taken to effect a modification.

Second, the 1980 AO itself is explicitly issued as "Findings of Violation and Orders for Compliance." While noting the pending waiver application, the AO reads as follows:

Based on the above findings, I further find that because of [the defendants"] failure to achieve secondary treatment, the permittee's discharge of pollutants from its POTW's [sic] is in violation of § 301(a) of the Act, 33 U.S.C. §1311(a). . . .

1980 AO at 2, Finding #5. The 1980 AO thereafter lists various interim effluent levels with which the Permittee must comply on pain of "further enforcement action . . . [including] . . . a civil action for injunctive relief and penalties or, in appropriate cases, criminal prosecution." 1980 AO at 17. The language of the AO and the section of the act pursuant to which it was issued make clear that the AO was intended to *enforce* existing limits, not to modify those limits. The AO does not and could not alter the permittee's duty to comply with the Act. As counsel for the United States argued at the hearing, it simply makes no sense to interpret this order, which was clearly issued to compel the defendants to comply with **[*21]** the Permit's limits, as granting the right to indefinitely violate the limits set by that Permit. *See* Defendants' Brief at 60 (the 1980 AO "modified the 1976 Permit by authorizing MDC to discharge effluent that satisfied less stringent interim limits, based on primary treatment, for an indefinite period of time"). The defendants would remake what was patently a sword to compel compliance into a shield to protect themselves from liability. I will not accept such an argument.

Third, the 1980 AO specifically notes that it "does not preclude the initiation of an action, pursuant to § 505 of the Act, by a third person other than the Agency to enforce the Permit's requirements to achieve the limitations by July 1, 1977." 1980 AO at 17. Had the AO legally modified the Permit's requirements, it would have barred third parties from instituting citizen suits.

The defendants, however, raise a final argument concerning the applicable effluent limits which requires somewhat more extended discussion. Briefly stated, they claim that the pendency of their waiver application relieves them of the obligation to comply with the Permit's secondary treatment requirements until that application **[*22]** is permanently denied. They claim

that this view of the effect of a pending section 1311(h) waiver application is supported by the legislative history of the Act and the "leading case" construing section 1311(h).

The United STates argues that the legislative history of the Act and the same "leading case" support exactly the opposite view, namely that the pendency of a waiver application does not excuse non-compliance with the Act.

After reviewing the legislative history concerning the effect of a pending waiver application, I find it inconclusive. Senator Muskie, a principal sponsor of the bill, stated in his introduction to the Report of the Committee on Environment and Public Works, "the mere application for a modification does not stay any requirement to achieve . . . secondary treatment by the applicant. . . ." 4 A Legislative History of the Clean Water Act of 1977 at 683, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4375. The subsequent Conference Committee Report states:

An application for a modification [of secondary treatment requirements] is not to stay requirements of the Act unless in the judgment of the Administrator the stay or modification will not result **[*23]** in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment and there is a substantial likelihood the applicant will succeed on the merits.

H.Con.R. No. 95-830 at 79, *reprinted in* 1977 U.S. Code Cong. & Ad. News at 4454.

As finally enacted, section 1311 does not use the language quoted above in relation to section 1311(h) waivers. Rather, in discussing section 1311(g) applications for waivers of treatment for certain pollutants, section 1311(j)(2), entitled "modification procedures," states:

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 . . . and there is a substantial likelihood that the appellant will succeed on the merits of such application.

33 U.S.C. § 1311(j)(2). Why this language was not retained in section 1311(h) is unclear. Its omission might **[*24]** tend to support the defendants' argument that Congress did intend that an application for a waiver would stay the secondary treatment deadline. As the United States points out, however, where Congress wanted a modification application to stay the Act's requirements, it knew how to do so. *See* 33 U.S.C. § 1311(j)(2). Since I find the legislative history unenlightening as to the effect of a secondary treatment waiver application, I turn to case law for further guidance.

Both parties cite the same case, National Resources Defense Council, In.c v. Environmental Protection Agency, 656 F.2d 768 (D.C. Cir. 1981) [hereinafter cited as *NRDC* v. *EPA*], as supporting their views. That case involved challenges to the EPA's adoption of certain regulations governing the granting of section 1311(h) waivers. The plaintiffs argued that the EPA had no authority to grant section 1311(h) waivers that would extend compliance deadlines beyond the Act's July 1, 1977 deadline. In upholding the challenged regulations, the Court stated:

The second serious flaw in NRDC's argument is that it ignores the period of non-compliance assumed in the statute itself. Congress knew that thousands **[*25]** of municipalities had not met the July 1, 1977 deadline. Congress authorized coastal municipalities to apply for section 1311(h) permits, and did not restrict the eligibility of municipalities not in compliance with the July 1, 1977 deadline. Congress itself recognized that noncomplying municipalities would apply for section 1311(h) permits. Therefore a period of non-compliance was assumed for at least some section 1311(h) applicants. Under NRDC's interpretations no period of non-compliance can be allowed, yet Congress itself assumed such a period.

HN10[↑] *To the extent that municipal applicants are not in compliance with the July 1, 1977 deadline it is the responsibility of the municipalities, not the Administrator. The Administrator's regulations do not encourage non-compliance. Non-complying municipalities may apply for a variance, but the ultimate responsibility for statutory compliance rests on the municipal applicant. The statutory deadline is not extended unless an application is granted, a result clearly intended by Congress.*

Id. at 780-81 (citations omitted, emphasis added).

I accept this reasoning of the Circuit Court for two reasons. First, as the court noted, **[*26]** the overriding purpose of the Act is the prevention of water pollution.

Id. at 780. The more reasonable interpretation of the Act consistent with this purpose is to encourage earlier rather than later compliance. Second, it is well established as a general principal of environmental law that waiver requests and appeals from decisions on those requests are "on the polluter's time." *Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 92 (1975)*; *Union Electric Co. v. Environmental Protection Agency, 593 F.2d 299, 303-305* (8th Cir.), *cert. denied, 444 U.S. 839 (1979)*; *SPIRG* v. *Monsanto, supra,* 600 F.Supp. at 1486. [6] I therefore hold that ***HN11***[⬆] the pendency of a *section 1311(h)* waiver application does not shield the defendants from liability for violations of the Act's otherwise applicable secondary treatment standards.

[*27] The defendants protest that it makes no sense to require them to build a secondary treatment plant merely to discover later that they have been excused from complying with secondary treatment requirements. This argument, appealing though it may sound, is relevant only to the choice of remedy, not to the existence of a violation of the Act. As the *NRDC* court stated, the "statutory deadline is not extended unless an application is granted. . . ." *NRDC* v. *EPA* at 781. No application has been granted, and therefore the July 1, 1977 secondary treatment deadline applies to the defendants. [7]

[*28] Having determined that the 1976 Permit provides the applicable effluent standards, I turn to the evidence offered to show violations of those standards. Both CLF and the EPA have submitted copies of the defendants' self-monitoring monthly summaries. At oral argument, defense counsel conceded the authenticity of the documents. I need not rely on the separate summaries of violations provided by the CLF and the EPA since the mechanics of comparing the Permit levels and the reported outflow are straightforward.

HN12[⬆] Self-monitoring reports such as those submitted in this case may be used to establish liability. *Sierra Club* v. *Raytheon Co.,* No. 83-1785-MA, slip op. at 7 (D. Mass. October 26, 1984); *Student Public Interest Research Group v. Fritzche, Doge & Olcott, Inc., 597 F.Supp. 1528, 1538 (D.N.J. 1984)*, *aff'd, 759 F.2d 1131 (3d Cir. 1985)* [hereinafter cited at *SPIRG* v. *FDO*]. The permittee cannot avoid liability by arguing that the self-monitoring reports are inaccurate, since submission of inaccurate monitoring reports is, in itself, a violation of the Act. *SPIRG* v. *FDO* at 1539, n.14.

Special Condition II(A)(1)(c) sets the following

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[6] In this case, the EPA's second denial of the MDC's *section 1311(h)* waiver application has not yet become "final," and hence appealable, due to the regulatory complexity of issuing a new NPDES permit. In their various briefs and at oral argument, defense counsel indicate that an appeal may indeed be sought from the denial of the waiver application, although that decision has not yet been made. When questioned at oral argument about the basis for the assertion that there is a "substantial likelihood" that an appeal would be granted, Defendants' Brief at 56, counsel for the MWRA indicated that there had been certain irregularities in the manner in which the application had been denied.

Understandably, counsel declined to elaborate on this point. I note, however, that his argument suggested only a procedural error in the denial of the application, not necessarily a substantive error.

While the merits or likelihood of success of the waiver application are not before this Court and are not technically relevant to the present issues, I believe that the extended delay involved in obtaining a final resolution of the waiver application is relevant. Were I to accept the defendants' arguments, the citizens of Massachusetts could be denied the benefit of any progess towards achieving secondary treatment during a lengthy administrative appeal within the EPA, then to an administrative law judge, then to the Court of Appeals for the First Circuit, and finally to the United States Supreme Court. According to the defendants, during all these steps, they would not be required to plan for or begin to implement secondary treatment requirements despite the fact that their application has been denied twice. The question, therefore, is who should bear the Law's delay? The defendants' do not satisfactorily answer this pressing question.

[7] The defendants argue throughout their briefs that their slowness has been caused by the EPA's extreme delay in processing the waiver application. They further claim that the EPA should be estopped from seeking to establish liability because of that delay.

I do not know why it has taken the EPA so long to act on the application. I do know that the EPA has taken varying and perhaps contradictory positions as a defendant in the *CLF* case and as aligned with the plaintiff in the *EPA* case. If any action or inaction by the EPA has contributed to the defendants' failure to move forward with the clean up of the Harbor, the Court will take that into account when fashioning an appropriate remedial order.

I will not, however, apply the doctrine of equitable estoppel to this case. The "pressing public interest in the enforcement of congressionally mandated public policy" clearly outweighs the possibility of harm to the defendants. *United States v. Van-Fuel, Inc., 758 F.2d 741, 761 (1st Cir. 1985)*.

monthly **[*29]** average effluent limits: [8] for BOD, 30 mg/1; for TSS, 30n mg/1; for fecal coliform bacteria, 200/100 ml; for total coliform bacteria, 1000/100 ml. Attached to this opinion as Appendix A is a chart setting out these different limits and the months in which the Permit limits were violated.

[*30] Comparing the Permit levels with the self-monitoring reports reveals persistent and severe violations of the Act. Even were I to accept the defendants' argument that the 1980 AO set the applicable limits, it is clear that the MDC has substantially violated even the 1980 AO. Appendix B attached to this opinion sets out violations of the monthly average limits set by sections II(A)(1) and II(B)(1) of the 1980 AO. Even judged by the much more lenient standards set by the 1980 AO, the self-monitoring reports reveal many serious violations of the Act.

The United states has also moved for summary judgment as to Counts V and VII of the complaint, which involve discharges of sludge from both Deer and Nut Islands. Special Conditions II(a)(1)(a)(5) and II(A)(3)(c) of the Permit require the MDC to cease discharging sludge from both islands as soon as sludge disposal facilities are completed. Special Condition II(B)(5) requires completion of those facilities by July 1, 1977. The facilities have not been constructed, and the defendants admit that they are still discharging sludge into the Harbor on a daily basis. Defendants' Answer at PP45, 46; MWRA, *The Clean up of Boston Harbor, a* **[*31]** *Status Report* (May 30, 1985) at 33. This clearly violates the Permit. [9]

As noted above, the pendency of a section 1311(h) waiver application does not stay the July 1, 1977 deadlines. Further, the 1980 AO did not modify the requirements of the Permit. The 1980 AO, however, states:

Until *termination of sludge discharge,* digested sludge may be discharged . . . to *Boston Harbor only during the four hour period beginning at high tide.* This discharge of sludge shall terminate upon completion of the sludge disposal facilities.

1980 AO II(A)(5) (emphasis in original). *See also* 1980 AO II(B)(6). The defendants argue that this language confers a blanket license to discharge unlimited quantities of sludge for an indefinite period of time. Defendants' Brief at 83-84. The flaw in this argument is readily **[*32]** apparent and has been discussed above. The 1980 AO was designed to enforce the Act, not to lessen its requirements. HN13[↑] The AO could not legally vary the requirements of the Act. Further, it explicitly stated that it did not prevent third parties (such as CLF) from suing to enforce the Permit's requirements to achieve secondary treatment requirements by July 1, 1977. 1980 AO VI(C). Since the defendants have failed to raise any genuine issue of material fact as to the sludge charges, I find that the United States has made out a prima facie case for summary judgment as to Counts V and VII as well. [10]

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[8] I have chosen to analyze only the monthly average limits as a matter of convenience. I do not believe that it is necessary for this Court to compare each of the five major effluent limits for each day of the period September 1, 1980 through May 31, 1985. I have chosen the limits for BOD, TSS, fecal coliform bacteria and total coliform bacteria simply because a monthly average limit was set for each of them.

Were the Court inclined to impose a civil penalty per day of violation, I would have analyzed each limit for each day of the approximately five year period for which I have been given self-monitoring reports. CLF, however, has waived any claims for civil penalties and the United States had made clear that is has no intention of seeking the imposition of the multi-million dollar fines that might be authorized if all the alleged violations were proven. At oral argument, defense counsel stated that it was the fear of such fines that prevented the parties from reaching a settlement in this case. I reiterate now that if it is merely the specter of such an enormous fine that prevents the parties from settling this case, the defendants should rest assured that this Court would not impose an enormous and counter-productive fine, even assuming that it had the authority to do so. *See* Edelman v. Jordan, 415 U.S. 651 (1974). If, as counsel implied, this is the only obstacle to settlement, I urge the parties to resume negotiations at the earliest opportunity.

[9] As I delve into the record in this case, it becomes more and more incomprehensible to me that the defendants have continually discharged the sludge back into the Harbor daily. By so doing, they virtually eliminate any benefit the initial treatment steps may have had. This simply amounts to separating water from filth, and pumping *both* back into the Harbor.

[10] The defendants argue that the EPA should be estopped from complaining about sludge discharges since the 1980 AO explicitly conferred a right to discharge sludge. Had the defendants faithfully complied with each and every condition of the 1980 AO, and had CLF never filed suit, this Court might have been confronted with an interesting estoppel question. CLF, however, has filed suit, and the defendants have violated the 1980 AO on numerous occasions. The Court therefore

V. *THE DEFENDANTS" CASE*

The self-monitoring **[*33]** reports reveal chronic and severe violations of both the Permit and the 1980 AO. ***HN14***[⬆] Intent and good faith are irrelevant to the existence of violations of the Act, since NPDES enforcement actions are based on strict liability. *SPIRG* v. *Monsanto, supra,* at 1485. The defendants nonetheless seek to raise a final defense to liability, namely that many, if not all, of the violations fall within ***HN15***[⬆] the temporary "upset" regulation which forgives temporary non-compliance due to extraordinary circumstances. An "upset" is defined as:

an exceptional incident in which there is unintentional and temporary non-compliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittees. An upset does not include non-compliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

40 C.F.R. § 122.41(n)(1).

I reject the defendants' "upset" defense. First, the defendants have failed to satisfy the regulatory prerequisites to establishing the defense. EPA regulations clearly place the burden of proof for **[*34]** establishing an upset on the permittees. *40 C.F.R. § 122.41(n)(4)*. There are detailed notice requirements with which a permittee must comply in order to establish the existence of an upset. *See, e.g., 40 C.F.R. §§ 122.41(n)(3)(iii)*, *122.41(1)(6)(ii)(B)* (permittee must provide 24 hour telephone notice to EPA and written notice within five days, specifying the date and time of the upset, the reasons for it and the steps that have been and will be taken to correct the upset). [11] The United States has submitted an affidavit stating that no upset notices are on file with the EPA.

The defendants contest the accuracy of the affidavit, not by submitting opposing affidavits or producing copies of the notices, but rather by claiming that they need more time to be allowed to investigate and **[*35]** develop their "upset" defense. At oral argument, defense counsel stated that several MDC employees have been assiduously poring over five years of records for the treatment plants, in an effort to discover which days of alleged violations might be attributable to upsets. [12] The defendants claim that there may be letters to the EPA explaining various violations, but the defendants simply have not had time to thoroughly research their filed to discover those letters, or to depose EPA employees to discover the existence of these letters.

[*36] As I stated at oral argument, any force this might have had a few years ago has long since dissipated. CLF filed its motion for summary judgment in October 1983; the *EPA* suit was filed more than six months ago, and this Court consolidated the cases and lifted the stay in May, 1985. The defendants have found the time to prepare a 96 page brief in opposition to the motion for summary judgment, a 27 page reply brief, and numerous other documents. They have spent their time attempting to prevent the Court from reaching the merits of the case, rather than defending against the straightforward claims pressed by the United States and CLF. They are of course entitled to pursue the strategy of their own choosing, but they must bear the consequences of that choice.

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need not reach this issue. *See also* note 6, *supra.*

[11] The purpose of the regulation's allocation of the burden of proof and these extensive notice requirements is to ensure that "prosecution for permit violations be swift and simple." ***44 Fed. Reg. 32863*** (June 7, 1979). Congress evidently wanted to prevent exactly the kind of drawn out inquiry into the causes of violations in years long since passed that the defendants now seek to conduct.

[12] In their brief and at oral argument, the defendants appeared to assume that an upset includes violations due to factors such as normal seasonal variations in weather, necessary maintenance, and construction designed to remedy inadequate capacity. *See* Defendants' Brief at 73-79. I do not believe that this is correct as a matter of law. *See 40 C.F.R. § 122.41(n)(1)*.

Defendants also argue that many violations are attributable to compliance with operational practices mandated by EPA. For example, the EPA requires MDC to increase the flow rate through the plants during excess flow periods in order to avoid bypasses. In simpler terms, during heavy rains, the EPA requires the MDC to treat incoming sewage less thoroughly than usual so as to avoid having to bypass an overloaded plant and discharge raw sewage directly into the Harbor. The defendants argue that the EPA should not be able to blame them for violations when all they are doing is complying with the EPA orders in the first place.

This argument is unconvincing. The problem only arises because the plants are woefully inadequate. EPA is entitled to insist that the MDC comply with procedures designed to mitigate the harm caused by that inadequacy. That the EPA is trying to make the best of a bad situation does not relieve the defendants from liability for having created that bad situation.

The rule is clear: a party opposing a motion for summary judgment must present evidence of a genuine issue of material fact. Even were I inclined to ignore the defendants' failure to comply with the notice requirements, they have failed to produce any evidence supporting their claim of upset. To the extent that this Court has any discretion to defer ruling on the motions, I decline to do so.

VI. *MOTION OF THE CONSERVATION* **[*37]** *LAW FOUNDATION FOR SUMMARY JUDGMENT*

CLF's motion for partial summary judgment anteceded the motion of the United States and is substantially similar. CLF urges that the Court grant summary judgment due to the defendants' discharge of sludge and violations of the Permit and the 1980 AO. For the reasons set forth above, summary judgment as to those counts is granted. [13] Therefore, it will not be necessary, *deo volente,* to address CLF's many additional claims for relief.

For the record, however, those claims are that the defendants have violated the 1981 and 1982 AOs, failed to carry out best practicable treatment of combined sewage/wastewater discharges, failed to **[*38]** meet state water quality standards, and failed to maintain an adequate number of working pumps at Deer Island. In addition to my reluctance to deal with these claims at this time, they have been somewhat cursorily treated by the parties in their rush to reach the core violations which were discussed at length above. In light of the voluminous record compiled to date, the parties focus on those core violations is understandable.

CLF's motion for summary judgment as to those claims enumerated above is therefore denied without prejudice to renew at a later date.

VII. *SUCCESSOR LIABILITY OF THE MASSACHUSETTS WATER RESOURCES AUTHORITY*

The final issues before the Court are whether the MWRA should be joined or substituted as a defendant in the *CLF* suit and whether it should be held liable for the MDC's prior violations under the doctrine of successor liability. [14]

[*39] CLF has moved to substitute or join the MWRA pursuant to *Fed.R.Civ.P. 25(c)*. The rules states:

HN16[↑] In cases of *any* transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.

Fed.R.Civ.P. 25(c) (emphasis added). The MWRA does not appear to seriously contest that joinder is appropriate under this rule, since it is clear that the transfer of control of the physical treatment plants is a transfer of a sufficient interest to satisfy the rather minimal requirements of the Rule. CLF's motion to join the MWRA pursuant to *Rule 25* is therefore allowed.

The hotly contested issue is whether in addition to "mere" joinder the MWRA is to be held liable for the acts of the MDC. The substantive right that CLF seeks to enforce in its suit arises from federal law. I therefore turn to federal law to decide whether the MWRA should be considered a successor to the MDC. *Town of Brookline v. Gorsuch, 667 F.2d 215, 221 (1st Cir. 1981)*; *United States v. Ira S. Bushey & Sons, Inc., 363 F.Supp. 110, 119* (D. **[*40]** Vt.), *aff'd w/o op., 487 F.2d 1393 (2d Cir. 1973)*, *cert. denied, 417 U.S. 976 (1974)*.

I do not believe that it ***HN17***[↑] matters for purposes of this analysis that the MWRA is a state created authority rather than a private corporation. The Act specifically authorizes citizen suits against any person, and "person" is defined to include government instrumentalities or agencies. *33 U.S.C. § 1365(a)(1)(ii)*. I therefore turn to the general federal

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[13] CLF and the EPA have purported to sign a stipulation dismissing the EPA and the named individual defendants as defendants in the *CLF* case. The other defendants oppose this motion on the ground that *Fed.R.Civ.P. 41(a)(1)(ii)* requires signatures of all parties in order for a voluntary dismissal to be effective. Although I agree with this argument, I nonetheless grant the motion to dismiss since CLF's claim against the EPA is now moot: CLF has the relief it sought when naming the EPA as a defendant.

[14] The MWRA initially argues that CLF's suit should be dismissed for lack of standing under the citizen suit provision of the Act, since the EPA has now entered the case and is actively litigating to enforce the Act. I reject this argument. Once a proper party, CLF cannot subsequently be deprived of standing by actions occurring after the initiation of the law suit. Further, under the unique circumstances of these cases, it is far from certain that the EPA will pursue a consistent enforcement policy for the many years it will take to clean up the Harbor. CLF was a motivating force behind early efforts to clean up the Harbor. The CLF suit should not be dismissed now merely because a new player has recently entered the arena. *See SPIRG* v. *Monsanto, supra,* at 1485.

rules on successor liability. In this circuit those rules are set forth in Cyr v. B. Offen & Co., 501 F.2d 1145 (1st Cir. 1974). In *Cyr* the court struck down a provision in a contract governing the transfer of corporate assets. That provision purported to limit the liability of the buyer for the acts of the predecessor corporation. The court stated:

We cannot believe that the issue of liability would turn on whether the founder's shares in the company decreased below a majority ownership, or whether he entered into an arrangement by which he sold all of his shares to his employees, with payment to be made over a period of years. . . . *If as a group the same employees continue, without pause to produce the same products* **[*41]** *in the same plant, with the same supervision, the ownership of the entity which maintains essentially the same name cannot be the sole controlling determinant of liability.*

Id. at 1154 (emphasis added). *See also* Minnesota Mining and Manufacturing Co. v. Eco Chem, Inc., 757 F.2d 1256, 1264-65 (Fed. Cir. 1985) (**HN18**[⬆] successor corporation liable for acts of predecessor when transfer included assets, trademarks, customer lists and good will, and successor company continued to produce same product); Moody v. Albemarle Paper Co., 50 F.R.D. 494, 497 (E.D.N.C. 1970) (plaintiff "should be allowed to pursue his claim . . . even though his course of pursuit may lead him through that dark and dismal forest known to all as the corporate reshuffle").

Under the rule set forth in *Cyr,* the question is whether "the transferee was a mere continuation or reincarnation of the old corporation." *Cyr at 1152*. While I believe it is a close question, and I am not unmindful that my ruling adds another concern and hangs a potential albatross around the neck of the fledgling MWRA, I am compelled to find that the MWRA is indeed a reincarnation of the MDC, and is therefore liable **[*42]** for its predecessor's liabilities. Put in starkest terms, the MWRA controls the same sewage plants, with the same personnel, the same governing NPDES permit, the same woeful operating limitations, for the same purpose of serving the metropolitan Boston community. The distinctions on which the MWRA would rely to prevent successor liability are that unlike the MDC, the MWRA: (1) is independent from the Executive Office of Environmental Affairs; (2) has some employees who are not subject to civil service; (3) has an independent budget and rate-setting authority; and (4) can adopt new rules and regulations, although the MDC's rules and regulations remain in effect until revised or rescinded. 1984 Stat. c. 372 (the Enabling Act), § 4(f). These differences simply do not counterbalance the striking similarity in purpose and method of operation of the MDC and the MWRA.

The MWRA raises several additional arguments that merit discussion. First, it claims that it is shielded from liability by **HN19**[⬆] section 4(f) of the Enabling Act. That section provides in part:

No liability in tort, or for water pollution under a statutory or other basis, arising prior to July first, nineteen hundred and **[*43]** eighty-five, however, shall be imposed upon the Authority and this sentence shall apply to all actions or proceedings, including those commenced prior to the effective date of this act.

CLF claims that this seciton is preempted by federal law. The MWRA disagrees, arguing that the Enabling Act is not preempted by federal water pollution law since it "governs the internal operations of state government qua government." Memorandum in Opposition to Motion to Substitute or Join the Massachusetts Water Resources Authority at 10. I reject the MWRA's argument since it seems clear to me that section 4(f) does not merely govern internal state operations, but rather attempts to limit liability for violations of federal law. **HN20**[⬆] The state can no more do this than it can prevent the enforcement of a remedy for violating civil rights law by shuffling responsibility among different state agencies. Wright v. County School Board of Greensville County, 309 F.Supp. 671 (E.D.S.C. 1970), *rev'd on other grounds sub nom.* Wright v. City Council of Emporia, 442 F.2d 570 (4th Cir. 1971), *rev'd* 407 U.S. 451 (1972). *See also* Cornelius v. Hogan, 663 F.2d 330 (1st Cir. 1981). The state **[*44]** cannot sanctify what Congress prohibits.

The MWRA cites Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190, 203-205 (1983), in support of its theory. In that case, the state had attempted to establish more stringent standards for nuclear power plant safety than required by the federal government. The Supreme Court held that more stringent state regulation was not preempted by federal laws governing the same subject. I bvelieve that the result would have been the opposite had the state passed a law that effectively established more lenient safety standards than the federal ones. By attempting to limit the MWRA's liability for its predecessor's act, section 4(f) tries to impose a more lenient standard than that allowed by federal law. I therefore find that section 4(f) of the Enabling Act is preempted because it "stands as

an obstacle to the accomplishment and execution of the purposes and objectives of Congress" as expressed in the Clean Water Act. *Hines v. Davidowitz, 312 U.S. 52, 67 (1941)*.

The MWRA also argues that an EPA regulation explicitly prevents the imposition of successor liability. The regulation **[*45]** in question is ***HN21*** *40 C.F.R. section 122.61*, which provides in part:

[A]ny NPDES permit may be automatically transferred to a new permittee if: (1) The current permittee notifies the Director at least 30 days in advance of the proposed transfer date . . .; (2) The notice includes a written agreement between the existing and new permittees containing a specific date for transfer of permit responsibility, coverage, and liability between them. . . .

There is no dispute that the MDC and the MWRA signed such a letter, and that the letter purports to allocate liability for violations occurring prior to July 1, 1985 to the MDC. The EPA agreed to the transfer of the Permit, but by letter dated June 28, 1985, specifically rejected the MDC-MWRA allocation of liability. The EPA pointed out that General Condition III(D) of the Permit states that "[s]ucceeding owners or controllers shall be bound by all the conditions of this permit, unless and until a new or modified permit is obtained."

The regulation can be read either to apply to any "new" holder of a permit, or, as argued by CLF, only to those transferees who have taken over the Permit as a result of "arms-length transactions." Further **[*46]** Reply of Conservation Law Foundation and Motion for Leave to File the Same at 2. The question is also a very close one, and one on which much of the future course of this litigation will turn. In light of the discussion above on successor liability, I accept CLF's argument that this regulation is irrelevant to the present case. If, as a matter of substantive federal law the MWRA is liable for the MDC's violations, a letter agreement between the parties could not alter that conclusion. It simply does not make sense to interpret this ***HN22*** regulation as allowing a pemittee that has flagrantly violated the Act to rid itself of all liability for those violations by undergoing what is basically cosmetic surgery. I do not mean by this to belittle the MWRA or the important and difficult progress it has made. I merely find that as a matter of law, this regulation cannot be interpreted to wipe the MWRA's slate clean of its predecessor's violations.

CONCLUSION

Boston Harbor is a powerful ecological system which is capable of reconstituting itself as long as the system is not overloaded. The record before me shows the system is being continuously overloaded and, as a result, each day **[*47]** the Harbor becomes more polluted. I believe that condition cannot be sincerely disputed. The self-motivating reports submitted to this Court reveal chronic, flagrant violations of the federal law. That law secures to the people the right to a clean harbor. No argument raised by any of the defendants disputes the fact that massive quantities of pollutants are discharged every day into the Harbor. For the reasons set forth above, I reject the defendants' various technical defenses to the claims raised by the plaintiffs.

Some further comment is in order. The task the MWRA has been assigned is complex and politically sensitive. It will entail many unpopular decisions. We are all aware that sewage treatment plants are expensive; that they are complicated and time-consuming to construct; and that they will not be welcome as neighbors. The MWRA will be in a better position to cope with these problems then the MDC. It is certainly in a better position than any court to make decisions about the myriad of details that will arise during the courts of the clean up effort. Its effort, thus far, has been heartening and I would be remiss if I did not express an appreciation for an encouragement **[*48]** of the MWRA's initial, difficult actions.

The purpose of these proceedings is to ensure that the MWRA fulfills the mission entrusted to it by the state legislature. Delay in this mission only enlarges the problem and means an even more expensive and prolonged effort. If the MWRA acts expeditiously, it need not concern itself with interference from this Court. I am ever mindful of the delicate balance of federal and state interests presented by these unique circumstances. At the same time, this Court was invited into this litigation only when voluntary efforts proved ineffective. The plaintiffs have not proven a violation of a federally protected right, and this Court must protect that right if the entity entrusted by the state to do so should falter in its task. This is not to say that this should be solely a state effort. Despite its present posture as a plaintiff, the EPA, as its name indicates, is an environmental protection agency and its duty is to cooperate in an ensure the expeditious design, funding, and construction of the necessary facilities. Fulfillment on this duty will assure that the Harbor will remain a vital economic and esthetic resource.

For the reasons **[*49]** set forth above, the motion of the United States for partial summary judgment is granted.

The motion of the Conservation Law Foundation is granted in part and denied in part. The motion of the Conservation Law Foundation to join the Massachusetts Water Resources Authority is granted. The Environmental Protection Agency and the named individual defendants in their capacity as Administrator of the Environmental Protection Agency and the Region I Administrator of the Environmental Protection Agency are dismissed as defendants in the *CLF* suit.

SO ORDERED.

APPENDIX "A"

The following appendix sets forth violations of the 1976 Permit effluent limitations for both Deer and Nut Islands. The only categories considered are monthly average violations for the limits for BOD, TSS, fecal coliform bacteria, and total coliform bacteria. The limit for each of these factors is set out at the column heading. Only for those months in which a violation occurred is a number reported; if there is no number, there was no violation for that particular effluent limit. The number listed indicates the amount of the pollutant of the particular category, in the units listed at the column heading. **[*50]** All numbers are obtained from the self-monitoring monthly summaries found in volumes I through IV of the Pitt Affidavit Appendices.

Go to table1

Go to table2

[*51]

Go to table3

Go to table4

[*52]

APPENDIX "B"

The following appendix sets forth violations of the 1980 Administrative Order for both Deer and Nut Islands. The only categories considered are monthly average violations for the limits for BOD, TSS, fecal coliform bacteria, and total coliform bacteria. The violations are as follows:

I. *For Deer Island* (TSS limit under the 1980 AO is 91 mg/L)

February 1981: TSS violation of 95 mg/L

September 1981: TSS violation of 104 mg/L

October 1981: TSS violation of 102 mg/L

January 1982: TSS violation of 92 mg/L.

February 1982: TSS violation of 105 mg/L

October 1982: TSS violation of 93 mg/L

September 1984: TSS violation of 112 mg/L

October 1984: TSS violation of 103 mg/L

November 1984: TSS violation of 94 mg/L

January 1985: TSS violation of 96 mg/L

February 1985: TSS violation of 93 mg/L

March 1985: TSS violation of 102 mg/L

April 1985: TSS violation of 123 mg/L

II. *For Nut Island*

No violations.

Table1 (Return to related document text)

I. *Violations of the 1976 Permit at Deer Island*

	Month	*BOD: 30 mg/L*	*TSS: 30 mg/L*	*FCB: 200/100*	*TCB: 1000/100*
September	1980	101	65		
October	1980	93	68		
November	1980	88	74		
December	1980	106	83		
January	1981	98	86		
February	1981	102	95		
March	1981	109	82		
April	1981	108	85		
May	1981	99	89		
June	1981	77	61		
July	1981	90	61		
August	1981	93	88		
September	1981	105	104		
October	1981	97	102		
November	1981	89	76		
December	1981	84	84	272	
January	1982	96	82		
February	1982	99	105		
March	1982	80	85		
April	1982	85	88		
May	1982	104	107		1025
June	1982	87	8		
July	1982	89	70	249	
August	1982	91	82	621	1848
September	1982	124	85	769	1431
October	1982	115	93	373	
November	1982	79	74	309	1910
December	1982	85	74	203	1288
January	1983	83	85		
February	1983	92	86		
March	1983	91	74		
April	1983	105	78		
May	1983	82	85		
June	1983	109	79		

Table1 (Return to related document text)

Table2 (Return to related document text)

	Month	*BOD: 30mg/L*	*TSS: 30 mg/L*	*FCB: 200/1000 ml*	*TCB: 1000/100 ml*
July	1983	117	73	343	1118

August	1983	113	84		1182
September	1983	120	71		
October	1983	128	73	457	
November	1983	105	74	217	
December	1983	114	74		
January	1984	120	71		
February	1984	108	79		
March	1984	82	69		
April	1984	79	84		
May	1984	90	87		
June	1984	85	78		
July	1984	92	76	619	6298
August	1984	104	83	476	2840
September	1984	124	112	[*]8.6M	[*]1.8M
October	1984	134	103	520	2771
November	1984	126	94	437	4015
December	1984	115	91		2265
January	1985	121	96		2265
February	1985	111	93		
March	1985	106	102		1115
April	1985	116	123		
May	1985	101	89		

Table2 (*Return to related document text***)**

Table3 (*Return to related document text***)**

II. *Violations of the 1976 Permit at Nut Island*

	Month	*BOD: 30 mg/L*	*TSS: 30 mg/L*	*FCB: 200/100 ml*	*TCB: 1000/100 ml*
September	1980	113	59		
October	1980	123	75		
November	1980	95	68		
December	1980	115	77		
January	1981	130	75		
February	1981	120	61		
March	1981	95	50		
April	1981	102	71		
May	1981	102	66		
June	1981	112	78		
July	1981	114	68		
August	1981	98	77		
September	1981	100	87		

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[*] "M" presumably has been used to designate a unit of 1000.

October	1981	102	72	323	6824
November	1981	82	45		3760
December	1981	67		232	3472
January	1982	62	32		1420
February	1982	73			1395
March	1982	72.3			1140
April	1982	66.7			1260
May	1982	93	39		3380

Table3 (*Return to related document text*)

Table4 (*Return to related document text*)

	Month	*BOD: 300 mg/L*	*TSS: 30 mg/L*	*FCB: 200/100 ml*	*TCB: 1000/100 ml*
June	1982	54		216	4645
July	1982	71	40		1349
August	1982	82.23	38.9		1848
September	1982	107			
October	1982	116	46		1320
November	1982	**	**	205	3350
December	1982	**	**		
January	1983	**	**		
February	1983	58.5	38.85		1622
March	1983	47			
April	1983	58			
May	1983	63	38		
June	1983	106	34		
July	1983	76	51		
August	1983	86	53		
September	1983	100	61		
October	1983	100	74		
November	1983	90	45		
December	1983	46			
January	1984	84			
February	1984	60			
March	1984	50	37		
April	1984	47	33		
May	1984	86	59		
June	1984	66	70		
July	1984	89	91		
August	1984	82	82		1926
September	1984	105	103		

** No information was reported for these categories.

October	1984	85	88
November	1984	113	101
December	1984	105	82
January	1985	93	71
February	1985	100	66
March	1985	77	57
April	1985	101	80
May	1985	93	70

Table4 (*Return to related document text***)**
