

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES PUBLIC)
INTEREST RESEARCH)
GROUP, STEPHEN E.)
CRAWFORD, AND)
CHARLES FITZGERALD,)
)
Plaintiffs) Civil No. 00-150-B-C
)
v.)
)
HERITAGE SALMON, INC.)
)
Defendant)
)

RECOMMENDED DECISION ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, DEFENDANT'S FIRST MOTION FOR SUMMARY JUDGMENT, AND DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT

Plaintiffs, the United States Public Interest Research Group, Stephen Crawford, and Charles FitzGerald (collectively "USPIRG"), filed a Clean Water Act citizen suit against defendant, Heritage Salmon, Inc.. (Docket No. 2.) Before me for recommended decision are USPIRG's motion for summary judgment on the issue of Heritage's liability for Clean Water Act violations (Docket No. 9); Heritage's motion for summary judgment on the basis of primary jurisdiction (Docket No. 19); and Heritage's second motion for summary judgment on all claims. (Docket No. 43.) I recommend that the Court **DENY** Heritage's motions for summary judgment and **GRANT** USPIRG's motion for summary judgment on the issue of liability under the Clean Water Act.

Summary Judgment Standard

Summary judgment is appropriate when the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment

as a matter at law.” Fed. R. Civ. P. 56(c). A fact is “material” when it has the “potential to affect the outcome of the suit under the applicable law.” Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). A “genuine issue” exists when the evidence is “sufficient to support rational resolution of the point in favor of either party.” Id. To determine whether genuine issues of material fact exist in matters subject to cross-motions for summary judgment, the court must draw all reasonable inferences against granting summary judgment. Cont’l Grain Co. v. P.R. Mar. Shipping Auth., 972 F.2d 426, 429 (1st Cir. 1992). Summary judgment should be granted “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

Facts

The Parties

Since the early 1990s, Defendant, a Canadian corporation named Heritage Salmon, Inc. (“Heritage”), has owned and operated five salmon farms known as South Bay, Broad Cove, Deep Cove, and Comstock Point I and Point II. (Pls.’ Statement of Material Facts (PSMF) ¶¶ 1, 2, 7; Def.’s Statement of Material Facts (DSMF) ¶ 1.) These farms are located off the Maine coast in Cobscook Bay. (PSMF ¶ 5; Def.’s Resp. Statement of Material Facts (DRSMF) ¶ 5.) Heritage also operates a sixth farm in Cobscook Bay called Birch Point, which Heritage leases from another company. (PSMF ¶ 3.) Heritage owns an additional salmon farm called Goose Island, which is not currently operating. (Id. at ¶ 4.)

Plaintiffs consist of the United States Public Interest Research Group, a national organization dedicated to environmental protection, and two individual members, Stephen Crawford and Charles FitzGerald. (Id. ¶¶ 138-139.) Collectively, the plaintiffs will be referred to as “USPIRG.” USPIRG initiated this citizen suit claiming that Heritage’s salmon farms release pollutants into the water in violation of the Clean Water Act. (Am. Compl. at 1.)

Heritage’s Fish Farm Operations

Heritage’s salmon farms consist of collections of floating nets arrayed in the ocean. (Def.’s Second Statement of Material Facts (D2dSMF) ¶ 9.) Heritage uses two types of net pens, both designed to contain fish, exclude predators, and allow the free passage of ocean water. (Id. ¶¶ 9-11; DRSMF ¶ 184.) One type consists of square steel net pens that have plastic floats filled with polystyrene. (D2dSMF ¶ 10.) An inner containment net and an outer predator net hang from the steel frame structure and a bird net covers the top. (Id.) The other type of net pen has circular plastic piping instead of a steel structure and has the same inner and outer nets hanging from the structure. (Id. at 11.) Both types of net pens are moored to the sea floor. (PSMF ¶ 18; DRSMF ¶ 18.) The open mesh of the nets allows the current to pass through the nets. (D2dSMF ¶ 9.) The square net pens are joined and held in a grid pattern by a center bridge section. (D2dSMF ¶ 10.)

Heritage nurtures salmon eggs in its Maine hatcheries and then raises them in a smolt field until they become smolts (i.e. young salmon that are ready to migrate from fresh water to salt water). (PSMF ¶ 18; DRSMF ¶ 18.) Most of the fish Heritage grows are one of two North American strains of salmon, although on February 14, 2001,

Heritage reported it is raising approximately 100,000 fish of non-North American strain. (PSMF ¶ 11, Nicholas Decl. I Ex. B at 97.) When the fish become smolts, Heritage transfers them into the net pens (also referred to as “sea cages”) by either emptying them from boxes or fluming them down plastic tubes. (Id. ¶¶ 18-19.) Each one hundred meter net pen can hold 35,000 fish. (DRSMF ¶ 20.) The salmon are grown in the net pens for about fifteen to twenty-seven months and then are harvested for market. (PSMF ¶ 21.) All of Heritage’s farms, except Goose Island, produce at least 9,090 harvest weight kilograms (approximately 20,000 pounds) of salmon a year. (Id. ¶¶ 108-109; DRSMF ¶ 108.)

1. Copper

The nets that confine the fish, as well as the nets that keep predators away from the fish, are treated with an “antifoulant” called Flexguard II. (Id. ¶ 26.) Flexguard II contains copper, which is designed to reduce marine growth on Heritage’s nets. (Id. ¶ 26.) While the net pens are in the water, copper is released from the nets into the marine environment. (Id. ¶ 27; DRSMF ¶ 27.)

2. Feed

Heritage feeds its salmon a meal containing waste products from the chicken processing industry, which include chicken feathers, chicken blood, and chicken carcasses. (PSMF ¶ 28; DRSMF ¶ 28.) The feed also contains soybean meal, wheat, a “vitamin/mineral pack,” and other ingredients. (PSMF ¶ 29; DRSMF ¶ 29.) Heritage adds to the feed a pharmaceutical manufactured pigment called canthaxanthin, which colors the fish’s flesh pink. (PSMF ¶¶ 30-33.) Heritage sprays the feed into the net pens from underwater pipes attached to a barge. (Id. ¶¶ 34-36.) Occasionally, the fish are fed

by hand or by “blowers” which blow the feed into the salmon cages. (Id. ¶ 37.) During feedings, excess feed falls through the net pens into the ocean and collects on the sea floor under Heritage’s pens. (Id. ¶ 88; DRSMF ¶ 88.) At least thirty days a year, Heritage introduces feed into the water and feed exits the net pens. (PSMF ¶¶ 106-107; DRSMF ¶¶ 106-107.) Each Heritage farm, except Goose Island, feeds at least 2,272 kilograms (approximately 5,000 pounds) of food during the calendar month of maximum feeding. (PSMF ¶¶ 110-111; DRSMF ¶ 110.)

3. Diseases, Viruses, and Parasites

In the past, salmon in Heritage’s pens have contracted bacterial kidney disease (“BKD”), fununculosis, hitra, and vibrios, which can kill fish or have sublethal effects. (PSMF ¶¶ 40-41.) Bacterial diseases can spread by becoming water-borne and by contaminating material such as feces and fish carcasses. (Id. ¶ 44.)

Additional concerns at Heritage’s farms are sea lice and a viral disease called infectious salmon anemia (“ISA”). (Id. ¶ 58; DRSMF ¶ 58.) Sea lice larvae are carried by water currents and are not confined to the net pens. (PSMF ¶ 62.) These parasites can cause serious wounds and kill salmon. (Id. ¶¶ 59, 61.) There has been one confirmed case of ISA at Heritage’s net pen sites. (Id. ¶ 54; DRSMF ¶ 54.) USPIRG asserts that there is no cure for ISA and it is a significant threat to the remaining endangered wild salmon. (PSMF ¶ 57.)

4. Chemicals and Fish Wastes

Heritage treats bacterial infections by adding the antibiotic TM 100 and/or Romet to the salmon feed. (PSMF ¶¶ 46, 47, 49; DRSMF ¶¶ 46, 47, 49.) This feed, like the

unmedicated feed, can flush out of the pens with the current or fall to the ocean floor. (PSMF ¶¶ 87, 88.)

In order to kill sea lice, Heritage uses a chemical called cypermethrin. (Id. ¶ 64; DRSMF ¶ 64.) The cypermethrin Heritage uses is contained in a product called Excis. (PSMF ¶ 70; DRSMF ¶ 70.) Heritage applies cypermethrin after placing a tarp around a net pen and raising the tarp to confine the salmon in a small area. (PSMF ¶ 66.) The cypermethrin, calculated to .5 parts per billion, is then poured from a container into the tarped pen. (Id. ¶ 66; DRSMF ¶¶ 66-67.) Following the hour-long treatment, the tarp is removed and the cypermethrin is released from the net pens into the marine environment. (PSMF ¶ 67; DRSMF ¶¶ 66-67.)

Aside from these chemicals, salmon feces and urine are flushed out of the net pens and enter the bay water. (PSMF ¶¶ 87, 102-104.) Salmon feces can accumulate on the sea floor under Heritage's pens. (Id. ¶ 88.) Salmon feces, urine, or other fish wastes exit the net pens at each of Heritage's farms at least thirty days a year. (Id. ¶ 105; DRSMF ¶ 105.)

5. Escapees

On occasion, fish escape from Heritage's net pens. (DRSMF ¶ 74.) USPIRG claims that fish can escape during transfer and harvesting or by swimming through holes in the nets created by storms, boats, logs and seals. (PSMF ¶¶ 75-76.) In November 2000, approximately 13,100 fish escaped from Heritage's Deep Cove farm when a boat tore a hole in a net. (Id. ¶ 78; DRSMF ¶ 78.) Between 1994 and 1998, Heritage lost a total of 90,359 fish, although not all of these losses reflect escapes. (PSMF ¶ 83.)

Heritage does not have a contingency plan to retrieve escaped fish, but has taken steps to reduce escapes. (PSMF ¶ 83; DRSMF ¶¶ 75-76.)

Heritage's salmon are different from the salmon that naturally exist in Cobscook Bay. First, in February 2001, Heritage reported it has approximately 100,000 salmon of non-North American origin. (PSMF ¶ 11; Nicholas Decl. I Ex. B at 97.) Second, Heritage's farm raised salmon can be differentiated from wild salmon by the bluntness of their fins, a deformity caused by stresses associated with crowded net pens. (PSMF ¶¶ 15, 16.) Third, some Heritage salmon become deformed due to unbalanced nutrition or physical injuries. (Id. ¶ 14; DRSMF ¶ 14.)

EPA Involvement

In a March 23, 1988 letter from Director of EPA Region I Water Management Division to William Lawless, Chief Regulatory Branch, Army Corps of Engineers, the Director, commented on applications from Ocean Products, Inc.¹ and Sea Farm Lubec Inc. to install and maintain floating fish pens. (Pls.' Resp. Second Statement of Material Facts (PR2dSMF) ¶ 18, Nicholas Decl. II Ex. 4.) The EPA Director stated that “depending on the number of fish to be raised, the amount of waste to be produced, and the feeding volumes, these projects may require National Pollutant Discharge Elimination System (NPDES) permits.” (Id. Ex. 4 at 2.)

A few months later, in August 1989, the EPA responded by letter to a party's notice of intent to sue the EPA for failing to require salmon net pen facilities in Maine to have NPDES permits. (Id. ¶ 19, Nicholas Decl. II Ex. 10 at 3.) In the letter, the EPA stated that upon its review of the Clean Water Act and the applicable regulations, it

¹ Ocean Products, Inc. was the name of Heritage's farms prior to Heritage's purchase in 1991 from Ocean Products, Ltd. (D2dSMF ¶ 2.)

concluded that salmon net pen facilities in Maine may constitute “Concentrated Aquatic Animal Production Facilities” under 40 C.F.R. § 122.24(b) and Appendix C or under § 122.24(c). (Id.) The EPA further stated that it planned to inform facilities operating in the coastal waters that they must obtain NPDES permits if they meet the criteria in § 122.24. (Nicholas Decl. II Ex. 10 at 3.)

In October 1990, EPA Region One sent Ocean Products Inc. a letter stating that its facilities are required to obtain National Pollutant Discharge Elimination System (“NPDES”) permits and instructed Ocean Products to submit an NPDES application. (PR2dSMF ¶ 20, Nicholas Decl. I Ex. S at 2; D2dSMF ¶ 2.) The letter cited the Clean Water Act, but did not refer to the § 122.24 regulations. (Def.’s Reply to Pls.’ Resp. Second Statement of Material Facts (DRR2dSMF) ¶ 20.) It is not clear whether Ocean Products, Inc. applied for a permit. (PR2dSMF ¶ 6.)

Near the beginning of May 2000, USPIRG gave Heritage notice of its intent to file a citizen suit for the Clean Water Act violations that are the subject of this action. (PSMF ¶ 140, Nicholas Decl. I Ex. X.) Heritage claims that in May 2000, an Environmental Protection Agency (“EPA”) representative informed Heritage that the EPA never issued National Pollutant Discharge Elimination System (“NPDES”) permits for Maine salmon farms because the agency was very busy and was not concerned about salmon farms. (DRSMF ¶ 145.) Heritage submitted applications to the EPA for NPDES permits² on June 23, 2000, for its Broad Cove, Deep Cove, Comstock Point, South Bay

² The EPA has not issued a “general” NPDES permit to cover the salmon farming industry in Maine (PSMF ¶ 101), thus Heritage applied for “individual” permits. A “general” NPDES permit is generally applicable to a group of point sources consisting of similar operations and similar types of waste discharges. Texas Oil & Gas Ass’n v. EPA, 161 F.3d 923, 929 (5th Cir. 1998) (citing 40 C.F.R. 122.28). An “individual” permit applies to individual point source dischargers. Driscoll v. Adams, 181 F.3d 1285, 1288 (11th Cir. 1999). When an NPDES permit is required, either type of permit suffices as compliance with the Act.

and Goose Island sites. (Id. ¶ 142.) However, Heritage never received a permit or any response from the EPA regarding its NPDES applications. (PSMF ¶ 100; DRSMF ¶ 100.) The EPA has not conducted a site inspection nor notified Heritage that its facilities have been designated under 40 C.F.R. § 122.24(c) as a “Concentrated Aquatic Animal Production Facility,” which requires an NPDES permit. (D2dSMF ¶ 13.)

In a June 23, 2000 letter from EPA, Region One to plaintiffs’ counsel in response to plaintiffs’ notice of intent to file a lawsuit against ASM, Connors Aquaculture [i.e. Heritage],³ and Stolt Sea Farm, the EPA states, “The EPA shares your concerns regarding the environmental issues raised in your notice. Under 40 C.F.R. § 122.24 and Appendix C to Part 122, salmon farms are concentrated aquatic animal production facilities (CAAPFs), and thus are point sources under the Act.” (PR2dSMF ¶ 23, Nicholas Decl. I Ex. R at 1; DRR2dSMF ¶ 23.) The EPA acknowledges that years ago when Maine salmon companies applied for NPDES permits, the EPA at that time because of “resource constraints” did not issue what they considered to be “minor” permits. (Nicholas Decl. I Ex. R at 1.) The EPA stated that it considered these to be low-priority permits “because the information available at the time indicated that such permits were not a significant environmental concern...[and] ... were considered low-priority permits because the environmental issues related to fish farms in Maine, including potential problems with the use of non-North American strains of Atlantic salmon, were not well understood.” (Id.)

³ Heritage changed its name from Connors Aquaculture, Inc. prior to the commencement of this citizen suit. (Am. Compl. at 4; Answer to Compl. at 1; PSMF ¶ 7; DRSMF ¶ 7.)

Prior to January 2001, the EPA was the only NPDES permitting agency in the State of Maine. In January 2001, the EPA granted the State of Maine the authority to issue NPDES permits. (DRSMF ¶ 146.) As a part of that delegation, Maine entered into a Memorandum of Understanding in which the State committed to issue “draft” individual or general permits for salmon farms by November 2001. (Id.) Although the State now has permitting authority, the EPA has oversight authority over all State-issued NPDES permits. (Id.; Nicholas Decl. I Ex. R.) In order to protect the endangered wild Atlantic salmon, the EPA determined that the State-issued NPDES permits for salmon farms should limit fish escapes and require a variety of measures to reduce the impact to wild salmon when escapes occur. (DSMF ¶ 2, Nicholas Decl. I Ex. K.) In furtherance of that goal, the EPA determined that the State-issued permits must ban transgenic fish, ban reproductively viable non-North American Atlantic salmon stocks, require cages designed to achieve zero escaped salmon in any Maine river, require a loss control plan, and require all fish to be marked so that they can be traced if they escape. (Id. ¶ 3, Nicholas Decl. I Ex. K.)

On April 19, 2001, Heritage and other members of the aquaculture industry met with representatives from the Maine Department of Environmental Protection (“DEP”), the Natural Marine Fisheries Service, the United States Army Corps of Engineers, the United States Fish and Wildlife Services, and Maine’s Department of Marine Resources to plan and to coordinate the NPDES permitting process. (DRSMF ¶ 114.) Heritage claims that during that meeting, and on other occasions, DEP stated that it intends and expects to issue NPDES permits in November 2001. (Id. ¶ 143.) Although Heritage submitted NPDES permit applications to the EPA for its net pen sites in June of 2000 (Id.

¶ 142), Heritage has not obtained an NPDES permit for any of its Maine salmon farms. (Id. ¶ 100; PSMF ¶ 100.)

Discussion

In its citizen suit under the Clean Water Act, USPIRG seeks a declaratory judgment that Heritage has violated, and is violating, the Clean Water Act and an injunction ordering Heritage to cease operations at its Maine salmon farms. (Am. Compl. at 9.) Further, USPIRG seeks civil penalties for Clean Water Act violations from April 26, 1995, to date and reasonable attorney's fees and costs. (Id.) USPIRG filed a motion for summary judgment requesting the court to grant its claim for declaratory relief by finding that Heritage's salmon farms violate the Clean Water Act, 33 U.S.C. § 1311, as the farms discharge pollutants without a National Pollution Discharge Elimination System ("NPDES") permit. (Pls.' Mot. Summ. J. (PMSJ) at 2.) Heritage filed a cross motion for summary judgment (Docket No. 19) asserting that plaintiffs lack standing and further arguing that primary jurisdiction requires the court to dismiss the action. (Def.'s Mot. Summ. J (DMSJ) at 17.) The Court denied Heritage's motion insofar as it sought dismissal based on plaintiffs' lack of standing. (Docket No. 36 & 41.) The remaining question of primary jurisdiction is addressed here. Heritage filed a second motion for summary judgment (Docket No. 43) claiming it is not required to obtain an NPDES permit and that it is not prohibited under the Clean Water Act from discharging pollutants. (Def.'s Second Mot. Summ. J. (D2dMSJ) at 2-3.)

A. *Is There a Violation of the Clean Water Act?*

The Clean Water Act (“Act”) states that “the discharge of any pollutant by any person is unlawful.” 33 U.S.C. § 1311(a). When a person or entity is in compliance with certain provisions of the Act, they are exempt from the prohibition in § 1311(a). Id. Here, the only relevant exemption is section 1342, which authorizes the Environmental Protection Agency Administrator (“EPA”) to issue NPDES permits allowing individuals or entities to discharge pollutants, thereby exempting them from the prohibition in § 1311(a). See 33 U.S.C. § 1342(a)(1) & (k). Sections 1311(a) and 1342 are understood to mean that the discharge of a pollutant is prohibited unless an NPDES permit has been obtained. See, e.g., EPA v. Cal. ex rel. State Water Res. Control Bd., 426 U.S. 200, 205, n. 14 (1976); Int’l Paper Co. v. Ouellette, 479 U.S. 481, 489 (1987) (“Section 301(a) of the Act, 33 U.S.C. § 1311(a), generally prohibits the discharge of any effluent into a navigable body of water unless the point source has obtained an NPDES permit... .”). A permit may be granted from the EPA or from the state where the discharger is located, if the state has developed a program and has received permitting authority from the EPA. See 33 U.S.C. § 1342(a), (b).

The phrase “discharge of a pollutant” found in § 1311(a) is defined as “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). Thus, a “discharge of a pollutant” occurs when five elements exist: “(1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source.” Nat’l Wildlife Fed’n v. Gorsuch, 693 F.2d 156, 165 (D.C. Cir. 1982). USPIRG has the burden of demonstrating that each element exists in order to establish that Heritage is “discharging a pollutant” as defined by the Act.

1. Elements (1) and (2): A Pollutant Must be Added

Under § 1362(6) of the Act, the term “pollutant”

means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

33 U.S.C § 1362(6) (emphasis added).

Courts have interpreted the definition of pollutant “to encompass substances not specifically enumerated but subsumed under the broad generic terms” listed in § 1362(6).

See, e.g., Hudson River Fishermen’s Ass’n v. City of N.Y., 751 F. Supp. 1088, 1101 (D.

N.Y. 1990), aff’d, 940 F.2d 649 (2nd Cir. 1991)(citing United States v. Hamel, 551 F.2d

107 (6th Cir. 1977)). It is not relevant that the EPA has not issued a permit or

promulgated an effluent limitation to regulate the substance alleged to be a pollutant; the

court can independently determine that a substance falls within one of the general terms

of § 1362(6).⁴ Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 566-

568 (5th Cir. 1996), cert. denied, 519 U.S. 811 (1996) (stating that the definition of

pollutant is meant to “leave out very little” and discussing the courts’ ability in citizen

suits to determine whether a particular substance falls within the definition of “pollutant”

and citing cases). See also Weinberger v. Romero-Barcelo, 456 U.S. 305, 309 (1982)

(“the release of ordnance from aircraft or from ships into navigable waters is a discharge

⁴ Although USPIRG introduces into the record numerous facts relating to the harm certain substances may have on the environment or to humans, the Act does not require proof that the pollutant causes harm. See Long Island Soundkeeper Fund, Inc. v. N.Y. Athletic Club, 1996 WL 131863, *15 (D.N.Y. 1996) (citing City of Milwaukee v. Ill., 451 U.S. 304, 310 (1981); Orange Env’t, Inc. v. County of Orange, 811 F. Supp. 926, 934 (D. N.Y. 1993)). In citizen suits such as this (where an action is brought against a defendant for discharging an alleged pollutant without a permit) a court’s role is only to “apply the statutory definition [of § 1362(6)] to determine if the substance in question is a pollutant.” Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 567 (5th Cir. 1996) (also stating that the determination of whether a substance is a pollutant does not require “a ‘complex balancing’ of biological, technical, and economic factors, such as the EPA must undertake when promulgating effluent standards.”).

of pollutants, even though the EPA, which administers the Act, had not promulgated any regulations setting effluent levels or providing for the issuance of an NPDES permit for this category of pollutants.”).

USPIRG alleges that Heritage’s fish farms release pollutants such as salmon, salmon feces, salmon urine, fish feed, cypermethrin, copper, pathogens, parasites, and antibiotics.⁵ (Am. Compl. at 5-6; PMSJ at 15-16.) USPIRG argues that these substances fall under the Act’s definition of “pollutants” because they are solid waste, chemical wastes, biological materials, or agricultural waste. (PMSJ at 16.)

The record supports USPIRG’s claim that Heritage puts various substances into the water at its net pens and these substances flow out of Heritage’s net pens and into Cobscook Bay. First, Heritage puts farm-raised salmon into its net pens that are located in the bay. (PSMF ¶¶ 1, 3, 4, 18-19; DRSMF ¶¶ 1, 3, 4, 18-19.) Although Heritage primarily grows native salmon, it has approximately 100,000 salmon of non-North American origin. (PSMF ¶ 11, Nicholas Decl. I Ex. B at 96-97.) It is undisputed that some of Heritage’s salmon escape from the pens into the bay. (*Id.* ¶ 74; DRSMF ¶ 74.) Fish that do not naturally occur in the water, such as non-North American salmon, fall within the term “biological material” and are therefore pollutants under the Act. See Nat’l Wildlife Fed’n v. Consumers Power Co., 862 F.2d 580, 583, 586 (6th Cir. 1988) (finding that “... live fish, dead fish and fish remains annually discharged into Lake

⁵ USPIRG also argues that Heritage releases “blood water” (i.e. the mixture of salmon blood and water that remains after bleeding the fish) into the water. (PMSJ at 2; PSMF ¶ 23.) It is undisputed that Heritage stopped this practice and has not dumped blood water since the early 1990s. (PSMF ¶¶ 23-25; DRSMF ¶¶ 23-25; Nicholas Decl. I Ex. B at 30-31.) USPIRG’s liability complaint does not extend beyond April 26, 1995 (Am. Compl. at 9), and neither the record nor USPIRG’s motion contains any allegations or indication that there are continuous or intermittent violations. As the violation appears to be a wholly past violation with no indication of a likely recurrence, liability for the dumping of blood water cannot be considered. See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 64 (1987).

Michigan by the... facility are pollutants within the meaning of the CWA, since they are ‘biological materials,’” but holding that because the fish were not “added,” a permit was not required) (citing Ass’n of Pacific Fisheries v. EPA, 615 F.2d 794 (9th Cir. 1980)).⁶ Second, the salmon feces and urine that exit the net pens and enter the waters (PSMF ¶¶ 87, 102-105; DRSMF ¶¶ 87, 102-105) are pollutants as they are “biological material” or “agricultural wastes.”⁷ See Higbee v. Starr, 598 F. Supp. 323, 330-331 (D. Ark. 1984), aff’d, 782 F.2d 1048 (8th Cir. 1985) (finding a hog farm to be a concentrated animal feeding operation and the hog waste that fell directly from the animals through slats in the floor into holding basins is “agricultural waste” under the Clean Water Act, but holding that there was no evidence that a “discharge” to navigable waters occurred).

Third, Heritage blows, sprays, or otherwise distributes salmon feed into the net pens. (PSMF ¶¶ 34-37, 88; DRSMF ¶¶ 34-36, 88.) This feed contains chicken by-products, soybean meal, and on occasion contains chemicals such as canthaxanthin, TM 100, and Romet. (PSMF ¶ 28-29, 46, 47, 49; DRSMF ¶ 28-29, 46, 47, 49.) Excess or uneaten feed can enter the water when it flows out of the pens or falls through the net pens to the ocean floor. (PSMF ¶ 88; DRSMF ¶ 88.) The feed falls under the category of “solid waste,” “biological materials,” or “agricultural wastes” as it contains poultry parts. Thus, it is a pollutant. The uneaten pigment canthaxanthin and the antibiotics TM 100

⁶ Heritage states that Nat’l Wildlife Fed’n v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988), is the only case on point, but nonetheless claims that live fish are not “pollutants” as defined by the Act. (DRMSJ at 19.) Heritage argues that “biological material” does not include live fish because “if Congress wanted live animals to be included it would have listed them.” (Id. at 19-20, n. 25.) However, Heritage offers no support for this contention and Consumers Power has not been overruled on this point.

⁷ Although animals themselves are not point sources, facilities that fall under the definition of concentrated animal feeding operations (CAFOs) or concentrated aquatic animal production facilities (CAAPFs) are point sources. See 33 U.S.C. § 1362(6); 40 C.F.R. §§ 122.23, 122.24. Animal feces released into the waters at such facilities are considered “pollutants” released by a “point source.” See Higbee v. Starr, 598 F. Supp. 323, 330-331 (D. Ark. 1984), aff’d, 782 F.2d 1048 (8th Cir. 1985).

and Romet, flow from the net pens and become waste. As such, they are subsumed in the category of “chemical wastes” and are therefore pollutants. See United States v. Schallom, 998 F.2d 196, 199 (4th Cir. 1993), cert. denied, 510 U.S. 902 (1993) (finding that shotcrete, which is “composed of materials specifically identified as pollutants, including chemicals,” is “chemical wastes” and finding that cement, which is a mixture of chemicals and materials, also falls under the category of “chemical wastes”).

Fourth, after treating its salmon for sea lice, Heritage releases the tarp holding the salmon and thereby releases cypermethrin through the net pens into the water. (PSMF ¶¶ 66-67; DRSMF ¶¶ 66-67.) This cypermethrin, released into the water after its use, falls within the category of “chemical wastes” and is therefore a pollutant. Fifth, it is undisputed that copper from the net pens at Heritage’s farms enters the water. (PSMF ¶ 27; DRSMF ¶ 27.) Copper is specifically listed by the EPA as a “toxic pollutant” in 40 C.F.R. § 401.15(22), thus copper is a pollutant under the Act. See Cedar Point Oil Co, 73 F.3d at 568-569 (finding produced water to be a pollutant under the Act in part because components of produced water were included in 40 C.F.R. § 401.15, the EPA’s “toxic pollutants” regulation (citing Dague v. Burlington, 732 F. Supp. 458, 469-70 (D. Vt. 1989) (“finding substances discharged by defendants to be pollutants by reference to the toxic pollutant list.”))).

In an attempt to avoid the classification of non-native salmon, fish feed, and cypermethrin as “pollutants,” Heritage points out that it does not put these items into the water to be discarded as wastes.⁸ (Def.'s Resp. Mot. Summ. J. (DRMSJ) at 19-20.)

⁸ Heritage’s claim that fish feed and cypermethrin could be subject to pollution controls by a state nonpoint source management program under 33 U.S.C. § 1329 (DRMSJ at 20), is not relevant to the question of whether these substances put in the water by Heritage, an alleged point source (under the CAAPF regulation), fall within the definition of “pollutant” under the Clean Water Act.

However, the classification of a substance as a “pollutant” does not involve consideration of the intended use of the substance nor the reason for which it was released into the waters. See, e.g., Hudson River Fisherman’s Ass’n, 751 F. Supp. 1088, 1101 (D. N.Y. 1990), aff’d, 940 F.2d 649 (2nd Cir. 1991) (citing Minnehaha Creek Watershed Dist. v. Hoffman, 597 F.2d 617 (1979) (stating that “a pollutant is a pollutant no matter how useful it may earlier have been”). The record clearly indicates that after Heritage’s sea lice treatments, cypermethrin is released into the water as waste. (PSMF ¶¶ 66-67; DRSMF ¶¶ 66-67.) Regardless of Heritage’s intent, excess fish feed, antibiotics, escaped salmon, and uneaten chemicals become waste as they flow out of the net pens and enter the waters. Heritage adds these items into the water at its net pens and does not prevent them from being released from the net pens into the bay.

Based on the undisputed facts and the broad reading of the term “pollutant,” the escaping non-North American origin salmon, the feed containing poultry parts and canthaxanthin, the cypermethrin, the copper, and the antibiotics TM 100 and Romet, all fall within the definition of “pollutants” under the Act.⁹ Moreover, as these items are put in the water by Heritage as a part of its operation, they do not naturally occur in the bay and therefore are “additions” to the water.¹⁰ See, e.g., Catskill Mountains Chapter of

⁹ USPIRG claims Heritage’s net pens also release parasites, pathogens, and disease. It is sufficient to find Heritage liable for Clean Water Act violations for adding pollutants such as non-native fish, fish feed, and chemicals, therefore I need not determine whether these other items are “pollutants” that are “added” to the water.

¹⁰ Heritage argues that inherent in the concepts “conveyance” and “discharge” is a sense of movement and concludes that copper from the nets is not “added” to the water because the nets themselves do not move the pollutant from the outside world into the water. (DRMSJ at 18.) However, USPIRG’s complaint and motion focus on the argument that the point source is Heritage’s facilities, not the nets in and of themselves (the distinction will become clear in the discussion below regarding whether Heritage’s net pen fish farms are “concentrated aquatic animal production facilities” and are therefore point sources). The nets are treated with copper, Heritage physically introduces the copper-coated nets into the water, and the copper is released from the nets into the waters. Thus, copper is added from the outside world into the waters at Heritage’s facilities.

Trout Unlimited v. City of N.Y., 273 F.3d 481, 491 (2nd Cir. 2001) (“The EPA’s position, upheld by the Gorsuch and Consumers Power courts, is that for there to be an ‘addition,’ a ‘point source must introduce the pollutant into navigable water from the outside world.” (citing Gorsuch, 693 F.2d at 165 and Consumers Power Co., 862 F.2d at 586) (emphasis added).

2. Element (3): Navigable Waters

The Clean Water Act defines “navigable waters” as “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). Heritage’s Maine sea farms are located off the Maine coast in Cobscook Bay (D2dSMF ¶ 1), thus they are clearly within the definition of “navigable waters.”

3. Elements (4) and (5): From a Point Source

Heritage does not dispute that the alleged discharges come “from” its farms (PSMF ¶¶ 27, 67, 87-88; DRSMF ¶¶ 27, 66-67, 74, 87-88), but does dispute the final element, whether Heritage’s net pen operations constitute a “point source.”

When the Clean Water Act was drafted, the focus was placed on point sources presumably because they were easy to identify and regulate compared to nonpoint sources. Natural Res. Def. Council v. EPA, 915 F.2d 1314, 1316 (9th Cir. 1990). The classification as a point source is crucial as the Act only prohibits discharges from a point source.¹¹ United States v. Earth Sciences, Inc., 599 F.2d 368, 371 (10th Cir. 1979). The EPA was given the power to define point sources and nonpoint sources. Natural Res. Def. Council, Inc. v. Costle, 568 F.2d 1369, 1382 (D.C. Cir. 1977). In exercising that

¹¹ Nonpoint sources can be regulated by states. Oregon Natural Res. Council v. U.S. Forest Service, 834 F.2d 842, 849 (9th Cir. 1987) (“Congress addressed nonpoint sources of pollution in a separate portion of the Act which encourages states to develop areawide waste treatment management plans.” (citing 33 U.S.C. § 1288)).

power, the EPA determined that fish farms which are “aquatic animal production facilities” (“AAPFs”) are nonpoint sources. 44 Fed. Reg. 32,854, 32,870 (June 7, 1979). As nonpoint sources, they are not prohibited by § 1311(a) from discharging pollutants and are not required to have an NPDES permit. The EPA also determined that AAPFs that fall within the definition of “concentrated aquatic animal production facilities” (“CAAPFs”) found in 40 C.F.R. Appendix C of Part 122, are point sources. 40 C.F.R. § 122.24(b). Appendix C, titled “Criteria for Determining a Concentrated Aquatic Animal Production Facility,” states:

A hatchery, fish farm, or other facility is a concentrated aquatic animal production facility for purposes of § 122.24 if it contains, grows, or holds aquatic animals in either of the following categories:

- (a) Cold water fish species or other cold water aquatic animals in ponds, raceways, or other similar structures which discharge at least 30 days per year but does not include:
 - (1) Facilities which produce less than 9,090 harvest weight kilograms (approximately 20,000 pounds) of aquatic animals per year; and
 - (2) Facilities which feed less than 2,272 kilograms (approximately 5,000 pounds) of food during the calendar month of maximum feeding.
 - (b) Warm water fish species or other warm water aquatic animals in ponds, raceways, or other similar structures which discharge at least 30 days per year, but does not include:
 - (1) Closed ponds which discharge only during periods of excess runoff; or
 - (2) Facilities which produce less than 45,454 harvest weight kilograms (approximately 100,000 pounds) of aquatic animals per year.
- “Cold water aquatic animals” include, but are not limited to, the Salmonidae family of fish; e.g., trout and salmon.
- “Warm water aquatic animals” include, but are not limited to, the Ameiuride, Centrarchidae and Cyprinidae families of fish; e.g., respectively, catfish, sunfish and minnows.

40 C.F.R. Pt. 122, App. C.

The EPA promulgated its determination that CAAPFs are point sources in a 1979 regulation, 40 C.F.R. § 122.24, which in part states:

- (a) Permit requirement. Concentrated aquatic animal production facilities, as defined in this section, are point sources subject to the NPDES permit program.

(b) Definition. “Concentrated aquatic animal production facility” means a hatchery, fish farm, or other facility which meets the criteria in Appendix C of this part, or which the Director designates under paragraph (c) of this section.

40 C.F.R. § 122.24

As subsection (b) mentions, AAPFs that do not fall within the Appendix C definition of a CAAPF, do not have a free pass to discharge pollutants. The EPA recognizes “that some [AAPFs] that may not be classified as concentrated under the formula [in Appendix C], nevertheless, may be significant contributors of pollution.” 44 Fed. Reg. 32,854, 32,870 (June 7, 1979). Thus, under subsection (c) of § 122.24, the EPA has the discretion, on a case-by-case basis to “designate any warm or cold water aquatic animal production facility as a concentrated aquatic animal production facility upon determining that it is a significant contributor of pollution to waters of the United States.” 40 C.F.R. § 122.24(c). This is established in the remainder of § 122.24:

(c) Case-by-case designation of concentrated aquatic animal production facilities.

(1) The Director may designate any warm or cold water aquatic animal production facility as a concentrated aquatic animal production facility upon determining that it is a significant contributor of pollution to waters of the United States. In making this designation the Director shall consider the following factors:

- (i) The location and quality of the receiving waters of the United States;
- (ii) The holding, feeding, and production capacities of the facility;
- (iii) The quantity and nature of the pollutants reaching waters of the United States; and
- (iv) Other relevant factors.

(2) A permit application shall not be required from a concentrated aquatic animal production facility designated under this paragraph until the Director has conducted on-site inspection of the facility and has determined that the facility should and could be regulated under the permit program.

40 C.F.R. § 122.24

“In designating an operation or facility as a significant contributor of pollutants, the Director essentially finds that the facility’s discharges are more like point sources already

subject to NPDES regulation than agricultural nonpoint sources that are not.” 65 Fed. Reg. 43,586, 43,648 (July 13, 2000). When an AAPF is designated as a CAAPF under subsection (c), the facility is not required to have a permit until after the EPA has conducted a site visit and made a determination that the site should and could be regulated under the NPDES program. 40 C.F.R. § 122.24(c)(2).

USPRIG and Heritage agree that the EPA has not designated Heritage’s farms as CAAPFs under the discretionary provision of subsection (c). (Pls.’ Resp. Second Mot. Summ. J. (PR2dMSJ) at 5; Def.’s Reply to Pls.’ Resp. Second Mot. Summ. J. (DRR2dMSJ) at 2.) USPIRG claims, and Heritage disputes, that Heritage’s farms are CAAPFs under Appendix C and are therefore required to have a permit. Heritage raises two intertwined arguments as to why their farms do not involve “ponds, raceways, or other similar structures” and thus are not regulated under Appendix C.¹² First, Heritage argues that their offshore net pen operations do not fall within the phrase “ponds, raceways, or other similar structures” because the phrase focuses on “land-based”

¹² Heritage’s underlying theory is that its net pen operations are CAAPFs that are not regulated. (D2dMSJ at 2, 4-5.) This theory is based on the fact that Heritage has not been designated by the EPA as a CAAPF under subsection (c) and Heritage’s conclusion that it does not fall within the Appendix C definition. (*Id.* at 2, 4, 7, 8.) However, this theory contradicts the definition of a CAAPF in § 122.24 which states that a CAAPF is a “hatchery, fish farm, or other facility which meets the criteria in Appendix C of this part, or which the Director designates under paragraph (c) of this section.” 40 C.F.R. § 122.24(b) (emphasis added). Thus, a facility must meet one of the two prongs to be a CAAPF. Moreover, Heritage’s interpretation of § 122.24 is inconsistent with the EPA’s statements regarding the regulation of CAAPFs. The EPA has clearly stated that all CAAPFs require an NPDES permit. 65 Fed. Reg. 43,586 43,648-649 (July 13, 2000) (stating that “[u]nder existing regulation, concentrated aquatic animal production facilities are subject to the NPDES program” and stating that an AAPF is “subject to regulation under the NPDES permitting program only if the facility is ‘concentrated’ according to the NPDES regulations.”). As a side note, the last full paragraph of footnote four in Heritage’s second motion for summary judgment contains an unwarranted interpretation of the regulation for CAAPFs. Heritage writes, “The regulations, however, did not impose a permit requirement on those facilities that qualified as CAAPFs but which did not meet certain elements set forth in Appendix C to Part 122, and were not otherwise designated by the EPA for regulation.” (D2dMSJ at 3, n.4.) As the above-mentioned definition of a CAAPF reveals, a facility qualifies as a CAAPF only if it meets the definition in Appendix C or, in the alternative, if it has been designated as such by the EPA under subsection (c). See also 44 Fed. Reg. 32,854, 32,870 (June 7, 1979)(stating that “The final regulation concerning permit coverage is...requiring only individual permits of concentrated aquatic animal production facilities” and stating that some AAPFs “that may not be classified as concentrated under the formula, nevertheless, may be significant contributors of pollutants” and thus may be designated as CAAPFs on a case-by-case basis).

structures. (D2dMSJ at 5-6.) Second, Heritage asserts that net pen operations do not involve a “discrete, confined and direct conveyance,” (*Id.* at 4, 6) or specifically “discrete discharge pipes,” and therefore “are not point sources subject to NPDES permitting.” (*Id.* at 5-6.)

In respect to Heritage’s first argument, Heritage’s conclusion that the Appendix C phrase “ponds, raceways, or other similar structures” excludes its net pen operations is contrary to various EPA statements that Heritage’s coastal net pens may fall within Appendix C.¹³ At least three communications from the EPA indicate that agency representatives view marine net pens as falling within the Appendix C phrase “ponds, raceways, or other similar structures.”¹⁴ First, EPA Region One sent a letter in 1988 to the Army Corps of Engineers, in which the EPA stated that Ocean Products’ (the name of Heritage’s farms prior to Heritage’s purchase in 1991) floating net pens may require an NPDES permit “depending on the number of fish to be raised, the amount of waste to be produced, and the feeding volumes...” (PR2dSMF ¶ 18, Nicholas Decl. II Ex. 4.) The determinative criteria the EPA mentioned are those listed in Appendix C, not the factors the EPA considers under section (c), the designation provision. See 40 C.F.R.

¹³ There are no cases interpreting the meaning of the Appendix C phrase “ponds, raceways or other similar structures.” In addition, neither the proposed rule nor the final rule for the promulgation of § 122.24 provides insight as to the scope of phrase. A traditional “raceway” is an enclosed channel with relatively high rates of moving or flowing water. See Michael P. Masser and Andrew Lazur, In-Pond Raceways, Southern Regional Aquaculture Center (SRAC), Publication No. 170 (August 1997), available at <http://www.msstate.edu/dept/srac/fslist.htm>. USPIRG and Heritage debate when net pen culture techniques came into existence in order to prove whether the Appendix C phrase includes such operations. (PR2dSMF ¶¶ 15-17; D2dMSJ at 7 n. 9; PR2dMSJ at 8.) However, establishing the time frame in which net pen facilities were first used is not dispositive to the crux of the matter here, which is whether net pens are structures similar to ponds or raceways.

§ 122.24(c); 40 C.F.R. Pt. 122, App. C. In a letter written August 1989, the EPA stated that it reviewed the provisions of the Act and applicable regulations and concluded that salmon net pen sea farms in Maine may constitute CAAPFs under 40 C.F.R. § 122.24(b) and Appendix C or under subsection (c). (PR2dSMF ¶ 19, Nicholas Decl. II Ex. 10 at 3; D2dSMF ¶ 2.) The EPA further stated that it planned to inform “facilities operating in waters off the coast of Maine” that they must obtain NPDES permits if they meet the criteria in § 122.24. (Nicholas Decl. II Ex. 10)(emphasis added). This communication demonstrates that the EPA interprets Appendix C as pertaining to offshore net pen sea farms. In a third letter, sent June 23, 2000 to plaintiffs’ counsel in response to USPIRG’s notice of intent to file a lawsuit, the EPA mentions Heritage’s net pen facilities and two other companies’ facilities located in the coastal Maine waters and stated, “The EPA shares your concerns regarding the environmental issues raised in your notice. Under 40 C.F.R. § 122.24 and Appendix C to Part 122, salmon farms are concentrated aquatic animal production facilities (CAAPFs), and thus are point sources under the Act.” (DRSMF ¶¶ 144, 146; DSMF ¶ 6, Nicholas Decl. I Ex. R at 1.) (emphasis added). This communication and the other two communications, strongly suggest that the EPA interprets the Appendix C phrase “ponds, raceways, or similar structures” as

¹⁴ This case involves the meaning of terms in an agency regulation and does not involve statutory construction. Generally, unless plainly erroneous or inconsistent, an agency’s interpretation of an ambiguous term in its own regulations is entitled to deference. *See, e.g., Am. Express v. United States*, 262 F.3d 1376, 1382 (Fed. Cir. 2001) (citing *Auer v. Robbins*, 519 U.S. 452, 461-462 (1997); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994)). Even without these EPA communications, I would reach the conclusion that offshore net pens fall within the scope of the Appendix C phrase “ponds, raceways, and other similar structures.”

encompassing net pen sea farms.¹⁵ The letters also show that the EPA has held this position since the late 1980's.

It is noteworthy to mention that in the June 2000 letter, the EPA explained that in the past they did not issue NPDES permits to marine net pen farms, such as Heritage's farms, because it considered these operations to be low-priority at the time and because of "resource constraints." (PR2dSMF ¶ 23, Nicholas Decl. I Ex. R; 50 ¶ 23.) This explanation for not issuing permits to net pen facilities in the bay, coupled with the EPA's 1988 interpretation of the phrase "ponds, raceways, or other similar structures" to encompass net pens, undercuts Heritage's argument that there is a long-standing course of dealing between the EPA and Maine's aquaculture companies that indicates that EPA Region One did not view net pens as falling under Appendix C. (D2dMSJ at n. 9.)

I find no support for Heritage's contention that the phrase "ponds, raceways, or other similar structures" excludes offshore sea cages because they are not land-based. There is no indication in the proposed rule or the final rule for § 122.24 that suggests the EPA was intending to narrowly focus on land-based fish farms. See 43 Fed. Reg. 37,078, 37,082 & 37,100 (Aug. 21, 1978); 44 Fed. Reg. 32,854, 32,870 (June 7, 1979). The goal of the Clean Water Act is to restore and maintain the integrity of the nation's waters. 33 U.S.C. § 1251(a). Requiring fish farms in ponds or raceways to obtain an NPDES permit based on their terrestrial location, while allowing other facilities located in a bay to

¹⁵ Heritage argues that these letters do not support USPIRG's assertion that the EPA clearly found Heritage to be an automatic CAAPF under Appendix C because the letters do not state that Ocean Product's or Heritage's facilities are CAAPFs. (DRR2dMSJ at 4, n. 5.) However, each of these letters clearly indicates that the EPA does not find the location or structure of net pens in the bay as precluding the net pens from falling within the Appendix C phrase "ponds, raceways, or other similar structures." Note that the parties here are not disputing an EPA determination (which would involve judicial review of the EPA's determination), but instead they dispute the meaning of the EPA letters and the meaning of the phrase "ponds, raceways, or other similar structures."

discharge directly into the water without a permit would be counter to the purposes of the Act. The goals of the Act, the EPA's interpretation that Appendix C is applicable to net pen sea farms, and the lack of judicial support to indicate otherwise, support the conclusion that a sea cage in a predominately enclosed bay can constitute a "similar structure" and therefore fall within Appendix C. Heritage offers no evidence or caselaw that would compel an alternative conclusion.¹⁶

Heritage claims in its second argument that it does not fall within the phrase "ponds, raceways, or other similar structures" because net pen operations do not involve a "discrete, confined and direct conveyance," (D2dMSJ at 4, 6) or specifically "discrete discharge pipes," and therefore "are not point sources subject to NPDES permitting." (*Id.* at 5-6.) This argument fails because it is contrary to the Act's definition of a point source and twenty years of caselaw. In differentiating itself from the Appendix C "ponds, raceways, or other similar structures," Heritage argues,

In the context of defining a point source, the key characteristic of ponds and raceways is their land-based location and their need to collect and direct the flow of discharge water in a discrete concentrated point source pipe discharge based on their construction and design. Net pens do not share that characteristic because they are not self-contained, solid facilities

¹⁶ One section of the 1990 NPDES application form for CAAPFs has a box labeled "ponds," a box labeled "raceways," and another marked "other." See "EPA Form 2B" at 1, Section III (B), [available at http://www.epa.gov/npdes/pubs/3510-2B.pdf](http://www.epa.gov/npdes/pubs/3510-2B.pdf). The application requires the applicant to indicate in one of the three boxes the total number of ponds, raceways or other similar structures involved. *Id.* Interestingly, the instructions for this section state:

Give the total number of ponds or raceways in your facility. Under [the box marked] "other," give a descriptive name of any structure which is not a pond or raceway but which results in discharge to waters of the United States."

(*Id.* at 2, Item III-B.)(emphasis added.)

This language further demonstrates that the Appendix C definition does not narrowly focus on "land based" facilities that operate with "discharging pipes," but rather focuses broadly on any structure that results in the discharge of pollutants into the waters. Heritage's facility consists of net pens, or sea cages as they are sometimes referred, that consist of huge nets that hang from square or round floating structures and are anchored to the bottom of the bay. (D2dMSJ at 2; D2dSMF ¶¶ 10, PSMF ¶ 18; DRSMF ¶ 18.) There is nothing in the record that precludes the conclusion that these net pens, which confine fish in a concentrated area and have substances flowing out of them into the waters of the bay, are structures.

that require the operator to gather water and funnel it through a pipe to a specific, confined outfall. Rather, because they are free floating in the ocean, the water flows through the nets driven by tides, currents, and other natural factors.

(Id. at 6.)¹⁷

Essentially, Heritage takes the position that the phrase “ponds, raceways, or other similar structures” refers to a “narrow category of land-based structures with discrete discharging pipes.” (Id.) Heritage defines “pond” as “a body of standing water smaller than a lake, often artificially formed,” but does not explain how a pond would fall into its interpretation of “structures with discrete discharging pipes.” (Id.) Heritage concludes that net pens do not involve “discharging pipes,” therefore they cannot be point sources.¹⁸

(Id.)

However, there is no basis for concluding that the phrase “ponds, raceways, or other similar structures” narrowly focuses on pipes, conduits, or the channeling of water. In cases involving “classic” point source discharges, surface water runoff, or stormwater, the use of buzzwords and phrases such as “collect and direct the flow,” “pipe discharge,” “self-contained, solid facilities,” and “gathering and funneling of water,” is relevant because the existence of such items is often dispositive.¹⁹ But the term “point source”

¹⁷ Note that Heritage’s net pens are located in the bay off the coast of Maine, not in the open ocean. (D2dMSJ at 2.) Additionally, although Heritage describes its net pens as “free floating,” Heritage’s description of its facilities shows that the net pens are secured to a floating platform and that the net pens are anchored to the floor of the bay. (Id.)

¹⁸ The designation of “nonpoint source” is limited to circumstances in which it is difficult to ascribe the discharge to a single polluter or to any identifiable point of discharge. See, e.g., United States v. Earth Sciences, Inc., 599 F.2d 368, 371 (10th Cir. 1979) (“Because nonpoint sources of pollution, such as oil and gas runoffs caused by rainfall on the highways, are virtually impossible to isolate to one polluter, no permit or regulatory system was established as to them.”); United States v. Plaza Health Lab., Inc., 3 F.3d 643, 647 (2nd Cir. 1993) (“Very simply, a non-point source of pollution is one that does not confine its polluting discharge to one fairly specific outlet... .” (citing S. Rep. No. 92-414, reprinted in 1972 U.S.C.C.A.N. 3668, 3760)).

¹⁹ Classic point source discharges involve things like pipes, in part because “pipes and similar conduits are needed to carry large quantities of waste water, which represent a large portion of the point

covers a broader means of discharging. Prior to the promulgation of § 122.24 and as early as 1974, the Act has defined “point source” as:

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

33 U.S.C. § 1362(14) (emphasis added)²⁰

See United States v. Holland, 373 F. Supp. 665, 668 (D. Fla. 1974)(quoting definition of “point source” with same language used today). The examples listed in section 1362(14) of the Act illustrate that a “point source” exists regardless of whether a pipe, a solid structure, or funneled/channeled water is involved.

Further, numerous cases reflect the broad means of discharging which constitute “point sources.” See, e.g., Romero-Barcelo v. Brown, 478 F. Supp. 646, 664 (D.P.R. 1979), rev’d on other grounds, 643 F.2d 835 (1st Cir. 1981), aff’d sub nom. Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) (aircraft from which the release or firing of ordnance into the water is a point source); Avonyelles Sportsmen’s League v. Marsh, 715 F.2d 897, 922 (5th Cir. 1983) (bulldozers and backhoes constitute point sources); Concerned Area Residents for Env’t v. Southview Farm, 34 F.3d 114, 119 (2nd Cir. 1994), cert. denied, 514 U.S. 1082 (1995) (manure spreader which distributed manure in field deemed a point source); United States v. West Indies Transp., Inc., 127 F.3d 299,

source pollution problem... and are readily classified as point sources.” United States v. Plaza Health Lab., Inc., 3 F.3d 643, 651 (2nd Cir. 1993) (Oakes, J., dissenting). Surface water runoff does not constitute discharge from a point source unless it is channeled or collected. See Sierra Club v. Abston Const. Co., 620 F.2d 41, 47 (5th Cir. 1980) (stating that the point source definition “excludes unchanneled and uncollected surface waters (citing Consolidated Coal Co. v. Costle, 604 F.2d 239, 249 (4th Cir. 1979) and Appalachian Power Co. v. Train, 545 F.2d 1351, 1373 (4th Cir. 1976)).

²⁰ The EPA states that although the Act does not specifically address CAAPFs, CAAPFs are a type of “‘concentrated animal feeding operation’ which the CWA explicitly identifies as a ‘point source.’” 65 Fed. Reg. 4,3586, 73,649 (July 13, 2000).

308 (3rd Cir. 1997), cert. denied, 522 U.S. 1052 (1998) (barge from which cement blocks were dumped and paint chips from sandblasting were projected is a point source); Stone v. Naperville Park Dist., 38 F. Supp.2d 651, 655 (D. Ill. 1999) (shooting range where lead shots and air borne clay targets ultimately land in the water is a point source). See also United States v. Plaza Health Lab., Inc., 3 F.3d 643, 651-652 (2nd Cir. 1993) (Oakes, J., dissent listing cases) and Long Island Soundkeeper Fund, Inc. v. N.Y. Athletic Club, 1996 WL 131863, *13 (D.N.Y. 1996) (listing cases). Rather than focusing on pipes, conduits, and the channeling of water, as Heritage suggests, the courts find that a point source exists where there is an identifiable source from which the pollutant is released.²¹

An argument similar to Heritage's was rejected in Stone v. Naperville Park Dist., 38 F. Supp.2d 651 (D. Ill. 1999), which involves a citizen suit brought under the CWA against the operators of a trap shooting facility. In Stone, the plaintiffs claimed that the defendants' facility discharged lead shot into navigable waters without an NPDES permit thereby violating the Act. Stone, 38 F.Supp.2d at 652. On plaintiff's motion for summary judgment, the court noted that the facility consisted of three firing stations, several target throwers, and a fenced shotfall zone where shooting debris would fall. Id. The defendants conceded that they discharged pollutants into navigable waters, thus, the sole issue was whether the facility constituted a "point source." Id. at 656. After considering defendants' argument that the shooting range "is a place, wholly unlike a discrete item like a pipe or container, that does not discharge or channel anything," the

²¹ The EPA has the same interpretation: that the term "point source" includes "all discrete, identifiable sources from which pollutants are emitted or conveyed into the United States waters." Long Island Soundkeeper Fund, Inc. v. N.Y. Athletic Club, 1996 WL 131863, *13 (D.N.Y. 1996) (citing Amicus Brief of the United States at 6 and finding that a trap shooting range designed to concentrate shooting activity from a few specific points, systematically directed in a single direction, is an identifiable source from which spent shots and target fragments are conveyed into navigable waters).

court concluded “the range ‘channels’ shooting by providing a facility at which individuals may shoot; it channels the discharge of pollutants by inviting individuals to come shoot at airborne clay targets that land in the water with lead shot that also land in the water.” Id. at 655. The court found that the range qualified as a point source and was in violation of the Act. Id. at 656.

The Act’s definition of “point source” and the caselaw identifying various point sources do not support Heritage’s conclusion that the phrase “ponds, raceways, or other similar structures” relates only to facilities with “discrete discharging pipes” or its conclusion that its net pen operations cannot be considered point sources.²² Instead, the Act and the caselaw lead to the conclusion that the release of pollutants from Heritage’s net pens into the bay constitutes an identifiable, discernible, confined, and discrete emission or conveyance into the water. To conclude that Heritage’s net pen operations could not constitute point sources would be contrary to twenty years of caselaw and would render impotent the “similar structures” language in Appendix C, contrary to the various EPA letter communications stating that net pen sea farms are within Appendix C.

²² Heritage cites part of 40 C.F.R. § 122.21(i)(2) which states that the CAAPF application requires the applicant to provide “(i) [t]he maximum daily and average monthly flow from each outfall”; (ii) the “number of ponds, raceways, and similar structures”; (iii) the “name of the receiving water and the source of intake water”; (iv) “the total yearly and maximum harvestable weight” for each species of aquatic animals; and (v) the “calendar month of maximum feeding and the total mass of food feed during that month.” See 40 C.F.R. § 122.21(i)(2). Heritage asserts that these requirements further demonstrate that its net pens do not fall within Appendix C because the concepts “outfall” and “intake” are meaningless to net pen operations. (D2dMSJ at 6, n. 7.) However, the instructions for the NPDES application define “outfall” as “a point source.” See “EPA Form 1 – General Information” at 1.8, available at http://www.epa.gov/npdes/pubs/form_1pdf. As explained above, a point source includes more than discharges from pipes. Although the instructions do not define “intake,” the water source Heritage’s net pen operations rely on is the bay water that flows into the net pens. Heritage needs this incoming water to carry fish waste and cypermethrin out of the net pens when the tide flows through the pens. This incoming water is Heritage’s “intake” water and the outgoing water carries away the chemicals and waste. Thus, the concepts of “intake” and “outfall” are not meaningless to net pen operations.

For these reasons, Heritage’s argument that its net pen operations cannot be characterized as point sources fails, as well as its assertion that Appendix C focuses narrowly on pipe discharges.²³

Based on the foregoing, USPIRG has met its summary judgment burden of demonstrating that Heritage has been and currently is “discharging pollutants” without an NPDES permit in violation of the Clean Water Act. USPIRG provides sufficient support and record evidence to compel the conclusion that net pens fall within the scope of Appendix C. Heritage’s reference to two law journals²⁴ and Heritage’s unsupported statements in its motions regarding what the EPA intended to regulate (i.e. enclosed, land-based structures with discharging pipes) under Appendix C does not support an

²³ I note that my determination that Heritage’s operations fall within the definition of a point source is limited to the purpose of refuting Heritage’s argument that its net pen operations cannot be classified as a “point source” pursuant to the CAAPF regulation, 40 C.F.R. § 122.24(a), (b), and Appendix C. My analysis should not be construed to contradict the EPA’s determination of which salmon farms constitute CAAPFs and are therefore deemed to be point sources under 40 C.F.R. ¶ 122.24. In other words, all CAAPFs are point sources under § 122.24, but not all salmon farms are necessarily CAAPFs. That determination would be based on whether the farm fell within the quantitative criteria of Appendix C or, in the case of an AAPF that did not meet the criteria of Appendix C, by a site visit and a designation by the EPA that the farm constitutes a CAAPF.

²⁴ In support of Heritage’s position, Heritage cites two law journals which state that the CAAPF regulation applies to inland fish farms. (DRR2dMSJ at 2-3.) However, the EPA communications mentioned above indicate that agency representatives have suggested the regulation is not limited to inland fish farms. Additionally, in a July 2000 final rulemaking decision, the EPA stated, “[m]ost commercial fish husbandry that the layperson refers to as ‘aquaculture,’ including fish farms located in waters of the U.S., is subject to NPDES regulation under the rubric ‘concentrated aquatic animal production facility.’” 65 Fed. Reg. 43,586, 43,648-649 (July 13, 2000)(emphasis added). This comment was made in explaining and correcting a mischaracterization the EPA made in a proposed rule preamble in which the EPA differentiated between “aquaculture projects” (regulated under § 122.25) and “concentrated aquatic animal production facilities” (regulated under § 122.24). (*Id.*) The mischaracterization stated that aquaculture projects confine aquatic stock within jurisdictional waters whereas AAPFs do not confine aquatic stock within jurisdictional waters but discharge to jurisdictional waters. (*Id.*) After reviewing the “original CWA legislative history, the regulations for aquaculture and aquatic animal production facilities, and past Agency statements on the matter,” the EPA corrected their error, stating that the difference between aquaculture projects and AAPFs “is not based on the location of aquatic stock confinement relative to jurisdictional waters of the United States.” *Id.*

alternate conclusion.²⁵ In sum, the Clean Water Act and the caselaw identifying various point sources support the conclusion that Appendix C is applicable to Heritage's sea net pen operations. Additionally, on numerous occasions the EPA has expressed its interpretation that the phrase "ponds, raceways, and other similar structures" encompasses net pen sea farms. There is no dispute that Heritage's facilities (with the exception of the Goose Island site) meet the quantitative criteria under Appendix C for AAPFs "automatically" deemed to be CAAPFs (PSMF ¶¶ 108-111; DRSMF ¶¶ 108-111) and Heritage concedes that its farms are "concentrated aquatic animal production facilities." (D2dMSJ at 2, 4.) Based on the foregoing, as a matter of law I conclude that Heritage's farms are CAAPFs as defined in Appendix C.²⁶ Under the regulation, all CAAPFs are prohibited from discharging pollutants unless an NPDES permit has been obtained. See 40 C.F.R. § 122.24(a). Heritage's salmon farms (with the exception of the Goose Island site) discharge pollutants without an NPDES permit and therefore are in violation of the Act. See 33 U.S.C. § 1311(a); (PSMF ¶¶ 27, 67, 87, 88, 100, 102-105; DRSMF ¶¶ 27, 66-67, 74, 88, 100, 105.)

²⁵ Heritage offered in its statement of material facts verbal comments allegedly made to Heritage's employee, Susan Hatton. (D2dSMF ¶ 7.) Although Heritage's motion cites this statement of fact in passing (DRMSJ at 2, n. 2), Heritage did not develop an argument involving these facts. To the extent that Heritage may be suggesting that the EPA representative's statements indicated to Heritage that it did not need a permit, Heritage's reliance on those statements of an EPA representative is an issue more appropriately addressed when considering whether to impose civil penalties or to order injunctive relief. See United States v. BP Oil, Inc., 1989 WL 83623, *5 (D. Pa. 1989); Conn. Fund for the Env't, Inc. v. Upjohn Co., 660 F. Supp. 1397, 1412 (D. Conn. 1987) (citing Heckler v. Comty. Health Serv. of Crawford County, Inc., 467 U.S. 51, 61 (1984); Student Pub. Interest Research Group of N.J. v. Monsanto, 600 F. Supp. 1479, 1486 (D.N.J. 1985); United States v. Amoco Oil, 580 F. Supp. 1042, 1050 (D. Mo. 1984). Additionally, the fact that the EPA has not established guidelines for any type of discharge by a facility is not relevant to whether or not a permit is required. United States v. Frezzo Bros, Inc., 602 F.2d 1123, 1128 (3rd Cir. 1979)(stating that the "absence of effluent limitations should not be allowed to nullify the flat prohibition on discharges under § 1311(a)").

²⁶ As I find that Heritage's farms constitute CAAPFs, I need not address USPIRG's alternative argument that Heritage's farms are "aquaculture projects" operating without a permit in violation of the Act. Clearly they are not aquaculture projects. See 65 Fed. Reg. 43586, 43649 (July 13, 2000) (stating that the EPA regulations for "aquaculture projects" do not apply to fish farms or fish hatcheries).

B. Primary Jurisdiction

Heritage claims that it is entitled to summary judgment pursuant to the doctrine of primary jurisdiction. (DMSJ at 17.) When the doctrine of primary jurisdiction is applicable, a court will generally issue a stay of the proceedings and refer the contested issue to the appropriate agency. Reiter v. Cooper, 507 U.S. 258, 268 (1993). The doctrine applies when claims involve an issue that falls within the special competence of an administrative agency. Id. The doctrine is intended to provide a means for which administrative and judicial machinery can be coordinated and to “promote uniformity and take advantage of agencies’ special expertise.” Mass. v. Blackstone Valley Elect. Co., 67 F.3d 981, 992 (1st Cir. 1995)(citing Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 580 (1st Cir. 1979)). Heritage asserts that the doctrine applies here because USPIRG essentially requests the court to write a permit (Def.'s Reply to Pls.' Resp. Mot. Summ. J. (DRRMSJ at 1-2), and because Heritage has a pending NPDES application before the State of Maine, which now has permitting authority. (DMSJ at 17.)

First and foremost, the provision which allows citizen suits in the context of this case, 33 U.S.C. ¶ 1365, provides only that the Court may exercise its jurisdiction to enforce existing standards or limitations and apply appropriate civil penalties. As this case concerns the discharge of pollutants in the absence of an NPDES permit, the applicable existing standard is found in 33 U.S.C. § 1311(a). Where a violation of the Act is found, section 1365 does not appear to authorize the Court to issue its own standards and limitations or to serve as a judicial permitting authority. Cf. Mumford Cove Ass’n, Inc. v. Groton, 640 F. Supp. 392, 395 (D. Conn. 1986)(“Any requirement that a court determine whether a particular permit violation is merely ‘technical’ or

whether a particular effluent limitation is necessary to control pollution would be inconsistent with the [c]ongressional intent to preclude ‘reanalysis of technological [or] other considerations at the enforcement stage.’”) (quoting Federal Water pollution Control Act Amendments of 1972, S. Rep. No. 414, 92d Cong., 1st Sess. reprinted in 1972 U.S. Code Cong. & Ad. News 3668, 3745).

Second, there is little merit to Heritage’s argument that courts should leave the resolution of a pending NPDES application to the state with the authority to issue such a permit. See, e.g., Committee to Save the Mokelumne River v. East Bay Mun. Utility Dist., No. 91-1372, 1993 U.S. Dist. LEXIS 8364, *26 (D. Cal. Mar. 3, 1993), aff’d, 13 F.3d 305 (9th Cir. 1993) (stating “[e]very district court presented with a primary jurisdiction argument in a case involving a Clean Water Act... citizen suit have rejected the suggestion that they defer to either state or federal regulatory agencies” and citing cases). Heritage claims the present case is a classic example of when a federal court should dismiss an action pursuant to the doctrine of primary jurisdiction. (DMSJ at 17.) However, courts have rejected the doctrine of primary jurisdiction in cases where an NPDES permit was applied for but was not obtained. See, e.g., O’Leary v. Moyer’s Landfill, Inc., 523 F. Supp. 642, 647 (D. Penn. 1981) (stating that the statutory enforcement schemes involved in a citizen suit alleging the discharge of pollutants from a landfill without a permit are not “so suffused by technical and policy considerations that my exercise of jurisdiction threatens to disrupt DER’s exercise of its authority. Nor are the problems central to this litigation beyond the ordinary competence of a court... .”).

Although there is no fixed formula courts can utilize to determine whether the doctrine of primary jurisdiction applies, Mass. v. Blackstone, 67 F.3d 981, 992 (1st Cir.

1995)(citing United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956)), the First Circuit finds there are three factors that guide the courts' decision whether or not to defer a matter to an agency. First, "whether the agency determination [lies] at the heart of the task assigned the agency by Congress;" second, "whether agency expertise [is] required to unravel intricate, technical facts;" and third, "whether, though perhaps not determinative, the agency determination would materially aid the court." Id. (citing Mashpee Tribe, 592 F.2d at 580-581 (citing Chicago Mercantile Exch. v. Deaktor, 414 U.S. 113, 114-115 (1973))).

The determination of whether Heritage falls within the CAAPF provision of 40 C.F.R. § 122.24 or discharges pollutants without a permit in violation of § 1311 of the Act does not involve the unraveling of scientific or technical facts. This is not a case where the court is asked to determine issues that clearly implicate the special expertise and competence of the EPA, such as the appropriate level and quality of discharges, the effect of a discharge on water quality, or whether a drainage endangers human health. See Montgomery Envtl. Coalition of Citizen Coordinating Comm. on Friendship Heights v. Wash. Suburban Sanitary Comm'n, 607 F.2d 378, 381-382 (D.C. Cir. 1979)(court referred to agency because issue involved permit limitations (i.e. the appropriate level and quality of discharge to be included in a permit) and because it was likely that a permit would issue in near future.); Friends of Santa Fe City v. LAC Minerals, Inc., 892 F. Supp. 1333, 1349-50 (D. N.M. 1995)(court referred to the agency the issue of whether acid mine drainage is a danger to health because the resolution would involve second guessing the Army Corps of Engineers, which is better suited to make the determination).

In the present case, the court is asked to determine whether Heritage is in violation of the Clean Water Act § 1311(a) for discharging pollutants without a permit. This is a question within the competence of courts. See, e.g., United States v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979.); Legal Env'tl. Assistance Found., Inc. v. Hodel, 586 F. Supp. 1163, 1169 (D. Tenn. 1984). Further, resolution of this question can be made on summary judgment. See Cmty. Ass'n for Restoration of the Env't v. Sid Koopman Dairy, 54 F. Supp.2d 976, 981 (D. Wash. 1999) (granting partial summary judgment in favor of plaintiffs on issue of whether defendant's dairy operation was a "concentrated animal feeding operation" (CAFOs) and thereby a point source subject to the NPDES permit requirement).

An agency determination is not necessary in this matter to aid the court in finding that Heritage is in violation of the Clean Water Act. Moreover, unlike some cases in which courts have deferred to an agency determination, this is not an instance where the court's decision would interfere with the appropriate agency's opportunity to first decide the matter or where the court's decision would result in an inconsistent outcome. According to Heritage, the State of Maine has already indicated that it will require Heritage to obtain an NPDES permit (D2dSMF ¶ 5; DMSJ at 17; DSMF ¶¶ 5, 8). Additionally, the EPA has indicated that Heritage's offshore net pen farms can fall within the scope of the Appendix C CAAPF provision that automatically requires a permit. (Nicholas Decl. II Ex. 4 at 2 & Ex. 10 at 3; PR2dSMF ¶ 23, Nicholas Decl. I Ex. R at 1.) "[W]hen the agency's position is sufficiently clear or nontechnical ..., courts should be very reluctant to refer [to the agency]." Miss. Power and Light v. United Gas Pipeline Co., 532 F.2d 412, 419 (5th Cir. 1976)(citing Great N. R.R. Co. v. Merch. Elevator Co.,

259 U.S. 285 (1922); Shew v. Southland Co., 370 F.2d 376 (5th Cir. 1966); Strickland Transp. Co. v. United States, 334 F.2d 172 (5th Cir. 1964)).

On a final note, a referral in this case may result in the continuation of the problem plaintiffs are seeking to cure through its citizen suit. When the State of Maine applied to the EPA to administer the NPDES program in Maine, the State included in its application a required Memorandum of Understanding. (D2dSMF Ex. R. at 2.) This draft Memorandum, later revised on April 20, 2000, stated that the State is to issue “draft” permits for Maine salmon farms by November 2001 (Id.), and final permits will be issued within six months thereafter. See NPDES Memorandum of Agreement Between the State of Maine and the United States EPA, Section III (A)(10), available at <http://www.state.me.us/dep/blwq/delegation/moa2000.pdf>. Heritage asserts that a permit is to be issued in November 2001. (DMSJ at 17.) However, it does not appear that a permit was issued by the State of Maine in November of 2001 and there is nothing in the record to indicate that a permit will be issued to Heritage in the near future.

As the purpose of the Act is to protect against further degradation of the nation’s waters and as many of the concerns warranting the application of the doctrine of primary jurisdiction do not exist here, a stay and a referral in this matter is not compelled and is not warranted.

Conclusion

I recommend that the Court **DENY** Heritage’s motions for summary judgment and **GRANT** USPIRG’s motion for summary judgment on the issue of liability under the Clean Water Act. I further recommend that the Court schedule a hearing on the issue of

what, if any, civil penalty or injunctive relief is appropriate in this case. Certainly the inaction and the delay of the permitting authorities, both the EPA and now the State, may be a factor that the court considers when fashioning its relief. See United States v. BP Oil, Inc., No. 86-0792, 1989 WL 83623, *5 (E.D. Pa. July 27, 1989) (“If any action or inaction by the government contributed to defendant’s violations, these facts can be considered when a remedy is fashioned.”)

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court’s order.

Margaret J. Kravchuk
U.S. Magistrate Judge

Dated February 19, 2002

BANGOR STNDRD

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 00-CV-150

U S PUBLIC INTEREST, et al v. HERITAGE SALMON INC Filed: 07/31/00

Assigned to: JUDGE GENE CARTER

Demand: \$0,000 Nature of Suit: 893

Lead Docket: None Jurisdiction: Federal Question

Dkt# in other court: None

Cause: 33:1319 Clean Water Act

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