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did not compel Whitman to find a violation, and Congress likely used the word *shall* as instructive rather than compulsory language.

The court criticized the Sierra Club's argument on three fronts. First, the court upheld the presumption that an agency's refusal to investigate or enforce statutory violations lies within that agency's discretion. Next, it reasoned the agency's limited resources, and the high number of potential investigations it could face, forced the Administrator to balance priorities and act only on serious violations. Finally, the court determined Whitman's decision not to take enforcement measure was of the type "typically committed to the agency's absolute discretion." Therefore, the court held "[when] used in a statute that prospectively affects government action" such as the CWA, the word *shall* sometimes carried only the connotations of the word "may," and did not mandate action.

In further justification of its ruling, the court noted the CWA's provision allowing citizens to file their own suits against polluters suggested no congressional intention to mandate government action for every alleged violation. The court also scrutinized the legislative history of the CWA for any indicia of a congressional intent to mandate EPA action via the act, but found no compelling evidence to suggest this. Accordingly, the court deemed the Sierra Club's claim outside the scope of judicial review and dismissed for lack of jurisdiction.

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Natural Res. Def. Council v. United States EPA, 279 F.3d 1180 (9th Cir. 2002) (holding that the Environmental Protection Agency erred by not providing the public with notice of or the opportunity to comment on changes included in final permits to release bark and woody debris into marine waters when those changes were not a logical outgrowth of the draft permits).

The Natural Resources Defense Council ("NRDC") brought this action against the Environmental Protection Agency ("EPA") for failing to provide the public with notice of and the opportunity to comment on changes the EPA approved in two final National Pollutant Discharge Elimination System permits. The permits authorized Alaskan logging transfer facilities ("LTFs") to discharge bark and woody debris into marine waters. NRDC asserted that interested parties could not have reasonably anticipated the changes EPA approved in the final permits. The EPA claimed references within the draft permits were sufficient to put interested parties on notice of the changes.

The Alaskan timber industry transports most of its logs to markets through marine waters. During transportation, friction between logs, water, and the bottom of the water body causes the discharge of bark and woody debris. The debris, which can accumulate in significant

concentrations, deteriorates water quality, creates problems for marine life and decays slowly.

In the mid-1990s, the EPA proposed a new, general permit that would apply to all LTFs in the state. Final approval of the proposed permit was conditioned upon the Alaska Department of Environmental Conservation's ("ADEC") certification of the permit. In its final draft certification, ADEC made substantive changes to the permit that had not appeared in its first or second draft certifications, but ADEC did not provide the public with notice or an opportunity to comment on the changes. Although the EPA expressed concern with the modifications, the Agency not only accepted ADEC's certification, but also finalized the rule without providing an opportunity for interested parties to comment. As a result, NRDC sued the EPA for failing to provide adequate notice and opportunity for comment as required by the Administrative Procedure Act.

This court decided the adequacy of the notice and comment procedure by noting the differences between the draft and final permits and analyzing whether interested parties would have reasonably anticipated the changes in the final rule as logical outgrowths of the draft permit.

Several differences between the draft and final permits led the court to determine that the EPA's notice was inadequate. First, the EPA's draft permit limited LTFs to a one-acre zone of discharge. ADEC's final draft certification, however, imposed no specific limit on the size of the zones into which LTFs could discharge bark and woody debris. Despite an express concern that ADEC's changes to its draft permit were substantive and might not comply with antidegradation laws, the EPA accepted the changes without public notice or comment.

Second, the EPA originally proposed a general permit that applied to nearly all LTFs but later adopted ADEC's proposal, which created a more lax permitting scheme for LTFs in existence prior to October 22, 1985. ADEC's final draft certification exempted pre-1985 LTFs from applying for a permit to discharge. Instead of applying for a permit, LTFs only had to notify the EPA they were conducting activities that resulted in the release of bark and woody debris. This decision was ironic; the EPA initiated the permitting process because the permits of pre-1985 LTFs did not comply with the Clean Water Act.

Third, there were considerable differences between the comments made in reference to the draft permit and those NRDC later raised in its petition. The court found these differences were a result of the inadequacy of EPA's notice and comment procedures.

In analyzing each of these factors, the court found that the public could not have reasonably anticipated the differences between the draft and final permits. That is, the final permit was not a logical outgrowth of the draft permit. As a result, the court remanded the permits to the EPA for further proceedings.

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