GENERALLY ILLEGAL: NPDES GENERAL PERMITS UNDER THE CLEAN WATER ACT

*Jeffrey M. Gaba**

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* Professor of Law, Dedman School of Law, Southern Methodist University. B.A., University of California, Santa Barbara, 1972; J.D., Columbia University, 1976; M.P.H., Harvard University, 1989. Of Counsel, Gardere, Wynne, Sewell LLP, Dallas, Texas.

I. INTRODUCTION

For over thirty years, federal water pollution policy has relied on the use of a federally mandated permit, the National Pollutant Discharge Elimination System ("NPDES") permit, to limit the discharge of pollutants.[1] It is the NPDES permit that contains both limitations on the amount of pollutants that a source may discharge and the monitoring and reporting requirements that form the basis of effective enforcement. In most cases, the owner or operator of a facility applies to either the Environmental Protection Agency ("EPA") or a state permitting authority for its own NPDES permit,[2] and the permit writer evaluates facility-specific information to determine the appropriate permit terms and conditions.[3] The process of issuing these individual permits requires public disclosure of both the permit application and the permit itself, and there are substantial opportunities for public participation. EPA has stated that over 48,000 industrial facilities have been issued individual NPDES permits.[4]

But there is another mechanism by which sources may obtain coverage under an NPDES permit. Since 1979, EPA and states have had a process of

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[1] The Clean Water Act makes it "unlawful" to discharge pollutants without meeting certain conditions. Clean Water Act ("CWA") § 301(a), 33 U.S.C. § 1311(a) (2006). The Environmental Protection Agency ("EPA") is authorized to issue permits allowing the discharge of pollutants meeting these conditions, or such conditions as the EPA deems necessary. *Id.* § 402, 33 U.S.C. § 1342(a).

The Clean Water Act actually establishes two quite different permit programs that address two different types of discharges of pollutants. The NPDES permit program, authorized under section 402 of the Act, deals primarily with the addition of pollutants by industrial and municipal point sources. See *infra* notes 13-56 and accompanying text for a discussion of the structure of the NPDES permit program. The Act also establishes a distinct permit program under which the Army Corps of Engineers issues dredge and fill permits that apply to the removal (dredging) or addition (fill) of materials from or to navigable waters. CWA § 404, 33 U.S.C. § 1344. *See also id.* § 318, 33 U.S.C. § 1328 (authorizing permits for pollution associated with aquaculture projects).

[2] EPA was initially responsible for issuance of all NPDES permits. The Clean Water Act, however, authorizes the delegation of permit issuance authority to states. CWA § 402(b), 33 U.S.C. § 1342(b). "States" is defined to include certain U.S. possessions and territories, *id.* § 502(3), 33 U.S.C. § 1362(c), and tribal authorities. *Id.* § 518(e), 33 U.S.C. § 1377(e). For convenience, and because the relevant issues do not vary depending on whether an NPDES permit is issued by an approved state or tribal authority, this Article will generally refer to the delegated authorities as "states."

[3] *See generally* 40 C.F.R. § 122.44 (2006) (criteria for "establishing limitations, standards and other permit conditions").

[4] Draft Strategy for National Clean Water Industrial Regulations, 67 Fed. Reg. 71,165, 71,168 (Nov. 29, 2002).

issuing "general permits" to satisfy the requirements of the Clean Water Act. These general permits may contain enforceable effluent limitations and other requirements, but, unlike individual permits, they may apply to large numbers of sources discharging into many different bodies of water.[5] The conditions of a general permit are developed through a "notice and comment" process similar to development of a regulation, but the application of the general permit to an individual source differs dramatically from the process of issuing an individual NPDES permit. Sources seeking coverage under a general permit generally need only submit a "Notice of Intent" to the permit authority, and they are then authorized to discharge under the terms of the general permit without additional government review or public participation. EPA has stated that over 300 general permits have been issued[6] and that "thousands" of point sources have been covered through general permits.[7] General permits have been used to permit a wide variety of sources, from industrial and municipal storm water discharges and Concentrated Animal Feeding Operations ("CAFOs") to redi-mix concrete plants and water treatment facilities.[8]

The Clean Water Act provides no special provisions applicable to the issuance or content of general permits; they are subject to the same substantive and procedural obligations that are applicable to all NPDES permits.[9] The use of general permits to satisfy the otherwise applicable requirements of the Clean Water Act, however, raises significant issues. How, for example, can a general permit, applicable to a wide variety of sources discharging into different bodies of water, adequately comply with the inherently site-specific requirements to ensure attainment of state water quality standards? How can the process of authorizing sources under the terms of a general permit adequately ensure public participation and citizen enforcement? These questions have existed since the beginning of the general permit program, but EPA has never adequately confronted the tension between the requirements for site-specific permitting and the generic, almost regulatory approach of general permits. In fact, EPA has failed to develop any coherent

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[5] EPA defines a "general permit" as "an NPDES 'permit' issued under [40 C.F.R.] § 122.28 authorizing a category of discharges under the CWA within a geographical area." 40 C.F.R. § 122.2 (2006). The provisions of section 122.28 are discussed *infra* notes 89-122 and accompanying text.

[6] *See* Brief of Respondent at 42, Wis. Builders Ass'n v. EPA, Nos. 03-2908 et al. (7th Cir. Sept. 22, 2004), *consolidated as* Tex. Indep. Producers and Royalty Owners Ass'n v. EPA, 435 F.3d 758 (7th Cir. 2006) [hereinafter "EPA Brief"].

[7] Draft Strategy for National Clean Water Industrial Regulations, 67 Fed. Reg. 71,165, 71,168 (Nov. 29, 2002).

[8] See *infra* notes 123-151 and accompanying text for a discussion of the scope of sources covered by general permits.

[9] In contrast to specific authorization for use of general permits under the section 404 "dredge and fill" program, CWA § 404(e), 33 U.S.C. § 1344(e) (2006), the Clean Water Act provides no specific statutory authority for the use of general permits to satisfy the NPDES permit requirement. See *infra* notes 57-61 and accompanying text for discussion of the legality of the use of general permits.

set of policies and for over two decades has issued a series of general permits that contain a hodgepodge of varying provisions.

In a series of recent cases, fundamental aspects of the general permit program have been called into question. In *Environmental Defense Center v. EPA*, the Ninth Circuit rejected the adequacy of EPA's public participation procedures for a general permit and concluded that EPA's failure to review pollution plans developed by permittees constituted a "failure to regulate."[10] In *Waterkeeper Alliance v. EPA*, the Second Circuit reached similar conclusions in rejecting elements of EPA general permit regulations applicable to CAFOs.[11] In *Friends of the Wild Swan v. EPA*,[12] the Ninth Circuit raised serious questions about EPA's ability to issue permits for new discharges on waters not yet achieving water quality standards. Taken together, these cases raise questions about the basic structure and scope of the general permit program.

The purpose of this Article is to assess the legality of the use of general permits to satisfy the NPDES requirement of the Clean Water Act. Part I begins with a brief overview of the basic substantive and procedural obligations applicable to the NPDES permit program. Part II addresses the history of the general permit program and discusses the current regulatory provisions that EPA has promulgated regarding their use. The Article continues with a discussion of a series of major issues that are raised by the use of general permits. These include, among others, issues relating to compliance with water quality standards provisions, the use of pollution plans developed by permittees that are neither reviewed nor approved by the government, and the provisions for public participation in permit issuance and enforcement. The Article suggests a variety of revisions to the general permit program that address some of the existing infirmities.

The EPA general permit program is now essentially incoherent, and existing federal and state issued general permits violate many fundamental requirements of the Clean Water Act. Although general permits can fill a useful role in implementing the NPDES permit program, EPA will need to modify its general permit policies to provide for greater public participation and government oversight to ensure compliance with water quality standards. The acknowledged efficiency advantages of general permits simply cannot trump the substantive requirements of the Clean Water Act.

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[10] 344 F.3d 832, 854-56 (9th Cir. 2003).
[11] 399 F.3d 486 (2d Cir. 2005).
[12] 74 F. App'x 718 (9th Cir. 2003).

II. THE NPDES PERMIT PROGRAM

The discharge of pollutants, otherwise illegal under section 301(a) of the Clean Water Act, can be authorized by compliance with an NPDES permit.[13] The Act provides:

> (1) [T]he Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding [section 301(a) of the Act], upon condition that such discharge will meet either (A) all applicable requirements under [various sections of the Act], or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.
> (2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.[14]

Although EPA was initially responsible for issuing all NPDES permits, section 402(b) authorizes the delegation of this authority to states if their laws and regulations establish a permit program that is substantially equivalent to the federal program.[15] At the moment, 45 states have full or partial authority to issue NPDES permits to sources within their jurisdiction.[16]

The NPDES permit program was one of the central innovations of the Federal Water Pollution Control Act ("FWPCA") Amendments of 1972.[17] The FWPCA, now known generally as the Clean Water Act, transformed the prior structure of federal water pollution control policy. Under prior statutory provisions, states established water quality standards, and dischargers were in potential non-compliance if their discharge violated these state stan-

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[13] The "discharge of a pollutant" is unlawful unless in compliance with various sections of the Act. CWA § 301(a), 33 U.S.C. § 1301(a)(1).

[14] *Id.* § 402, 33 U.S.C. § 1342.

[15] *Id.* § 402(b), 33 U.S.C. § 1342(b); *see also* 40 C.F.R. § 123 (2006) (state program requirements).

[16] *See* EPA, EPA State Program Status, http://cfpub.epa.gov/npdes/statestats.cfm (last visited Mar. 17, 2007) (on file with the Harvard Environmental Law Review). Most states now have authority to issue NPDES permits to sources within their jurisdiction, but not all state programs are authorized to issue permits to all classes of dischargers or to issue general permits. *Id.* In cases in which the state has not assumed full permit-issuing authority, either EPA or the state may be the NPDES permit-issuer depending on the scope of authorization. See *infra* notes 119-121 and accompanying text for a discussion of delegation of authority to issue general permits.

[17] Pub. L. No. 92-500, 86 Stat. 816 (1972). *See generally* William L. Andreen, *The Evolution of Water Pollution Control in the United States – State, Local, and Federal Efforts, 1789-1972: Part II*, 22 STAN. ENVTL. L.J. 215 (2003); Jeffrey M. Gaba, *Federal Supervision of State Water Quality Standards Under the Clean Water Act*, 36 VAND. L. REV. 1167 (1983); William F. Pedersen, Jr., *Turning the Tide on Water Quality*, 15 ECOLOGY L.Q. 69 (1988).

dards. Although states were required to develop implementation plans, there was no specific federal obligation to issue permits to sources of pollution. Enforcement involved a complex process in which the government was required to trace in-stream pollution back to specific dischargers, and, given the difficulty of this task, enforcement was largely nonexistent.[18]

The 1972 amendments replaced this general obligation to comply with state-established in-stream water quality standards with the obligation to obtain and comply with a federally-mandated NPDES permit. The NPDES structure established a relatively simple and effective mechanism for identifying and enforcing pollution requirements. Violations of pollution requirements were established, not by focusing on the effect of the discharge, but simply by establishing non-compliance with the specific limits in the permits.[19] As the Supreme Court stated in the early days of implementation of the program:

> An NPDES permit serves to transform generally applicable effluent limitations and other standards including those based on water quality into the obligations (including a timetable for compliance) of the individual discharger, and the Amendments provide for direct administrative and judicial enforcement of permits . . . In short, the permit defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations under the Amendments.[20]

The NPDES permit not only defines obligations, it also limits the scope of those obligations. Under the Act's "permit shield" provisions, permittees who comply with the specific requirements of their NPDES permit are generally deemed to be in compliance with all requirements of the Clean Water Act (except standards for toxic pollutants injurious to human health) regardless of whether those requirements have been included in the permit.[21]

A. The Scope of the NPDES Permit Program

The NPDES permit obligation applies exclusively to "discharges of pollutants."[22] This phrase is defined in the Act to apply to the "addition" of

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[18] *See* Gaba, *supra* note 17, at 1178-79.

[19] *See* CWA § 309, 33 U.S.C. § 1319 (authorizing administrative, civil, and criminal penalties for violation of conditions and limitations in an NPDES permit).

[20] EPA v. California *ex. rel.* State Water Res. Control Bd., 426 U.S. 200, 205 (1976).

[21] CWA § 402(k), 33 U.S.C. § 1342(k); *see* Pinney Run Pres. Ass'n v. City Comm'rs, 268 F.3d 255 (4th Cir. 2001) (holding that permit shield applies to discharge of pollutants not listed in its permit, as long as it only discharges pollutants that have been adequately disclosed to the permitting authority); Jeffrey M. Gaba, *Regulation of Toxic Pollutants Under the Clean Water Act: NPDES Toxics Control Strategies*, 50 J. AIR L. & COM. 761, 783-84 (1985).

[22] CWA § 301(a), 33 U.S.C. § 1311(a).

a "pollutant" to "navigable waters" from a "point source."[23] At its simplest, a facility that adds new pollutants from its industrial process through a pipe into a stream or lake is required to have an NPDES permit. Sources that are not "point sources" of pollutants are not subject to the NPDES permit requirements. Such non-point sources of pollutants include "area wide" runoff that does not collect into discrete ditches or other point source and "indirect dischargers" that discharge not into navigable water but into sewer systems connected to municipal sewage treatment plants, known as "publicly owned treatment works" ("POTWs").[24]

B. Inclusion of Permit Conditions

NPDES permits are intended to include substantive restrictions on the discharge of pollutants.[25] These effluent limitations contained in the NPDES permit in most cases specify the quantity or concentrations of specific pollutants that may be discharged from the point source. In general, there are two types of substantive restrictions imposed.[26] First, all point sources are re-

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[23] *Id.* § 502(12), 33 U.S.C. § 1362(12). "Navigable waters" is defined as "the waters of the United States, including the territorial seas." *Id.* § 502(7), 33 U.S.C. § 1362(7). The scope of the term has been the subject of considerable controversy. Since the mid-1970's, EPA and the Army Corps of Engineers had taken an expansive view of Clean Water Act jurisdiction and had imposed NPDES and Section 404 "dredge and fill" permit requirements on sources that discharged into waters that had the potential to affect interstate commerce. *See* 40 C.F.R. § 122.2 (2006); 33 C.F.R. § 328.3(a)(3) (2006) (definition of waters of the U.S. includes waters "the use, degradation or destruction of which would affect or could affect interstate or foreign commerce"). In a number of recent opinions, the Supreme Court has, however, construed the Clean Water Act to limit the scope of "navigable waters." In *Solid Waste Agency v. United States Army Corps of Engineers* (*SWANCC*), 531 U.S. 159 (2001), the Court held that the Corps could not use the presence of migratory birds to include nonnavigable, isolated, intrastate waters in the definition of "navigable waters." In *Rapanos v. United States*, 126 S. Ct. 2208 (2006), a divided court appears to have further limited the scope of "navigable waters," although the precise test required is not clear. *See* United States v. Johnson, 467 F.3d 56 (1st Cir. 2006) (discussing confusion in application of multiple opinions in *Rapanos*). The full implications of the *SWANCC* and *Rapanos* decisions remain to be seen. There is no doubt, however, that these decisions have limited the scope of waters subject to NPDES and Section 404 "dredge and fill" permit requirements. This has the potential to affect the number of sources that may need to be covered under general permits.

[24] CWA § 301(b)(1)(B), 33 U.S.C. § 1311(b)(1)(B) (application of effluent limitations to "publicly owned treatment works"); 40 C.F.R. § 403.3(q) (definition of POTW).

[25] In addition, NPDES permits typically contain monitoring and reporting requirements and a variety of other standard conditions. *See* 40 C.F.R. § 122.41.

[26] In addition to the two types of restrictions discussed *infra*, the Act also allows states to require that certain federally issued permits, including NPDES permits, include conditions necessary to comply with state water quality requirements. CWA § 401, 33 U.S.C. § 1341. States must certify that any activity that is authorized by a federal permit and that includes a "discharge into the navigable waters" is in compliance with state law, and, as part of this process, states can require inclusion of conditions in that permit that are necessary to assure the activity is conducted in a manner that complies with state law. *Id.* The scope of activities covered by section 401 is broader than the scope of activities subject to NPDES permit requirements. *See* S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 126 S. Ct. 1843 (2006) (discussing the applicability of section 401 certification to potential releases from hydroelectric dams). Section 401 certification is, however, required for federally issued NPDES permits. No certifi-

quired to meet "technology-based" limitations. Existing sources are subject to technology-based effluent limitations reflecting "best conventional technology" ("BCT") for a limited class of "conventional pollutants" and limitations reflecting "best available technology" ("BAT") for all other pollutants.[27] New sources, defined as sources that commenced construction after promulgation of national effluent limitations for their category, are subject to technology-based limitations reflecting "best available demonstrated control technology," generally known as "NSPS" (new source performance standard) limitations.[28]

Technology-based limits are determined by the level of control that is technologically and economically achievable through the use of existing technology,[29] and they are developed independently of any consideration of the impact of the discharge on receiving water.[30] EPA has promulgated uniform, national determinations of BAT, BCT, or NSPS for most major categories of industrial sources.[31] Where such national effluent limitation guidelines exist, a permit writer may simply incorporate those limitations in an NPDES permit.[32]

In addition to technology-based limitations, a point source may be subject to more stringent effluent limitations, known as "water quality based effluent limitations" ("WQBELs"), necessary to assure attainment of state water quality standards.[33] State water quality standards consist of three elements: "designated uses" that specify the intended uses or goals for each

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cation is required where the state is the permit issuer. *See, e.g.*, EPA OFFICE OF WASTEWATER MANAGEMENT, WATER PERMITTING 101, http://www.epa.gov/npdes/pubs/101pape.pdf (last visited Apr. 18, 2007) (on file with the Harvard Environmental Law Review) (describing application of 401(c) certification where State does not have approval for administering the NPDES permit program).

[27] CWA § 301(b), 33 U.S.C. § 1311(b); *see also* EPA OFFICE OF WASTEWATER MANAGEMENT, *supra* note 26.

[28] CWA § 306, 33 U.S.C. § 1316; *see also* EPA OFFICE OF WASTEWATER MANAGEMENT, supra note 26. Newly constructed sources in industrial categories without national effluent limitations may be described as "new dischargers" but they are subject to the technology-based requirements applicable to existing sources. *See* Jeffrey M. Gaba, *New Sources, New Growth and the Clean Water Act*, 55 ALA. L. REV. 651, 656 (2004).

[29] CWA §§ 304(b), 306, 33 U.S.C. §§ 1314(b), 1316.

[30] *See* Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1041 (D.C. Cir. 1978).

[31] *See* 40 C.F.R. §§ 405–471 (2006). EPA's authority to establish national "effluent limitations guidelines" applicable to categories of sources was confirmed in *E.I. DuPont de Nemours v. Train*, 430 U.S. 112 (1977).

[32] 40 C.F.R. § 125.3(c)(1). In the absence of promulgated effluent limitations guidelines, permit writers, using "best professional judgment," are authorized to develop effluent limitations for an individual source based on a case-by-case basis according to factors listed in the regulations. *Id.* § 125.3(c)(2). *See* Texas Oil & Gas Ass'n v. EPA, 161 F.3d 923, 928–29 (5th Cir. 1998) (In the absence of promulgated effluent limitations guidelines, "EPA must determine on a case-by-case basis what effluent limitations represent the BAT level, using its 'best professional judgment.' 40 C.F.R. § 125.3 (c)-(d). Individual judgments thus take the place of uniform national guidelines, but the technology-based standard remains the same.").

[33] NPDES permits must include "any more stringent limitations . . . necessary to meet water quality standards." CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C). Permit writers must include WQBELs for pollutants that "have the reasonable potential to cause, or contribute to an excursion above any State water quality standard." 40 C.F.R. § 122.44(d).

water body or segment of water in the state; criteria that are generally specific maximum numerical concentrations of pollutants in the water body that will not preclude attainment of the designated use; and an "anti-degradation" policy that may impose limits on the issuance of NPDES permits to point sources that will degrade existing water quality.[34] The process of translating water quality standards into specific WQBELs is complex and somewhat incoherent.[35]

Effluent limitations, whether based on technology or water quality standards, are typically expressed as a numerical limit in the quantity or concentration in the discharge of specific pollutants, and effluent limitations in NPDES permits are generally achieved through the use of waste water treatment systems that remove pollutants from the industrial effluent. In some cases, however, end-of-pipe treatment may not be feasible, and EPA regulations allow for permit limitations that require a permittee to employ "best management practices" ("BMPs") to minimize the discharge of pollutants.[36] In contrast to end-of-pipe numerical limits, BMPs may require modification of industrial processes or other management practices that minimize the release of pollutants in the first place. Although the Clean Water Act only authorizes the use of BMPs as technology-based limits for the control of toxic pollutants,[37] EPA regulations more broadly authorize the use of BMPs where necessary to "carry out the purposes and intent of the CWA."[38]

C. *Procedures for Issuance*

The Clean Water Act itself imposes only limited procedural obligations on the issuance of NPDES permits.[39] The statute requires that the permits be

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[34] *See* CWA § 303(c), 33 U.S.C. § 1313(c); 40 C.F.R. § 131.

[35] *See* EPA, EPA-833-B-96-003, NPDES PERMIT WRITERS' MANUAL 104-05 (1996); Gaba, *supra* note 28, at 658-62. See *infra* notes 155-164 and accompanying text for a discussion of the process of establishing WQBELs.

[36] EPA regulations define "best management practices" as "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of 'waters of the United States.' BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage." 40 C.F.R. § 122.2; *see also id.* § 122.44(k)(3) (BMPs may be used when numeric limits are infeasible).

[37] CWA § 304(e), 33 U.S.C. § 1314(e). The Act also specifically authorizes the use of "management practices" to control pollution from certain sources of storm water discharge. *See id.* §§ 402(p)(3)(B)(iii), 402(p)(6), 33 U.S.C. §§ 1342(p)(3)(b)(iii), 1342(p)(6).

[38] 40 C.F.R. § 122.44(k)(4).

[39] In several cases in the 1970s, courts held that the permit issuance process was subject to the adjudicatory procedures mandated by sections 554-557 of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 554-557. *See* Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 876 (1st Cir. 1978); Marathon Oil Co. v. EPA, 564 F.2d 1253, 1263 (9th Cir. 1977). Application of the formal adjudicatory hearing requirements of the APA meant that NPDES permit issuance involved the opportunity for an evidentiary hearing before an Administrative Law Judge, appeal within EPA, and a variety of evidentiary protections and limitations. In 2000, in response to subsequent cases that had raised questions about the continuing validity of the earlier holdings, EPA rejected the obligation to comply with the formal adjudicatory re-

issued "after an opportunity for a public hearing" and further provides that "permit applications" and the permits themselves be made available to the public.[40] EPA regulations provide a process for permit issuance that includes a number of requirements relating to public notice and public comment.[41] Public hearings may be requested, but the permit writer is required to hold such a hearing only if there is a "significant degree of public interest."[42] Appeals of an individual NPDES permit decision may, in certain circumstances, be taken to EPA's Environmental Appeals Board by parties who participated in the permit issuance process.[43]

The maximum term of an NPDES permit is five years, and permittees must apply for reissuance prior to expiration of their existing permit. As provided by the Administrative Procedure Act and EPA regulations, existing permittees who apply for an extension of their permit term are authorized to continue discharging under their old permit until EPA completes the administrative process of reissuance.[44] New applicants, dischargers who are not currently operating under an existing permit, are generally not authorized to discharge until they have received a final NPDES permit.[45]

Judicial review of federally issued permits is governed by section 509(b) of the Clean Water Act. Under section 509(b)(1)(F), the action of the Administrator in issuing an NPDES permit is subject to review in the appropriate federal court of appeals.[46] Judicial review, available after exhaustion of administrative procedures, must be sought within 120 days of permit issuance.[47] State-issued NPDES permits are subject to judicial review in state courts subject to the provisions of state law.[48]

D. Enforcement and Citizen Suits

Point sources that discharge without a permit or permittees who violate a "permit condition or limitation" of an NPDES permit are subject to a variety of administrative, civil and criminal penalties by state and federal authorities.[49] Civil and administrative penalties can include fines of up to

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quirements of the APA. Amendments to Streamline the National Pollutant Discharge Elimination System Program Regulations: Round Two, 65 Fed. Reg. 30,886, 30,896 (May 15, 2000) (codified at 40 C.F.R. pts. 22, 117, 122-25, 144, 270-71).

[40] CWA §§ 402(a)(1), 402(j), 33 U.S.C. §§ 1342(a)(1), 1342(j).

[41] EPA regulations governing permit procedures are found at 40 C.F.R. §§ 124.1–.21, 124.51–.66.

[42] 40 C.F.R. § 124.12(a)(1). This regulation, restricting the grant of a public hearing to situations in which there was significant public interest, was upheld in *Costle v. Pacific Legal Foundation*, 445 U.S. 198, 216 (1980). The Court rejected the argument that the Clean Water Act mandated a public hearing on every NPDES permit application.

[43] 40 C.F.R. § 124.19(a).

[44] Administrative Procedure Act § 558(c), 5 U.S.C. § 558(c) (2006); 40 C.F.R. § 122.6.

[45] *See* 40 C.F.R. § 124.60.

[46] CWA § 509(b)(1)(F), 33 U.S.C. § 1369(b)(1)(F) (2006).

[47] *Id.* § 509(b)(1), 33 U.S.C. § 1369(b)(1).

[48] *See, e.g.*, District of Columbia v. Schramm, 631 F.2d 854, 863 (D.C. Cir. 1980).

[49] CWA § 309, 33 U.S.C. § 1319.

$32,500 per day per violation.[50] Criminal sanctions, available for both knowing and negligent violations, can include both monetary penalties and imprisonment for up to one year.[51] Additionally, certain other actions, including submission of false information required under the Act, can result in civil or criminal sanctions.[52]

The Clean Water Act also has a citizen suit provision that authorizes private citizens to bring enforcement actions against persons violating an "effluent standard or limitation."[53] The citizen suit section specifically defines "effluent standard or limitation" to include discharge without a permit in violation of section 301(a) or violation of "a permit or condition" issued under section 402.[54] Citizens may seek injunctive relief to enforce a standard or limitation and civil penalties payable to the federal government.[55] In addition to satisfying constitutional standing requirements, citizens seeking to bring a citizen suit must satisfy certain statutory prerequisites.[56]

III. General Permits Under the Clean Water Act

EPA, through the use of general permits, has created a mechanism by which permit authorities can issue a single NPDES permit containing a common set of effluent limitations and other permit conditions that will apply to a potentially large number of point sources. The general permit itself is issued following the notice and comment process familiar from informal rulemaking, and individual point sources that are eligible for coverage under the permit need only submit a "Notice of Intent" ("NOI") to be covered under the permit. Following submission of the NOI, these point sources are authorized to discharge subject to the conditions of the permit. The Clean Water Act provides no express authorization for the issuance of general permits under the NPDES permit program.[57] Congress has, however, belatedly acknowledged the use of general permits in the NPDES permit program. In legislation adopted in 1991 dealing with storm water discharges, Congress provided that EPA "shall issue final regulations with respect to general per-

[50] Section 309 authorizes civil penalties of up to $25,000 per day. *Id.* § 309(d), 33 U.S.C. § 1319(d). Under the terms of the Debt Collection Improvement Act of 1996, EPA has issued a series of adjustments to the statutory penalty to reflect inflation. *See* 40 C.F.R. §§ 19.1-.4.

[51] CWA § 309(c), 33 U.S.C. § 1319(c).

[52] *Id.* § 309(c)(4), 33 U.S.C. § 1319(c)(4).

[53] *Id.* § 505(a)(1), 33 U.S.C. § 1365(a)(1).

[54] *Id.* § 505(f), 33 U.S.C. § 1365(f).

[55] *Id.* § 505(a)(2), 33 U.S.C. § 1365(a)(2).

[56] *Id.* § 505(b), 33 U.S.C. § 1365(b).

[57] In contrast, the Act provides specific authority for the issuance of general permits on a "State, regional or nationwide basis" under the section 404 "dredge and fill" permit program. *Id.* § 404(e), 33 U.S.C. § 1344(e). Section 404 permits, issued by the Army Corps of Engineers, authorize the dredging of material and the addition of fill material to waters of the U.S., including wetlands. Given the different set of requirements and concerns that apply to the dredge and fill program, the use of general permits raises much different concerns than those raised by the use of general permits under the NPDES program.

mits for storm water discharges associated with industrial activity on or before February 1, 1992."[58]

Notwithstanding the absence of direct legislative authorization, the legality of the use of general permits to implement NPDES permit requirements has never been seriously questioned. Indeed, as discussed below, the D.C. Circuit as early as 1977 stated that the Clean Water Act "allows" the use of general permits.[59] The limited case law involving challenges to elements of an EPA-issued general permit has not involved disputes as to their basic legitimacy. In *Environmental Defense Center v. EPA*,[60] for example, a panel of the Ninth Circuit invalidated significant elements of an EPA general permit for storm water discharges from small municipal storm sewers, but did not question EPA's authority to issue general permits. Indeed the court noted that "[g]eneral permitting has long been recognized as a lawful means of authorizing discharges."[61]

A. History of the General Permit Program

The initial impetus for general permits arose from EPA's attempt to exclude certain types of point sources from the NPDES permit program. In 1973, only months after Congress adopted the NPDES permit program, EPA issued a regulation that exempted from the permit requirement certain discharges from storm sewers composed entirely of storm runoff uncontaminated by industrial or commercial activity, relatively small animal confinement facilities, silvicultural activities, and irrigation return flow from smaller farms.[62]

EPA identified two rationales for this exclusion. First, EPA was concerned with the difficulty of developing "end-of-pipe" effluent limitations for these types of discharges. In many ways, each of the storm water and

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[58] Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. 102-240, § 1068, 105 Stat. 2007 (1991). These provisions are not codified as part of the Clean Water Act.

[59] NRDC v. Costle, 568 F.2d 1369, 1381 (D.C. Cir. 1977); *see infra* notes 65-70 and accompanying text.

[60] 344 F.3d 832 (9th Cir. 2003).

[61] *Id.* at 853. Judge Tallman, in dissent, did raise the specific issue of whether "Congress was clear in its intent concerning the propriety of a system of general permits augmented by NOIs." *Id.* at 880. Reviewing various elements of the Act, including the requirements regarding the issuance of NPDES permits generally and permit obligations relating to storm water discharges, Judge Tallman stated that "the Clean Water Act fails to address the propriety of a general permit system, or whether NOIs ought to be considered 'permits.'" Given the fact that the Clean Water Act does not address the propriety of general permits, Judge Tallman concluded that the court should have deferred to each of EPA's judgments regarding the requirements for the general permit at issue. *Id.* at 880-81.

[62] 40 C.F.R. § 125.4 (1975); *see* Form and Guidelines Regarding Agriculture and Silvicultural Activities, 38 Fed. Reg. 18,000 (July 5, 1973). EPA claimed that it was simply excluding these sources from the obligation to obtain NPDES permits, not from the requirement to comply with substantive limitations on the discharge of pollutants. It is not at all clear how EPA contemplated that sources would be subject to enforceable limitations in the absence of an NPDES permit.

agricultural discharges resembled non-point source discharges that did not lend themselves to control by placement of numerical limits on the discharge of pollutants. Second, EPA was concerned about the administrative difficulties of issuing NPDES permits to large numbers of small sources. EPA claimed that it would be administratively infeasible, given its limited resources, to issue permits to such large numbers of permit applicants.[63]

Environmentalists challenged this regulation, and, in *NRDC v. Train*,[64] the district court rejected EPA's attempt to exclude these sources from the NPDES permit requirement. The court concluded that Congress had intended that all point sources be subject to NPDES permit requirements.[65] In response to EPA's claim of administrative infeasibility, the court addressed a number of options available to EPA to ease the administrative burden. Referring to an alternative suggested by NRDC, the court, in a crucial sentence, noted that EPA "would also have substantial discretion to use administrative devices, such as area permits, to make EPA's burden manageable."[66]

On appeal, in *NRDC v. Costle*,[67] the D.C. Circuit affirmed the trial court's decision. Discussing the suggestion that area wide or general permits might be a method to minimize the administrative burdens of permit issuance, the court stated:

> Section 402 does not explicitly describe the necessary scope of a NPDES permit. The most significant requirement is that the permit be in compliance with limitation sections of the Act described above. As a result NRDC and the District Court have suggested the use of area or general permits. The Act allows such techniques.[68]

The court stated that it "discern[ed] an intent to give EPA flexibility in the structure of the permits, in the form of general or area permits."[69]

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[63] *See* NRDC v. Costle, 568 F.2d 1369, 1377-80 (D.C. Cir. 1977) (discussing feasibility issues raised by EPA to justify exclusion).

[64] 396 F. Supp. 1393 (D.D.C. 1975).

[65] *Id.* at 1402.

[66] *Id.*

[67] 568 F.2d 1369 (D.C. Cir. 1977).

[68] *Id.* at 1381. The court noted one "practical" difference between an exemption from the NPDES permit program and coverage under a general permit, even one which presumably contained no explicit effluent limitations.

> An exemption tends to become indefinite: the problem drops out of sight, into a pool of inertia, unlikely to be recalled in the absence of crisis or a strong political protagonist. In contrast, the general or area permit approach forces EPA to focus on the problems of specific regions and requires that the problems of the region be reconsidered at least every five years, the maximum duration of a permit.

Id. at 1382.

[69] *Id.* at 1383. Rejecting EPA's rationale relating to the difficulty of developing effluent limitations for these types of sources, the court recognized that EPA had authority to establish permit conditions based not on uniform numerical limitations but through proscription of industry practices. *Id.* at 1380. The court concluded, "We only indicate here that when numerical effluent limitations are infeasible, EPA may issue permits with conditions designed to reduce

Following the district court opinion in *NRDC v. Train* (but before the Court of Appeals' opinion in *NRDC v. Costle)*, EPA proposed its first regulation authorizing the use of general permits. The proposal, published in 1977, would have limited the use of general permits to "point sources in the separate storm sewer and agricultural activities categories."[70] The proposal required the designation of a "general permit program area," generally reflecting political, geographic, or institutional boundaries, which would define the geographic scope of a general permit.[71] The proposal stated that "general permits will include reasonable conditions determined necessary by the Regional Administrator or Director of a State water pollution control agency to obtain progress in reducing pollution and to meet the goals of the [Clean Water Act]."[72] The preamble indicated that substantive conditions would generally be limited to imposition of "best management practices" specified in local planning documents.[73] The proposal also established a basic structure that limited pubic participation to notice and comment on the proposed general permit itself.

In 1979, EPA promulgated the final regulation based on the 1977 proposal.[74] This regulation differed in several respects from the proposal. First, the regulation provided that general permits were not restricted to specific types of discharges. Rather, the regulation provided that general permits could be used, not only for certain storm water discharges, but also for "such other categories of point sources if there are a number of minor point sources operating in a geographical area" that, among other things, "involve the same or substantially similar types of operations," "discharge the same types of wastes," and "would require the same effluent limitations or operating conditions."[75] In the preamble, EPA indicated that comments had con-

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the level of effluent discharges to acceptable levels. This may well mean opting for a gross reduction in pollutant discharge rather than the fine-tuning suggested by numerical limitations." *Id.*

[70] General Permit Program, 42 Fed. Reg. 6846, 6846 (Feb. 4, 1977).

[71] *Id.* at 6847.

[72] *Id.* at 6856.

[73] *Id.* In the preamble to the proposal, EPA expressed substantial concerns about the means of controlling these types of sources through NPDES permits. EPA identified controls based on "best management practices" ("BMPs"), rather than end-of-pipe technology, as a potential type of restriction in a general permit. EPA focused on area wide management plans developed under section 208 as the source of BMP requirements. *Id.* EPA indicated that if localities failed to undertake planning under section 208, EPA would take action to meet the goals of the Act. The preamble identified the type of action contemplated: "An alternative to this general permit program, with its reliance on planning agencies' BMP recommendations, could be the issuance of individual NPDES permits imposing effluent limitations on the point sources identified in the agricultural and separate storm sewer categories." *Id.* at 6847.

[74] 44 Fed. Reg. 32,854, 32,916 (June 7, 1979) (codified at 40 C.F.R. § 122.48).

[75] *Id.* In 1977, Congress amended the Clean Water Act to exclude "irrigation return flow" from the definition of point sources. Act of Dec. 27, 1977, Pub. L. No. 95-217, § 33(b), 91 Stat. 1566, 1577 (amending CWA § 502(14), 33 U.S.C. § 1362(14)). Although the 1977 proposed regulation would have included such return flows, the 1979 final did not address these sources since they were no longer subject to the NPDES permit requirement. 44 Fed. Reg. at 32,873.

vinced the agency that the "administrative flexibility of the approach" warranted its applicability to other types of sources.[76] Second, the regulation removed any specific reference to terms or conditions in the general permit. EPA stated that this issue was covered by regulations establishing requirements for NPDES permits generally.[77] Finally, EPA modified the provisions for public participation and coverage by allowing "interested persons" to request that a source be subject to an individual rather than a general permit.[78] The preamble to the 1979 regulation also provided an expanded justification for the use of BMPs. According to EPA, BMPs could be included in general permits where, among other things, they are "'appropriate requirements' relating to achievement of effluent limitations"[79] or they constitute "a more stringent limitation established pursuant to State law or regulations under section 301(b)(1)(C) of the Act."[80]

Since its adoption in 1979, the general permit regulation has been subject to a series of amendments that have expanded the scope of sources eligible for coverage under a general permit. These changes included, among others, deletion of the requirement that such sources be "minor,"[81] allowing a single general permit to cover more than one subcategory or category of sources,[82] authorization of use of general permits for sewage treatment works,[83] and authorization for certain sources to be covered under a general permit without submission of a Notice of Intent.[84] The regulation has also been modified to provide certain procedural provisions applicable to specific sources, including oil and gas exploration and production facilities,[85] CAFOs,[86] and certain types of storm water sources.[87]

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[76] 44 Fed. Reg. at 32,873.

[77] *Id.*

[78] *Id.* at 32,874.

[79] *Id.* (citing CWA § 402(a)(2), 33 U.S.C. § 1342(a)(2)).

[80] *Id.* Section 301(b)(1)(C) requires inclusion of NPDES permit conditions necessary to meet water quality standards. 33 U.S.C. § 1311(b)(1)(c) (2006).

[81] NPDES Permit Regulations; Correction, 50 Fed. Reg. 6939, 6941 (Feb. 19, 1985) (codified at 40 C.F.R. § 122.28(a)(2)(ii)).

[82] Amendments To Streamline the NPDES Program Regulations: Round Two, 65 Fed. Reg. 30,886, 30,908 (May 15, 2000) (codified at 40 C.F.R. § 122.28(a)(1)).

[83] EPA Administered Permit Programs: The National Pollutant Discharge Elimination System, 54 Fed. Reg. 18,782 (May 2, 1989) (codified at 40 C.F.R. § 122.28).

[84] EPA Administered Permit Programs: The National Pollutant Discharge Elimination System, 64 Fed. Reg. 68,838, 68,841 (Dec. 8, 1999) (codified at 40 C.F.R. § 122.26).

[85] National Pollutant Discharge Elimination System, 48 Fed. Reg. 39,619 (Sept. 1, 1983) (codified at 40 C.F.R. § 122.28).

[86] EPA Administered Permit Programs: The National Pollutant Discharge Elimination System, 68 Fed. Reg. 7265, 7268 (Feb. 12, 2003) (codified at 40 C.F.R. § 122.23).

[87] The National Pollutant Discharge Elimination System Application Deadlines, General Permit Requirements and Reporting Requirements for Stormwater Discharges Associated with Industrial Activity, 57 Fed. Reg. 11,394 (Apr. 2, 1992).

B. Current Regulatory Requirements

EPA's specific regulatory requirements for general permits are currently found at 40 C.F.R. § 122.28.[88] This regulation specifies the scope of sources that are eligible for coverage under a general permit and establishes certain procedures regarding issuance and revocation of coverage under the permit.

1. *Scope*

Under section 122.28(a), the scope of coverage under a general permit is defined both on a geographic basis and through specification of the categories of sources covered under the permit. The regulation provides that the area of coverage should generally be based on geographic and political boundaries, and it is common for EPA to establish the scope of a general permit on state-wide or EPA region-wide basis.[89] State-issued general permits are frequently state-wide in scope.

The regulation provides wide authority to include differing categories or subcategories of sources under a single general permit. Under the regulation, differing sources can be covered under a single general permit as long as the sources: (1) involve the same or substantially similar types of operations; (2) discharge the same types of wastes or engage in the same types of sludge use or disposal practices; (3) require the same effluent limitations, operating conditions, or standards for sewage sludge use or disposal; (4) require the same or similar monitoring; or (5) in the opinion of the permit writer, are more appropriately controlled under a general permit than under individual permits.[90]

2. *Substantive Conditions*

Section 122.28 provides almost no specification of the required substantive limitations in a general permit. As noted, EPA had previously stated that the regulatory requirements that are applicable to all NPDES permits apply to general permits.[91] Section 122.28 merely requires that a general permit "clearly identify the applicable conditions for each category or subcategory of dischargers or treatment works treating domestic sewage covered by the permit."[92] Although the regulations do not contain an explicit cross-reference to the source of those conditions, the generic requirements for conditions in EPA-issued NPDES permits[93] presumably apply.

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[88] EPA has shifted the location of the requirements first from 40 C.F.R. § 122.48, then to 40 C.F.R. § 122.59 and finally to its current location at 40 C.F.R. § 122.28.

[89] 40 C.F.R. § 122.28(a)(1).

[90] *Id.* § 122.28(a)(2).

[91] *See supra* note 77 and accompanying text.

[92] 40 C.F.R. § 122.28(a)(4)(i).

[93] *Id.* §§ 122, 125.

Although section 122.28 is largely silent on the required substantive provisions of a general permit, in 2000, EPA added a new and curious subsection that purports to address the inclusion of "water quality based effluent limitations" ("WQBELs") in general permits. The regulation now states that "[w]here sources within a specific category or subcategory of dischargers are subject to water quality-based limits imposed pursuant to §122.44, the sources in that specific category or subcategory shall be subject to the same water quality-based effluent limitations."[94]

In the preamble to the proposed regulation, EPA explained the purpose of the regulation as follows:

> EPA is proposing to add this paragraph in part to clarify that general permit categories can be used to impose water quality-based limitations as well as technology-based limitations. However, paragraph (a)(3)'s requirement that sources in categories or subcategories be subject to the same water quality-based limits reflects EPA's position that general permits should not be used to provide permit coverage to loosely grouped categories of dissimilar discharges.[95]

Thus, EPA indicates that this provision simply reflects the pre-existing requirement that all permits, including general permits, satisfy water quality standards requirements, and suggests that the purpose of section 122.28(b)(3) is actually to limit the use of general permits for dissimilar sources.

This subsection, as written, is confusing at best. To the extent that it merely restates the requirement to include appropriate WQBELs in general permits, it is surplusage. This requirement, like the requirement to contain technology-based limitations, arises directly from the Clean Water Act and has been an undisputed requirement of all NPDES permits, whether individual or general.

To the extent that section 122.28(b)(3) requires that general permits contain some class of WQBELs applicable to a "category or subcategory" of sources derived under section 122.44, it is misleading. Section 122.44 contains EPA's regulations applicable to the development of effluent limitations in all NDPES permits, and section 122.44(d) specifies requirements for establishing limitations based on "water quality standards and state requirements."[96] Although this subsection contains detailed provisions for developing WQBELs, nothing in the subsection directly addresses development of such limitations for subcategories or categories of sources. The mechanisms

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[94] *Id.* § 122.28(a)(3); *see* Amendments to Streamline NPDES Regulations: Round Two, 65 Fed. Reg. 30,886, 30,890-91 (May 15, 2000).

[95] Amendments to Streamline NPDES Regulations: Round Two, 61 Fed. Reg. 65,268, 65,272 (Dec. 11, 1996).

[96] 40 C.F.R. § 124.44(d).

all reflect the site-specific nature of water quality standards-based restrictions.

There is one element of section 122.44(d) that could be read to authorize inclusion of categorical restrictions to comply with water quality standards. 40 C.F.R. § 122.44(d)(1)(vii)(B) contains a general requirement that WQBELs be "consistent with the assumptions and requirements of any available waste load allocation ('WLA') for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7."[97] WLAs can be developed for categories of sources, and, as discussed below, implementation of WLAs in general permits is becoming a central part of EPA's developing strategy for inclusion of WQBELs in general permits.[98] Thus, to the extent that section 122.28(a)(3) can be said to require general permits to include WQBELs necessary to comply with the "assumptions and requirements" of WLAs, it restates an important potential source of WQBELs for general permits. Although nothing in the preamble to the regulation indicates that this was its purpose, it can, nonetheless, serve this function.

3. *Procedures for Coverage*

Section 122.28 itself provides no specific procedures for issuance of a general permit but cross-references the generic permit procedures specified in 40 C.F.R § 124.[99] In general, the regulations in section 124 provide for issuance of a general permit following public notice, including publication in the Federal Register for EPA-issued permits, and an opportunity for comment on the terms of the proposed permit.[100]

Section 122.28 does provide procedures for obtaining individual coverage under a general permit. In most cases, individual sources that fall within the scope of a general permit obtain authorization by submission of a notice of intent.[101] Although the general permit is required to specify the content of the NOI, the regulation provides that the notice must, at a minimum, include the legal name and address of the owner or operator, the facility name and address, the type of facility or discharges, and the receiving streams.[102] As with other NPDES submissions, the NOIs must contain signature and certifications of accuracy by the submitter.[103] The regulation does give the permit writer the discretion to allow for coverage under a general permit without

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[97] 40 C.F.R. § 122.44(d)(1)(vii)(B).

[98] *See infra* notes 154-163 and accompanying text.

[99] 40 C.F.R. § 122.28(b)(1). The regulation identifies no particular provisions that actually address issuance of general permits, and, in fact, applicable requirements are scattered throughout section 124. Even with an electronic copy of the regulations and a good search function, it is very difficult to identify the variety of scattered provisions that apply to general permits.

[100] *See id.* §§ 124.10(c)(2)(i), 124.11.

[101] *Id.* §§ 124.10(c)(2)(i), 122.28(b)(2)(i).

[102] *Id.* § 122.28(b)(2)(ii).

[103] *Id.*

submission of a NOI for categories of dischargers other than storm water, certain municipal discharges, and discharges from a group of "primary industries."[104]

Under section 558(c) of the Administrative Procedure Act, holders of expired federal permits that are "required by law" may continue to operate under the expired permit if they have made a "timely and sufficient" application for renewal to the agency.[105] EPA's regulations generally provide for continuance of an EPA-issued permit when, among other things, the permittee has submitted a complete and timely application for a new permit.[106] The regulation does not address its applicability to general permits which do not have a mechanism for submission of an application for a new general permit. Although EPA had initially stated that the "administrative continuation" provision did not apply to permittees covered under a general permit, in a memorandum dated January 1984, EPA changed its position and asserted that permittees who had been covered under an expired general permit are authorized to operate until a new general permit is issued.[107]

In *Kitlutsisti v. ARCO Alaska*,[108] a federal district court expressly held that section 558(c) did not extend NPDES permit coverage for permittees who had previously been covered under an expired general permit. In part, the court relied on the fact that issuance of general permits is discretionary and not "required by law" and the fact that EPA regulations purported to apply section 558(c) only to individual permits. EPA subsequently issued a new general permit applicable to the sources at issue in *Kitlutsisti*, and the Ninth Circuit not only dismissed the appeal as moot but also vacated the entire district court opinion.[109] The issue of "administrative continuation" of expired general permits has not been subject to litigation since *Kitlutsisti*, and EPA now routinely provides that dischargers previously covered under an expired general permit are authorized to discharge pending re-issuance of the expired permit.[110]

4. *Requiring an Individual Permit*

EPA regulations provide that the permit writer may require a source, otherwise eligible for coverage under a general permit, to apply for an indi-

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[104] *Id.* § 122.28(b)(2)(v).

[105] 5 U.S.C. § 558(c) (2000).

[106] 40 C.F.R. § 122.6. This regulation was promulgated prior to 1984 and has not been substantively amended since then.

[107] Memorandum from Bruce Barrett, Director, Office of Water Enforcement and Permits, to Regional Water Management Division Directors and Regional Counsels (Jan. 16, 1984) (on file with Harvard Environmental Law Review).

[108] 592 F. Supp. 832, 843 (D. Alaska 1984).

[109] Kitlutsisti v. ARCO Alaska, 782 F.2d 800 (9th Cir. 1986).

[110] *See, e.g.*, NPDES Multi-Sector General Permits for Storm Water Discharges Associated with Industrial Activities, 65 Fed. Reg. 64,801, 64,853 (Oct. 30, 2000) [hereinafter "2000 Multisector General Permit"].

vidual NPDES permit.[111] The regulations specify a variety of factors that justify excluding a source from coverage under a general permit, including changes in regulatory requirements, violation of the terms of the general permit, or a determination that the source is a "significant contributor" of pollutants.[112] The regulations also provide that an individual source may request to be covered under an individual NPDES permit rather than the general permit.[113] The regulation does not appear to provide that individual sources have a right to coverage under an individual NPDES permit; the permit writer "shall" grant an individual source's request for coverage under an individual permit "if the reasons cited by the owner or operator are adequate to support the request."[114]

Finally, under the regulations, "interested persons" are also authorized to petition the permit writer to require that a specific source be subject to an individual rather than general NPDES permit.[115] There is no mandatory language associated with this right of petition; the permit writer has discretion to grant or deny the petition.[116] Nonetheless, this provision constitutes an apparently unused mechanism by which citizens could attempt to compel a permit writer to address a specific source through an individual rather than a general permit.

5. *State-Issued General Permits*

States have the discretionary authority to implement a general permit program that, if adopted, must satisfy the requirements of section 122.28.[117] To date, forty-five states have authority to issue general permits to all or some of the point sources within the state.[118] Thus, the vast majority of sources covered by general permits are subject to state rather than federally-issued permits.

EPA's involvement in these state-issued permits is limited. EPA regulations provide a ninety day period for EPA review and comment on state-issued general permits.[119] Further, statutory requirements applicable to federal actions, such as preparation of an Environmental Impact Statement under the National Environmental Policy Act or endangered species consultation under the Endangered Species Act, may not apply when a state issues a general permit.[120]

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[111] 40 C.F.R. § 122.28(b)(3)(i). EPA procedures for implementing a determination that a source must apply for an individual permit are at *id.* § 124.52.

[112] *Id.* § 122.28(b)(3).

[113] *Id.* § 122.28(b)(2)(vi).

[114] *Id.* § 122.28(b)(3)(iii).

[115] *Id.* § 122.28(b)(3)(i).

[116] *Id.*

[117] *Id.* § 123.25(a)(11).

[118] *See* EPA, *supra* note 16.

[119] 40 C.F.R. § 123.44(a)(2).

[120] *See infra* notes 287-290 and accompanying text.

C. Categories of General Permits

EPA's general permit regulations have been modified over time to expand the scope of sources eligible for coverage under a general permit,[121] and EPA and state NPDES permit writers have used general permits to cover large numbers and a wide variety of types of sources. Consistent with its history, however, the general permit program has focused on storm water and agricultural discharges that exist in large numbers and which raise particular problems in developing end-of-pipe effluent limitations. EPA has also used general permits extensively in coverage of offshore oil and gas exploration facilities.

1. *Storm Water Discharges*

The regulation of point source discharges of contaminated storm water has, since the earliest days of the NPDES permit program, posed problems for EPA. Storm water discharges are different from industrial process discharges. There is generally no specific discharge pipe to which to apply waste treatment technology, and controls of discharge generally focus on management practices to minimize contact of storm water with industrial materials or to control the flow of storm water.[122] Additionally, large numbers of facilities are potential point source dischargers of storm water.[123] Indeed, the general permit program itself can be traced to EPA's initial attempt to exclude storm water discharges from the NPDES permit program.[124]

EPA and states have generally addressed permitting of storm water discharges by issuing a series of general permits.[125] The Multisector General Permit ("MSGP") establishes a set of requirements applicable to storm water discharges from specified industrial categories.[126] EPA has also issued

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[121] *See supra* notes 81-86 and accompanying text.

[122] *See* NPDES Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 47,991 (Nov. 16, 1990) (promulgation of EPA storm water regulations discussing background of storm water control under the Clean Water Act).

[123] *See* 40 C.F.R. § 122.26(a) (scope of storm water permit program extends to municipal storm systems and a wide variety of industrial sources of storm water).

[124] *See supra* notes 62-66 and accompanying text.

[125] EPA regulations provide for the use of General Permits for storm water discharges from industrial sources, and small municipal separate storm sewer systems, 40 C.F.R. §§ 122.26(c), 122.33(b).

[126] *See* 2000 Multisector General Permit, *supra* note 110 *see also* Final Reissuance of NPDES Storm Water Multi-Sector General Permit for Industrial Activities, 65 Fed. Reg. 64,746 (Oct. 30, 2000) (fact sheet). The MSGP includes requirements generally applicable to all industrial categories covered by the permit and, in a series of sub-sections, specific requirements applicable to specified industrial categories. EPA's first MSGP was published in 1995. *See* Final NPDES Storm Water Multi-Sector General Permit for Industrial Activities, 60 Fed. Reg. 50,804 (Sept. 29, 1995). The permit was amended in 1996 and 1998. *See* Technical Correction, 61 Fed. Reg. 5248 (Feb. 9, 1996); Technical Correction, 61 Fed. Reg. 6412 (Feb. 20, 1996); Modification, 63 Fed. Reg. 42,534 (Aug. 7, 1998); Technical Modification, 63 Fed. Reg. 52,430 (Sept. 30, 1998). The permit was reissued in 2000. The 2000 MSGP has expired, but has been "administratively continued" pending issuance of a new general permit. *See* EPA,

a series of general permits applicable to construction activity, called construction general permits ("CGPs").[127] Finally, EPA has issued a series of general permits applicable to small "municipal separate storm sewer system" discharges ("MS4 GP").[128]

All of these general permits rely in large part on pollution plans developed by the permittees based on "best management practices" to limit the discharge of contaminated storm water. In the case of storm water from industrial sources, both the MSGP and the CGP require development of "storm water pollution prevention plans" ("SWPPPs").[129] In the case of the MS4 GP, smaller municipalities may be required to develop a "storm water management program" that includes certain "minimum measures" to limit the introduction of contaminated storm water into municipal storm sewer systems.[130]

2. *Concentrated Animal Feeding Operations*

Concentrated animal feeding operations are generally industrial operations where large numbers of animals are kept and raised in confinement, and the large quantities of animal wastes generated at these facilities can

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EXPIRATION OF EPA'S MULTI-SECTOR GENERAL PERMIT (MSGP-2000), http://www.epa.gov/npdes/pubs/msgp_expired.pdf (last visited Mar. 22, 2007) (on file with the Harvard Environmental Law Review). As discussed below, EPA has proposed significant revisions as part of its 2006 proposed reissuance of the MSGP. *See infra* notes 184-193 and accompanying text.

[127] *See* EPA, NPDES GENERAL PERMIT FOR STORM WATER DISCHARGES FROM CONSTRUCTION ACTIVITIES (2005), http://www.epa.gov/npdes/pubs/cgp2003_entirepermit.pdf [hereinafter 2003 CONSTRUCTION GENERAL PERMIT] (on file with the Harvard Environmental Law Review). EPA first published its Construction General Permit in 1992. *See* Proposed Reissuance of NPDES General Permits for Storm Water Discharge From Construction Activities, 62 Fed. Reg. 29,786, 29,787 (June 2, 1997). The CGP was subsequently reissued in 1998 and 2003. *See* 63 Fed. Reg. 7858 (Feb. 17, 1998); 68 Fed. Reg. 39,087 (July 1, 2003). The 2003 CGP was modified in 2004. *See* Final Modification, 69 Fed. Reg. 76,743 (Dec. 22, 2004).

[128] *See, e.g.*, Notice of Availability of NPDES Storm Water General Permit for Small MS4s, 67 Fed. Reg. 58,802 (Sept. 18, 2002) (notice of proposed MS4 general permit for applicable portions of EPA Region 9). The legal requirements applicable to MS4 storm water discharges are significantly different than those applicable to industrial storm water discharges. Under section 402(p)(3)(B) of the Clean Water Act, MS4 storm water sources are subject to effluent limitations based on a standard of "maximum extent practicable" and, in contrast to all other point sources, including industrial storm water discharges, municipal separate storm sewer system permits need not include restrictions to achieve water quality standards. *See* Defenders of Wildlife v. Browner, 191 F.3d 1159 (9th Cir. 1999). EPA has, however, stated that under the provisions of section 402(p) an MS4 NPDES permit may, "where necessary," include "water quality-based controls." NPDES Permit Application Regulation for Storm Water Discharges, 55 Fed. Reg. 47,990, 47,994 (Nov. 16, 1990). Several courts have concluded that permit writers have the authority to include water quality-based conditions in MS4 permits. *See Defenders of Wildlife*, 191 F.3d at 1166-67; *see also* Bldg. Indus. Ass'n of San Diego County v. State Res. Control Bd., 22 Cal. Rptr. 3d 128 (Cal. Ct. App. 2004).

[129] *See, e.g.*, 2000 Multisector General Permit, *supra* note 110, at 64,812; 2003 CONSTRUCTION GENERAL PERMIT, *supra* note 127, at 7.

[130] *See* 40 C.F.R. §§ 122.33(b)(1), 122.34(d).

create significant environmental problems.[131] Although runoff from CAFOs has attributes of non-point source pollution, both the Clean Water Act and EPA regulations define CAFOs as point sources and therefore subject to NPDES permit requirements.[132] EPA's CAFO regulations place limitations on various aspects of the management of animal wastes to minimize the discharge of pollutants. Among other things, permittees are required to design containment structures to meet minimum standards and develop "nutrient management plans" that limit the rate of application of animal waste as fertilizer to reduce runoff of wastes into navigable water.[133] EPA and states have issued a number of CAFO general permits to implement these permit requirements.[134]

3. *Offshore Oil and Gas Exploration and Production Facilities*

Some of the earliest general permits were issued to the large number of offshore oil and gas exploration and production facilities operating in the Gulf of Mexico.[135] EPA has also issued general permits for offshore oil and gas facilities operating offshore of California[136] and Alaska.[137] EPA has promulgated technology-based effluent limitations applicable to the offshore subcategory of the oil and gas extraction industry, and these effluent limita-

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[131] *See generally* NPDES Regulation and Effluent Limitation Guidelines and Standards for CAFOs, 68 Fed. Reg. 7176 (Feb. 12, 2003) (EPA permit regulations and effluent limitations applicable to CAFOs).

[132] *See* CWA § 502(14), 33 U.S.C. § 1362(14)(2006); 40 C.F.R. § 122.23(b). EPA regulations define CAFOs based on the number of animals at the facility.

[133] EPA states that runoff from land application of wastes that are applied in accordance with an NMP are "agricultural" discharges that are exempt from the NPDES permit requirement. 40 C.F.R. § 122.23(e).

[134] *See, e.g.*, Notice of Proposed NPDES General Permit for Discharges from CAFOs in New Mexico, Oklahoma, and on Indian Lands in New Mexico and Oklahoma, 69 Fed. Reg. 70,684 (Dec. 7, 2004); Final Issuance of NPDES General Permit for Discharges from CAFOs in Arizona, 66 Fed. Reg. 38,266 (July 23, 2001); Final General NPDES Permit for CAFOs in Idaho, 62 Fed. Reg. 20,177 (Apr. 25, 1997). Texas regulations specifically authorize the use of general permits for coverage of CAFOs except in certain watersheds in the state. 30 TEX. ADMIN. CODE § 321.33 (2006).

[135] EPA issued several general permits applicable to various portions of the Gulf of Mexico in 1981. *See, e.g.*, Issuance of Final General NPDES Permits for Oil and Gas Operations in Portions of Gulf of Mexico, 46 Fed. Reg. 20,284 (Apr. 3, 1981). Most oil and gas facilities in the Gulf continue to operate under EPA-issued general permits. *See, e.g.*, Final NPDES General Permit for the Offshore Subcategory of the Oil and Gas Extractions Located in Eastern Portion of OCS and Gulf of Mexico, 69 Fed. Reg. 76,740 (Dec. 12, 2004); Notice of Final NPDES General Permit for New and Existing Sources and New Discharges in the Offshore Subcategory of the Oil and Gas Extraction for Western OCS and Gulf of Mexico, 69 Fed. Reg. 60,150 (Oct. 7, 2004).

[136] *See, e.g.*, Final NPDES General Permit for Offshore Oil and Gas Extraction, Development and Production Operations Off Southern California, 69 Fed. Reg. 56,761 (Sept. 22, 2004).

[137] *See, e.g.*, Proposed Reissuance of the NPDES General Permit for Oil and Gas Exploration, Development and Production Facilities Located in State and Federal Waters in Cook Inlet, 71 Fed. Reg. 10,032 (Feb. 28, 2006); Final NPDES General Permit for Offshore Oil and Gas Operations on the OCS and State Waters of Alaska, 60 Fed. Reg. 27,508 (May 24, 1995).

tions are incorporated into the general permits.[138] EPA is the permit writer for all facilities operating beyond the three mile territorial sea. Either EPA or the state issues permits for sources operating within the territorial sea depending on the delegation of authority. Sources operating beyond the territorial seas are not subject to state water quality standards, and environmental quality-based conditions in permits are based on the "ocean discharge criteria" established under section 403 of the Clean Water Act.[139] EPA's general permit regulations expressly require the use of general permits for offshore oil and gas facilities except in certain cases.[140]

4. *Other Categories of Sources*

Although most point sources subject to general permits involve storm water discharges, CAFOs, or oil and gas facilities, EPA and the states have issued general permits that apply to a wide, if not bewildering, array of other sources. These include, among others, sewage treatment facilities,[141] log transfer facilities,[142] petroleum bulk stations and terminals,[143] water treatment facilities,[144] ready-mix concrete plants,[145] discharges resulting from corrective action at underground storage tank sites,[146] coal mining activities,[147] reject water from reverse osmosis units,[148] and seafood processors.[149]

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[138] 40 C.F.R. § 435.10-.15. EPA has also issued general permits for offshore oil and gas facilities containing effluent limitations based on case-by-case "best professional judgment" determinations. *See generally* Am. Petroleum Inst. v. EPA, 787 F.2d 965 (5th Cir. 1986) (considering BAT and BCT challenge to effluent limitations contained in general permits applicable to certain Alaskan offshore oil and gas facilities).

[139] CWA § 403, 33 U.S.C. § 1343 (2006); 40 C.F.R. §§ 125.120-.124 (2006). Based on a finding that the discharges will not cause "unreasonable degradation" of the marine environment, general permits can be issued without additional conditions under the ocean discharge criteria. *See, e.g.*, Final NPDES General Permit for the Offshore Subcategory of the Oil and Gas Extraction for Eastern OCS and Gulf of Mexico, 69 Fed. Reg. 76,740 (Dec. 22, 2004); Final Modification of NPDES General Permit for Storm Water Discharges from Construction Activities, 69 Fed. Reg. 76,743 (Dec. 22, 2004).

[140] 40 C.F.R. § 122.28(c)(1).

[141] Final NPDES General Permit for Domestic Waterwaste Discharge in the State of Louisiana, 56 Fed. Reg. 11,435 (Mar. 18, 1991).

[142] Draft General NPDES Permit for Log Transfer Facilities in the State of Alaska, 49 Fed. Reg. 6788 (Feb. 23, 1984).

[143] Final NPDES General Permit for Discharges from Petroleum Bulk Stations and Terminals in Texas, 64 Fed. Reg. 34,243 (June 25, 1999).

[144] Final NPDES General Permits for Water Treatment Facility Discharges in the States of Massachusetts and New Hampshire, 65 Fed. Reg. 69,000 (Jan. 13, 2000).

[145] Final NPDES General Permit for Discharges From Ready-Mixed Concrete Plants, Concrete Products Plants and Their Associated Facilities in Texas, 65 Fed. Reg. 2165 (Nov. 15, 2000).

[146] Final NPDES General Permits for Discharges Resulting From Implementing Corrective Action Plans for Cleanup of Petroleum UST Systems in Texas, Louisiana, Oklahoma and New Mexico, 62 Fed. Reg. 61,116 (Nov. 14, 1997).

[147] Draft General NPDES Permit for Coal Mining Activities in the Commonwealth of Kentucky, 48 Fed. Reg. 39,982 (Sept. 2, 1983).

[148] Final NPDES General Permit for Reject Water from Reverse Osmosis Units, 67 Fed. Reg. 77,258 (Dec. 17, 2002).

IV. Issues Under the General Permit Program

The general permit program has obvious administrative advantages to EPA, states, and permittees. The permit writer, whether EPA or a state, can publish a single permit that covers literally hundreds of dischargers that would otherwise require individual permits. Avoiding the administrative burden of the individual permit issuance process, the permit writer simply receives, but does not need to review, NOIs from permittees. Permittees can obtain coverage simply by filing an NOI, and, under many of the general permits, the permittee can itself specify the "best management practices" that will govern its own operations.

This efficiency, however, comes with a cost. In many cases, general permits may be in violation of the requirements of the Clean Water Act. Several major infirmities afflict the general permit program. First, the Clean Water Act requires that most NPDES permits contain conditions necessary to meet water quality standards.[150] The broad scope of most general permits, as discussed below, preclude the site-specific assessment that underlies compliance with the various elements of water quality standards, including limitations on discharges into impaired waters, special limitations on discharges from new sources, and the anti-degradation provisions applicable to "high quality" waters. Second, NPDES permits must contain applicable technology-based effluent limitations. Many general permits purport to meet this requirement by having permittees develop their own effluent limitations based on "best management practices" that are neither reviewed nor approved by the permit writer. Third, general permits may not adequately assure required public participation where neither the NOIs nor pollution control plans developed by permittees are available for public review. Finally, federally issued general permits must assure compliance with applicable requirements of the National Environmental Policy Act, Endangered Species Act, and Historic Preservation Act that themselves require a level of site-specific evaluation not readily achieved through use of general permits.

Some of the problems associated with EPA's broad use of general permits may not be remediable without amendment of the Clean Water Act.[151] Many, perhaps most, of the problems, however, can be resolved by development of proper general permit provisions. The following sections discuss each of these major issues and the statutory and regulatory problems raised by EPA's current general permit approach. The sections also discuss some possible regulatory mechanisms that could be employed that preserve the

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[149] The Pribilof General NPDES Permit, 64 Fed. Reg. 1010 (Jan. 7, 1999).

[150] CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (2006); 40 C.F.R. § 122.44(d)(1). As noted, permits applicable to municipal separate storm sewer systems and offshore oil and gas facilities discharging beyond the territorial seas are not subject to state water quality standards requirements.

[151] *See infra* note 194.

administrative advantages of general permits while better assuring compliance with the requirements of the Clean Water Act.

A. Authorizing Discharges into "Impaired Waters"

1. *The Issue of Discharges to Impaired Waters*

Discharges into waters not currently meeting water quality standards, so-called "impaired waters," are subject to specific requirements under the Clean Water Act and EPA regulations. Foremost among these is a requirement that NPDES permits include "water quality based effluent limitations" ("WQBELs") as necessary to ensure attainment of water quality standards.[152] EPA's process and procedures for imposing WQBELs for discharges into impaired waters are not the clearest.

First, specific WQBELs may be derived from the Total Maximum Daily Load/Waste Load Allocation process specified in section 303(d) of the Act. Under this process, states are required to identify impaired waters that will not meet water quality standards after application of all technology-based limits on point source discharges.[153] For each impaired water, the state is required to determine the total amount of a specific pollutant that can be discharged without violating water quality criteria (the "Total Maximum Daily Load" ("TMDL")), and then allocate the load for that pollutant among point sources ("Waste Load Allocations" ("WLAs")) and possibly non-point sources ("Load Allocations" ("LAs")).[154] TMDLs are subject to review and approval by EPA. To date, a growing number of TMDLs have been approved.[155]

A WLA specified in an approved TMDL may apply to specific sources or categories of sources, and the permit writer, using information relating to the flow and variability of an individual point source discharge, must translate the WLA into a specific end-of-pipe WQBEL.[156] Thus, even implementation of an applicable WLA involves translation into a discharge limit based on application of site specific factors. However, in addition to consistency with the applicable WLA, EPA regulations also require that any WQBEL be

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[152] *See supra* note 33.

[153] CWA § 303(d)(1), 33 U.S.C. § 1313(d)(1).

[154] *Id.* § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C). States are required to prepare TMDLs for those pollutants that EPA has identified as "suitable for such calculation," and EPA has stated that all pollutants are suitable for TMDL calculation. *See* Total Maximum Daily Loads Under Clean Water Act, 43 Fed. Reg. 60,662, 60,665 (Dec. 28, 1978). The application of the TMDL/WLA process to "non-point" sources has been inconsistent and controversial. *See, e.g.*, Pronsolino v. Nastri, 291 F.3d 1123 (9th Cir. 2002).

[155] *See* EPA, National Section 303(d) List Fact Sheet, http://oaspub.epa.gov/waters/national_rept.control (last visited Feb. 12, 2007) (on file with the Harvard Environmental Law Review).

[156] *See* EPA, EPA/505/2-90-001, TECHNICAL SUPPORT DOCUMENT FOR WATER QUALITY-BASED TOXICS CONTROL 139 (1991).

consistent with the "assumptions" of any applicable WLA.[157] This raises difficult problems in translating a TMDL into a WQBEL. Identification of the WLA applicable to a specific source or categories of sources in the TMDL document is generally straightforward, but the calculations that form the basis for a specific WLA may involve complex formulas that include inputs relating to in-stream flow conditions, the amount of discharges attributable to other point and non-point sources on the stream, and other factors that affect the amount and variability of a pollutant in a water body. Identification of these "assumptions" that form the basis of a WLA is far from clear, and it requires technical sophistication in reviewing the TMDL documents to assess the significance of these "assumptions" to a final WLA and WQBEL.

Second, in the absence of an approved TMDL/WLA that applies both to the source and to the specific pollutant, permit writers must develop a WQBEL on a case-by-case basis. Permit writers are required during the permit issuance process to determine whether a proposed discharge has "the reasonable potential to cause, or contribute to, an excursion above any State water quality standards."[158] The regulations identify a number of site-specific factors to be considered in assessing the potential for such an excursion.[159] Under EPA guidance, this may involve comparison of the "worst case" concentrations of pollutants that may be discharged by the permittee with the calculated in-stream concentrations of the pollutant.[160] The permit writer "must" include limitations that control all pollutants which the permit writer determines meet the "reasonable potential" standard.[161] This may be done by imposing WQBELs that ensure that state water quality criteria will not be exceeded outside the limit of some "mixing zone" around the discharge point.[162]

The process of both determining the need for and developing the content of WQBELs obviously does not lend itself to the general permit process. General permits may authorize discharges by sources on a state-wide or region-wide basis and eligible sources may be authorized to discharge into water bodies of varying water quality. EPA, in the absence of any comprehensive set of policies for assuring attainment of water quality standards requirements in general permits, has imposed a variety of differing water quality standards provisions that relate to discharges into impaired waters.

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[157] 40 C.F.R. § 122.44(d)(1)(vii)(B) (2006).
[158] *Id.* § 122.44(d)(1)(i).
[159] *Id.* § 122.44(d)(1)(ii).
[160] *See, e.g.*, EPA, *supra* note 35, § 6.3; EPA, *supra* note 156, at Chapter 9.
[161] 40 C.F.R. § 122.44(d)(1)(i).
[162] *See* EPA, *supra* note 156.

a. Exclusion of Discharges to Impaired Waters

In some cases, general permits have avoided the need to impose WQBELs by excluding from coverage any source that will discharge into impaired waters.[163] This is, in some ways, a neat solution to aspects of the water quality standards issue. There are, however, a number of problems with this approach. First, such an approach places the obligation on the prospective permittee to make a determination of whether it will discharge into a designated impaired water. This information may be available in readily accessible lists, but determining eligibility for coverage may not be simple since, among other things, permittees must identify the waters into which they will discharge. Given the broad scope of the definition of "navigable waters," it can be difficult to determine where a discharge first enters such waters, and permits may not be clear whether coverage is available for discharges into tributaries that ultimately flow into impaired waters.[164] Further, no government entity reviews the determination made by the permittee, and, in the absence of this review, the potential for ineligible dischargers to claim coverage under the general permit is substantial. An error in the determination would mean that the discharger was not covered by the general permit and in violation of the Act.

Further, the approach can be both underinclusive and overinclusive. It can be underinclusive since discharges to waters that are not designated as impaired may still raise water quality standards problems. A state may not have included all waters on its designated list of impaired waters, and self-implementing exclusions have relied on published designations under section 303(d) for determining whether a water body is impaired. Furthermore, waters that are not impaired, so-called "high quality waters," may not maintain water quality necessary to preserve their designated use.[165] In other words, prohibiting coverage under a general permit for sources discharging into waters listed in a 303(d) list may not fully address the potential of sources to cause or contribute to violations of water quality standards.

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[163] *See, e.g.*, Final NPDES General Permit for Reject Water from Reverse Osmosis Units, 67 Fed. Reg. 77,258 (Dec. 17, 2002); Final Reissuance of NPDES General Permit for Construction Dewatering Activity Discharges in the States of Massachusetts and New Hampshire, 67 Fed. Reg. 59,503 (Sept. 23, 2002); Final NPDES General Permits for Water Treatment Facility Discharges in the States of Massachusetts and New Hampshire, 65 Fed. Reg. 69,000 (Nov. 15, 2000).

[164] A general permit issued by Texas for CAFOs has specific requirements applicable to land management units, areas where animal waste is applied as fertilizer, that are located within 200 feet of the main stem of an impaired segment of a water body listed as impaired on a section 303(d) list. General Permit TXG920000 (July 20, 2004), http://www.tceq.state.tx.us/assets/public/permitting/waterquality/attachments/cafo/txg920000.pdf. As noted, the scope of "navigable waters" is subject to considerable uncertainty in response to recent Supreme Court decisions. *See supra* note 23.

[165] See *infra* notes 231-235 and accompanying text for a discussion of the applicability of EPA's anti-degradation requirements to general permits.

The approach may also be overinclusive by establishing a broader exclusion from the general permit program than is necessary to satisfy water quality standards requirements. Discharges, even new discharges, to impaired waters are not automatically prohibited under the Clean Water Act. Under the "exclusion" approach, however, sources otherwise eligible for coverage under a general permit must seek coverage under an individual permit. For a broad class of potential permittees, particularly storm water sources, this may not be a practical alternative and undermines the utility of the general permit. This is not, itself, a legal objection, but a significant practical consequence of this approach. Certainly, from the perspective of prospective permittees, a generic exclusion from a general permit of sources discharging into impaired waters has substantial problems.

b. Inclusion of Specific Technology-Based Limitations with a Water Quality Standards-Based Reopener

The requirement to include technology-based effluent limitations poses no particular conceptual problems for general permits. Where EPA has developed pollutant-specific effluent limitations that represent BAT, BCT, or NSPS, the general permit simply incorporates these limitations as enforceable obligations of the permit. Inclusion of technology-based limitations does not, however, automatically satisfy the requirement that permits include limitations necessary to ensure water quality standards are achieved. Indeed, the entire structure of the NPDES permit program is based on the premise that all point sources must meet technology-based requirements and *additional, more stringent* water quality standards-based limitations in those cases where technology-based limitations are inadequate.

With an inadequate nod to water quality standards obligations, some permits that contain technology-based effluent limitations also include a "reopener" provision that provides that coverage under the general permit can be withdrawn, and an individual permit required, if the discharge by a particular point source causes a violation of water quality standards.[166] Reliance on such an after-the-fact assessment of water quality standards compliance certainly violates EPA permit regulations. Permit writers are required to determine, as part of the permit issuance process, whether a discharge has the "reasonable potential" to cause or contribute to violations of water quality standards.[167] The regulations do not themselves allow permit writers to avoid assessing water quality standards requirements simply because there will be a subsequent review after the discharge is authorized.[168] Although reopener

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[166] *See, e.g.*, 2000 Multisector General Permit, *supra* note 110, at 64,811-12.

[167] 40 C.F.R. § 122.44(d)(1) (2006).

[168] EPA permit guidance does, however, contain a statement that if the permit writer is unable to assess the impact of the proposed discharge on water quality standards, a permit may be issued and subsequent monitoring employed. *See* EPA, *supra* note 35, § 6.3.3. This statement, not reflected in the regulations themselves, is based on two premises. First, a permit writer must have attempted to assess the impact prior to authorizing the discharge but has

provisions may be appropriate to allow modification of the permit if subsequent information determines that there was an error in the permit issuance process, such a provision cannot be used to avoid the obligation to assess water quality standards requirements in the first place. The Clean Water Act is not based on a "discharge first, ask questions later" approach.

c. Requirement for Development of Best Management Practices Plans

EPA has taken the position that implementation of Best Management Practices through a general permit will somehow satisfy water quality standards requirements.[169] EPA, in 1996, published a document entitled "Interim Permitting Approach to Water Quality-based Effluent Limitations in Storm Water Permits."[170] The "Interim Permitting Approach" states that "[t]he interim permitting approach uses best management practices (BMPs) in first-round storm water permits, and expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards."[171] Although specifically applicable to storm water permits, this guidance is perhaps EPA's most significant general statement regarding the means of ensuring compliance with water quality standards requirements in general permits.

In most cases, however, required BMP plans must contain technological and economically feasible management practices that will minimize the discharge of pollutants, and the obligation to develop these BMP plans is justified as a form of technology-based limitation under the Clean Water Act.[172] The adequacy of a BMP plan is not assessed by whether it is in fact adequate to prevent violation of water quality standards, but by whether it

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inadequate data at that point to make a determination. Second, a permit must contain mandatory monitoring requirements to ensure that an after-the-fact assessment can be made. Neither of these premises is satisfied in general permits that simply impose technology-based limitations with a generic reopener provision.

[169] *See, e.g.*, 2000 Multisector General Permit, *supra* note 110 (technology-based BMPs and reopener). In the various storm water general permits, these BMP plans are called Storm Water Pollution Prevention Plans ("SWPPPs").

[170] Letter from Robert Perciasepe, Assistant Administrator, EPA, to State Water Program Directors, *available at* http://www.epa.gov/npdes/pubs/swpol.pdf [hereinafter "Perciasepe Letter"] (last visited Apr. 18, 2007) (on file with the Harvard Environmental Law Review); *see also* Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, 61 Fed. Reg. 43,761 (Aug. 26, 1996).

[171] The guidance goes on to state:

> In cases where adequate information exists to develop more specific conditions or limitations to meet water quality standards, these conditions or limitations are to be incorporated into storm water permits, as necessary and appropriate. . . .
>
> Each storm water permit should include a coordinated and cost-effective monitoring program to gather necessary information to determine the extent to which the permit provides for attainment of applicable water quality standards and to determine the appropriate conditions or limitations for subsequent permits.

Perciasepe Letter, *supra* note 170, at 3.

[172] *See supra* notes 36-38 and accompanying text.

appropriately includes available management techniques for control of pollutant discharges.[173]

Standing alone, reliance on a BMP obligation is self-evidently inadequate to assure attainment of water quality standards. The memorandum itself, and the Question and Answer materials that accompany it, focus primarily on explaining why specific numerical WQBELs are not required by the Act; there simply is no discussion of how BMPs will ensure attainment of water quality standards. Inclusion of BMPs, essentially technology-based management or process controls, can no more be said to satisfy water quality standards requirements than the inclusion of specific numerical technology-based limitations can presumptively be assumed to satisfy site-specific water quality standards requirements. In other words, although technology-based BMPs can be a technique for minimizing the discharge of pollutants, it does not follow that use of BMPs will ensure that water quality standards are met.

d. Reliance on Consistency with Total Maximum Daily Loads

EPA, in a number of permits, requires that permittees ensure that any discharge is "consistent with the assumptions and requirements of [a given water body's total maximum daily load of pollutants.]."[174] In some cases, this is the exclusive water quality standards-based requirement in the permit.[175] There are substantial problems with this approach. First, there are a limited number of approved TMDLs, and this permit condition does nothing to ensure compliance with water quality standards requirements in the vast number of water bodies for which TMDLs have not been approved for the pollutants being discharged.[176] Thus, this provision, standing alone, seems more smoke and mirrors than substance; it creates the illusion of compliance with water quality standards requirements without, in most cases, imposing meaningful obligations.

Second, a limitation that requires individual permittees to determine whether their discharge is consistent with the "assumptions and requirements" of a TMDL is impossibly vague and inadequate as a permit obligation. Translation of an applicable WLA requirement into a site-specific effluent limitation is itself a potentially complex exercise. But compliance with the "assumptions" of a TMDL is, as discussed above, a confusing and uncertain process.[177] It is one thing to require permit writers, as part of a public permit issuance process, to ensure that an NPDES permit contain con-

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[173] The 2000 CGP, however, contains provisions that seem to impose a water quality-based standard for evaluation of BMP plans. *See infra* note 179 and accompanying text.

[174] *See, e.g.*, 2003 CONSTRUCTION GENERAL PERMIT, *supra* note 127, at 3.

[175] *See, e.g.*, Multisector General Permit, *supra* note 110.

[176] TMDLs are prepared and approved on a pollutant-by-pollutant basis, and even stream segments for which there are TMDLs may not have TMDL requirements for the pollutants which the permittees actually discharge.

[177] *See supra* note 157 and accompanying text.

ditions that are consistent with the assumptions and requirements of a TMDL; it is quite another to include that as a general obligation to be implemented by the permittees. Yet some general permits purport to satisfy water quality standards requirements by requiring individual permittees to make these assessments on their own, without government review or approval and without public participation.

At its worst, a generic requirement to comply with "requirements and assumptions" leaves the permittee and the public uncertain about the eligibility of the source for coverage under the permit and the substantive limitations applicable to the source, and results in inadequate compliance. At its best, this TMDL provision involves informal discussions between individual permittees and state water quality officials to determine what requirements apply. Certainly, there is no public participation required in this process. Given the ambiguity of the requirement to comply with the "assumptions and requirements" of a TMDL, it is difficult to know if this provision even creates an enforceable obligation.

e. A General Requirement to Comply with Water Quality Standards

Some general permits contain a generic requirement that any covered discharge not violate water quality standards.[178] This provision on its face appears to place an enforceable obligation on the permittee to ensure compliance with water quality standards requirements.[179] Thus, these provisions

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[178] A general permit for seafood processors in Alaska, for example, simply states that "all discharges shall be in compliance with Alaska water quality standards." The Pribilof General NPDES Permit, 64 Fed. Reg. 1010, 1014 (Jan. 7, 1999); *see also* Issuance of Final General NPDES Permits for Petroleum Storage and Transfer Facilities in the States of Arkansas, Louisiana, Oklahoma, and Texas, 49 Fed. Reg. 28,446 (July 12, 1984). Some state-specific requirements of the 2000 Multisector General Permit contain a provision prohibiting violation of state water quality standards. *See* 2000 Multisector General Permit, *supra* note 110, at 64,861 (requirements applicable to Arizona).

[179] In most cases, this requirement is simply phrased as a general obligation not to violate water quality standards; in the 2003 Construction General Permit, the obligation seems unfortunately expressed as a requirement to develop water quality standards-based BMP plans. In addition to other requirements, the 2003 CGP imposes an obligation on the permittee to "select, install, implement and maintain BMPs at your construction site that minimize pollutants in the discharge *as necessary* to meet applicable water quality standards." 2003 CONSTRUCTION GENERAL PERMIT, *supra* note 127, at 15 (emphasis added). This sentence seems to provide that a permittee has violated the terms of its permit if its discharge causes a violation of water quality standards. Thus, this provision seems to be an awkwardly phrased prohibition on violation of water quality standards.

The very next sentence of the permit, however, raises doubts as to its meaning. That sentence states that "[i]n general" a BMP plan, the SWPPP, that is developed pursuant to requirements specified elsewhere in the permit "is considered as stringent as necessary to ensure that your discharges do not cause or contribute to an excursion above any applicable water quality standard." *Id.* In a recent brief, the government dismissed the significance of the second sentence stating that "[t]he requirement articulated in the first sentence of Section 4.5.A of the CGP, however, stands on its own; if a discharger covered by the CGP fails to select, install, implement, or maintain appropriate BMPs as necessary to meet applicable water quality standards, that discharger has violated the permit." EPA Brief, *supra* note 6, at 39. EPA's response to comments on the 2003 CGP also made clear that "[n]on-attainment of a water

place the risk on permittees that, notwithstanding coverage under the general permit, they will be in violation of the permit limitation based on the water quality impact of their discharges.

The use of a generic water quality standards compliance provision has obvious advantages for the general permit program. It creates an enforceable obligation on the part of the permittee to ensure that a covered discharge does not cause in-stream conditions that exceed state criteria or otherwise violate water quality standards requirements. The provision avoids the need to develop a permit-specific limitation that will ensure compliance.

A generic water quality standards compliance provision is, however, in many ways inconsistent with the structure of the NPDES permit program. First, compliance with this permit obligation is not simply established by an assessment of the pollutants in the discharge. Rather, the quantity of a pollutant that may be discharged will vary depending on in-stream conditions. Variations in the quantity of in-stream flow, for example, may result in varying discharge obligations on the permittee; discharges that would not violate water quality standards at times of high in-stream flow may violate water quality criteria values during periods of low flow. Thus, such a generic obligation creates substantial difficulties in enforcement. Enforcement, rather than relying on the simple process of monitoring the quality of the discharge, involves assessment of in-stream quality and a subsequent "causation" step to demonstrate the conditions were caused by the discharger. This is precisely the circumstance that Congress intended to avoid when it established the NPDES permit program in 1972.[180] Further, reliance on a generic water quality standards compliance obligation essentially eliminates the advantages of the "permit shield;" permittees have little certainty regarding their compliance obligations under a permit.[181]

At least one court has upheld the enforceability of a generic water quality standards compliance provision in an NPDES permit. In *Northwest Environmental Advocates v. City of Portland*,[182] the majority opinion held that the CWA allowed direct citizen enforcement of water quality standards as long as the permit contained a general provision requiring compliance with such

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quality standard, and a demonstration that your discharge caused or contributed to that nonattainment, is a violation of the permit." *Id.* at 40 (citing EPA-App. 0108 (Response 479)). Thus, the second sentence seems to have no legal consequences and would perhaps be more appropriate in a fact sheet or preamble rather than the permit itself.

[180] *See* Gaba, *supra* note 17, at 1182–85.

[181] See *supra* note 21 for a discussion of the permit shield provisions of section 402(k).

[182] 56 F.3d 979, 990 (9th Cir. 1995); *see also* Gill v. LDI, 19 F. Supp. 2d 1188, 1195 (W.D. Wash. 1998) (granting summary judgment to plaintiffs in citizen suit based on permit limitation prohibiting violation of state water quality standards). The panel in *Northwest Environmental Advocates* initially held that a generic water quality standards compliance provision in an NPDES permit was *not* enforceable in a citizen suit, but this opinion was withdrawn and superseded following rehearing. Nw. Envtl. Advocates v. City of Portland, 11 F.3d 900 (9th Cir. 1993).

standards.[183] The court rejected the argument that water quality standards must be translated into specific effluent limitations in order to constitute an enforceable requirement of the permit. The dissent, recognizing that general water quality standards requirements can form the basis for enforceable requirements, nonetheless concluded that citizen suits were not available for violation of water quality standards unless those standards were translated into presumably more specific effluent limitations. Perhaps surprisingly, no other court has directly addressed the enforceability of a generic water quality compliance provision in an NPDES permit.

f. The Proposed 2006 Multisector General Permit

This jumble of varying provisions finds its most comprehensive expression in EPA's proposed 2006 Multisector General Permit ("2006 Proposed MSGP").[184] This proposal contains a variety of different elements that create a more coherent, but still inadequate, approach to addressing water quality standards in general permits.[185] In general, the proposal relies on three water quality standards-related components for discharges by existing sources into impaired waters.[186] First, permittees are required to comply with any applicable TMDL requirements.[187] If a TMDL/WLA is applicable to a specific source or category of sources, the permittee is required to adopt "all neces-

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[183] Violation of in-stream water quality standards does not, in and of itself, constitute a violation of the Clean Water Act. *See, e.g.*, McClellan Ecological Seepage Situation v. Weinberger, 707 F. Supp. 1182, 1200 (E.D. Cal. 1988). The court in *Northwest Environmental Advocates* quite correctly concluded that only inclusion of an NPDES permit requirement made compliance with water quality standards enforceable as an "effluent standard or limitation" under the citizen suit provisions of section 505 of the Clean Water Act. 56 F.3d at 986-87.

[184] EPA, MULTI-SECTOR GENERAL PERMITS FOR STORMWATER ACTIVITIES ASSOCIATED WITH INDUSTRIAL ACTIVITY, http://www.epa.gov/npdes/pubs/msgp2006_all-proposed.pdf [hereinafter PROPOSED 2006 MSGP] (last visited Mar. 22, 2007) (on file with the Harvard Environmental Law Review); *see also* Proposed National Pollutant Discharge Elimination System (NPDES) General Permit for Stormwater Discharges from Industrial Activities, 70 Fed. Reg. 72,116 (Dec. 1, 2005) (notice of availability for comment). Although EPA published notice of availability of the proposed MSGP permit in December 2005, the proposed permit is self-described as the 2006 proposal.

[185] This permit replaces the previous Multisector General Permit that was issued for a five-year term on October 30, 2000. *See* 2000 Multisector General Permit, *supra* note 110. The 2000 MSGP was subsequently corrected twice. Final Reissuance and Correction, 66 Fed. Reg. 1675 (Jan. 9, 2001); Final Reissuance and Correction, 66 Fed. Reg. 16,233 (Mar. 23, 2001). EPA then re-issued the permit, as corrected, for facilities in certain areas of Regions 8 and 10. Final Reissuance for Alaska and for Indian Country in Montana, 66 Fed. Reg. 19,483 (Apr. 13, 2001).

[186] The proposed permit contains a separate set of water quality standards requirements applicable to "new dischargers." *See* PROPOSED 2006 MSGP, *supra* note 184, at 9.

[187] The proposed permit also provides that if the TMDL/WLA for the source or category of sources requires controls "more stringent" than those required by the permit, the source is ineligible for coverage. *Id.* at 8. This particular provision seems to be a tautology. Since the permit requires that permittees adopt controls necessary to be consistent with an applicable TMDL/WLA, there should be no permittees that are ineligible for coverage because the *permit* is insufficiently stringent.

sary controls to meet that allocation."[188] The permit suggests that permittees contact applicable government entities to determine the required TMDL obligations.[189] This informal process of determination is not subject to any public notice or participation and relies on no process of government approval of the permittee's subsequent determination of their applicable requirements.

Second, in the absence of an approved TMDL, or if an approved TMDL is silent with respect to the category of sources covered by the permit, the MSGP provides that compliance with the technology-based requirements, including BMPs, "will be deemed adequate to meet the requirements for discharging into impaired waters."[190] EPA may "deem" whatever it wants, but that does not change the fact that EPA provides no justification for its conclusion that BMPs will ensure compliance with water quality standards. In fact, the permit relies on the unsupported presumption that compliance with technology-based limitations will satisfy water quality standards requirements on water bodies without applicable TMDLs.[191]

Finally, the permit relies on an after-the-fact response to water quality standards problems. The proposed permit provides that if the permittee or EPA determines that a discharge causes or contributes to an exceedance of water quality standards, the permittee must take "corrective actions" and undertake monitoring.[192] Additionally, EPA may withdraw coverage under the MSGP and require the discharger to obtain an individual NPDES permit.[193] While these provisions are triggered by a "determination" that the discharge causes or contributes to an exceedance of water quality standards,

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[188] *Id.* at 11. If the TMDL specifically provides a WLA of zero, then the source is not eligible for coverage. *Id.* at 8. The permit itself only requires that permittees establish controls necessary to satisfy the WLA; it does not require that controls also satisfy the "assumptions and requirements" of the TMDL as required by 40 C.F.R. § 122.44(d)(1)(vii)(b). *See supra* note 157 and accompanying text. The "Fact Sheet" accompanying the proposed permit, however, does state that permittees:

> Are not eligible for coverage under this permit for discharges of pollutants of concern to waters for which there is a Total Maximum Daily Load (TMDL) established or approved by EPA unless you incorporate into your SWPPP measures or controls, and conditions applicable to your discharge, that are *consistent with the assumptions and requirements* of such TMDL.

EPA, 2006 PROPOSED REISSUANCE OF NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) STORM WATER MULTI-SECTOR GENERAL PERMIT FOR INDUSTRIAL ACTIVITIES FACT SHEET 27, http://www.epa.gov/npdes/pubs/msgp2006_factsheet-proposed.pdf (last visited Apr. 25, 2007) (on file with the Harvard Environmental Law Review) (emphasis added).

[189] PROPOSED 2006 MSGP, *supra* note 184, at 8.

[190] *Id.* at 11.

[191] In a section titled "Water Quality Provisions," the permit contains the declarative sentence that "this permit contains provisions to ensure that discharges do not cause or contribute to exceedances of water quality standards." *Id.* at 9. The next sentence contains the further declarative sentence that the permit establishes technology-based BMP and numeric effluent limitations. *Id.* at 9–10. One assumes that EPA is claiming that it is generally the technology-based limitations that are the source of controls to prevent exceedance of water quality standards.

[192] *Id.* at 10.

[193] *Id.*

the permit does not require that the permittee evaluate whether such exceedances are occurring.

The proposed permit consolidates many of the worst elements of EPA's past approaches: reliance on TMDL/WLA requirements determined, not in the permit, but through private assessments by the permittee; an assumption that in the absence of an approved TMDL, compliance with technology-based limitations, including a BMP obligation, satisfies water quality standards requirements; and use of a reopener provision as an alternative to determining whether a source has the "reasonable potential" to violate water quality standards requirements prior to permit issuance.

2. *Resolving the Impaired Waters Issue*

The biggest challenge facing use of general permits is ensuring compliance with water quality standards. Both the statute and EPA regulations require inclusion of WQBELs where necessary to ensure compliance with water quality standards. Under EPA regulations, this requires that the permit writer either ensure compliance with any applicable WLA/TMDL or make a case-by-case determination of any necessary WQBELs. These requirements are extremely difficult to reconcile with the broad authorization to discharge contained in general permits.

Any approach under the current statute has serious limitations.[194] A permit condition that flatly prohibits any discharge that violates water quality standards in some sense resolves this problem. But such a solution has enormous enforcement problems and leaves the permittee with no certainty and no protection under the permit shield. A limitation of the scope of a general permit that excludes discharges into impaired waters or waters without TMDLs would, without any other change to the NPDES program, drastically restrict the utility of general permits.

There may, however, be alternative approaches that achieve many of the administrative advantages of general permits in a manner that better satisfies the requirements of the Act. As an alternative to, or in addition to, a general prohibition on violation of water quality standards for discharges into impaired waters, EPA could satisfy the requirements of the Clean Water

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[194] One possible statutory amendment could facilitate use of general permits without significantly compromising the basic protections of the Clean Water Act. Under section 402(p), discharges from municipal separate storm sewers are subject only to technology-based BMP requirements; industrial storm water discharges are, in contrast, subject to "all applicable requirements" of sections 402 and 301. CWA § 402(p)(3), 33 U.S.C. § 1342(p)(3) (2006). Amending the statute to provide that both industrial and municipal storm water discharges are subject only to technology-based requirements, including available BMP controls, would avoid the problem of compliance with site-specific water quality standards obligations. This would not substantially affect control of water pollution from storm water discharges since existing permits almost exclusively rely on imposition of technology-based BMP-based controls as the effective control mechanism. This exemption would apply only to discharges of storm water unmixed with industrial process water.

Act by replacing its current approach of issuing broadly applicable general permits with a system that relies on three classes of permits: (1) De Minimis Discharge General Permits; (2) TMDL-based General Permits; and (3) a new class of individual "Expedited Standard NPDES Permits."

a. De Minimis Discharger General Permits

Under EPA regulations, water quality standards-based provisions are required in NPDES permits only if the permit writer determines that the discharger has the "reasonable potential" to cause or contribute to excursions above water quality standards.[195] It is the finding of "reasonable potential" that is the trigger that requires inclusion of WQBELs in NPDES permits.

Relying on this trigger, EPA could issue a class of general permits that need not include water quality standards-based limitations *if* the permit writer makes an affirmative determination, supported by the administrative record of the general permit, that the covered point sources do not meet the "reasonable potential" standard. In other words, general permits could apply to a class of de minimis discharges without violating water quality standards requirements of the Act.

Obviously this would restrict the scope of general permits, but it need not eliminate their use. There are several elements that would support a conclusion that discharges authorized by a general permit would not "cause or contribute" to violation of water quality standards. First, the potential impact on water quality standards is to be assessed *after* application of technology-based effluent limitations, including BMPs. Sources that effectively eliminate all but de minimis discharges of pollutants through application of technology-based limitations might be authorized under general permits without additional water quality standards-based requirements. Small area construction projects might be a suitable candidate for such a general permit determination.[196]

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[195] 40 C.F.R. § 122.44(d) (2006).

[196] The 2003 CGP actually has a provision that purports to provide a limited exemption from permitting for certain small construction activities disturbing between one and five acres. 2003 CONSTRUCTION GENERAL PERMIT, *supra* note 127, at 5. Under the terms of the 2003 CGP, these small construction activities may be "waived from the NPDES permitting requirements detailed in this general permit" if, among other things, the operator documents that (1) there is an approved TMDL which determines that controls on small construction activities are not necessary to protect water quality or (2) *for non-impaired waters only*, if the operator "can develop an equivalent analysis that determines allocations for his small construction site for the pollutant(s) of concern or determines that such allocations are not needed to protect water quality." *Id.* at D-2 (emphasis added). EPA's storm water regulations purport to authorize this exemption. 40 C.F.R. § 122.26(b)(15)(i)(B) (2006). This provision apparently exempts a source from all NPDES permit requirements, both technology-based and water quality standards-based. The Clean Water Act does not generally authorize exemptions from NPDES permit requirements based on water quality considerations, but this exemption may be justified under the special provisions applicable to storm water discharges. Section 402(p) exempts a storm water discharge from NPDES permit requirements unless, among other things, it is

Second, the potential impact on water quality standards could be assessed on a pollutant-by-pollutant basis. Stream segments are designated as impaired because specific pollutants exceed criteria values. Two different types of permit provisions could ensure that a discharge does not contribute to violation of standards for those pollutants. First, the permit could prohibit the discharge of the specific pollutants for which a water body has been classified as impaired. This is an approach contained in the 2006 proposed MSGP for "new dischargers."[197] Alternatively, the permit could prohibit the discharge of those pollutants in excess of criteria values. Discharges containing pollutants at concentrations that are below criteria values would actually lower in-stream concentrations for those pollutants. Either provision would support a conclusion that the sources subject to the general permit will not have a reasonable potential to cause or contribute to violation of standards.[198]

The central element of a de minimis general permit approach is the obligation that EPA justify, in the administrative record of the general permit, the basis for its conclusion that sources subject to the permit will not "cause or contribute" to violation of water quality standards. If an individual source did, in fact, cause water quality problems, a reopener provision could require that the source obtain an individual permit.

b. TMDL General Permits

For "non-de minimis" point sources, EPA should not allow discharges into impaired waters under a general permit unless the point sources covered by the permit are subject to an applicable WLA in an approved TMDL. Discharges into water bodies without TMDLs or which do not contain allocations applicable to the point sources simply could not be authorized through general permits. Further, since the scope of any non-de minimis general permit would be limited to water bodies having TMDLs, the general permit itself would contain the applicable effluent limitations that are derived from the "assumptions and requirements" contained in the TMDL. Thus, the permit writer would be responsible for determining applicable WLA/TMDL requirements through the public notice and comment process employed in development of the general permit.

The TMDL process was intended to be the vehicle through which states allocate required pollution reductions among existing sources and between

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classified as a discharge associated with "industrial activity." CWA § 402(p)(1)-(2)(B), 33 U.S.C. § 1342(p)(1)-(2)(B) (2006). EPA's regulatory "waiver" is contained as part of its definition of "discharges associated with industrial activity from small construction activity" and thus may be justified as an exercise of EPA's authority to define the scope of the NPDES permit obligation itself, 40 C.F.R. § 122.26(b)(15), rather than a water quality waiver for a source otherwise subject to the NPDES permit program.

[197] *See infra* notes 215-217 and accompanying text.

[198] A prohibition on discharge of pollutants for which a water body has been found to be impaired does not assure that a source will not "cause or contribute" to violation of water quality standards. A major discharger might cause a violation of standards for other pollutants. Nonetheless, such a provision would provide support for a de minimis determination.

new and existing sources. As has been widely noted, the TMDL process has never been properly implemented by EPA or the states,[199] and this has ensured that water quality standards concerns were either addressed on a permit-by-permit basis or not addressed at all. EPA can establish new incentives for states to establish TMDLs and ensure compliance with water-quality-standards-based requirements for impaired waters if it generally limits the use of general permits to non-de minimis discharges into water bodies that have applicable TMDLs. At a minimum, this would result in new political pressure by permittees on states to adopt TMDLs.

c. Expedited Standard NPDES Permits

For all other dischargers, EPA could develop a system that provides most of the advantages of general permits while still providing for sufficient individualized assessment to satisfy the requirements of the Act. EPA could publish documents essentially identical to general permits that serve, not as the applicable permit itself, but as proposed standard permits that would apply following a process of individual permit issuance. Such a proposed permit would define the scope of dischargers eligible for coverage, the applicable effluent limitations, and standard permit conditions.

Issuance of an individual NPDES permit to those discharges that are included within the scope of the standard permit would be subject to an expedited process. Rather than submit an NOI to the permit issuer, prospective permittees could submit an abbreviated permit application, essentially containing the information now contained in NOIs, but also including any necessary BMP plans, for review by permit writers. Thus, one of EPA's primary rationales for development of general permits, the difficulty of developing effluent limitations for storm water and agricultural discharges, would be addressed by requiring the permittee to submit its proposed BMP plans prior to authorization to discharge.

EPA could develop expedited procedures that would authorize a short administrative review period, and, in the absence of a determination of deficiency or the need for additional water quality standards-based restrictions, the permittee would be authorized to operate under the terms of the standard permit. The document issued to the permittee could be no more than its individual NPDES permit number and an obligation, established by explicit cross-reference, to comply with the terms of the published standard permit. In cases where more stringent requirements are appropriate, EPA could either require the discharger to apply through the normal individual NPDES permit process or include more stringent requirements as a supplement to the standard permit conditions.

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[199] *See, e.g.*, OLIVER A. HOUCK, THE CLEAN WATER ACT TMDL PROGRAM: LAW, POLICY AND IMPLEMENTATION (1999).

As discussed above, EPA has rejected the need to apply the formal adjudicatory requirements of the Administrative Procedure Act when issuing NPDES permits.[200] The otherwise applicable minimum procedural requirements contained in the Clean Water Act are limited to public notice of the permit application and an opportunity to request a public hearing on the proposed permit, and EPA could establish specific procedural provisions applicable to expedited standard permits that easily meet these requirements.[201]

Proper government review would require an assessment of whether the proposed permittee falls within the scope of the expedited standard permit and otherwise meets the eligibility criteria and whether any permittee-developed plans comply with the substantive requirements of the permit. Most crucially, such a process would require the government to determine, before a permittee is authorized to discharge pollutants, whether additional water-quality-standards-based restrictions are necessary. At a minimum, this would require the government to formally determine that no additional conditions are necessary. It would also provide an opportunity for citizens to comment on the permit application and raise specific water quality concerns.

Reliance on general permits creates a presumptive authorization to discharge and limits public involvement to the submission of petitions requesting the government to exclude a discharger from coverage under the general permit. Expedited permit issuance, although not perhaps ideal, strikes a better balance between the administrative efficiency concerns of government and prospective dischargers and the individualized review that may be required.

B. New Dischargers on Impaired Waters

1. *The Problem of New Dischargers*

For waters not yet meeting water quality standards, the addition of new pollutant loads from new sources or from expansion of existing sources raises difficult problems.[202] Any such new discharges can be considered to

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[200] *See supra* note 39.

[201] The requirement for public notice could be satisfied by web posting of notice of permit applications or through the existing mechanisms of public notice of individual permits. The opportunity for a public hearing would simply reflect existing EPA regulations that provide for a public hearing if there is significant public interest. *See supra* notes 41-43 and accompanying text for a discussion of EPA's existing regulatory requirements for public participation in permit issuance.

[202] Nomenclature on this issue is somewhat confused. The term "new source" is a term of art under the Clean Water Act and refers to sources that, in most cases, are constructed after the promulgation of national new source performance standards. CWA § 306(a)(2), 33 U.S.C. § 1316(a)(2) (2006); 40 C.F.R. § 122.2 (2006). In other words, a newly constructed source will be classified as an "existing source" unless EPA has previously promulgated an applicable new source performance standard. The term "new dischargers" has, for various reasons, been defined by EPA to include facilities that did not discharge pollutants until after August 13, 1979, which have never received an NPDES permit and are not otherwise classified as a "new

"cause or contribute" to violation of the standards since any additional discharge makes it that much more difficult to improve water quality to levels that satisfy water quality standards. While the Clean Air Act has elaborate provisions relating to the permitting of new or modified major stationary sources in areas not meeting air quality standards, the Clean Water Act has no comparable provisions. In fact, EPA has largely ignored the problem of the impact of new or expanded dischargers on water quality standards.[203]

EPA regulations address the problem of new dischargers on impaired waters in two ways. First, EPA authorizes states to include growth allowances in TMDLs.[204] Such a growth allowance reserves some portion of the authorized pollutant load for use by later dischargers. This approach, if properly implemented, would impose additional obligations on existing sources to preserve the option for discharge by new sources. Although authorized by EPA regulations, states are not required to include growth allowances and EPA has provided no guidance on their use.

Second, EPA has a curious regulation that seems to prohibit the permitting of new dischargers in the absence of a growth allowance or specifically applicable WLA. This regulation prohibits issuance of an NPDES permit to any new dischargers on impaired waters if their discharge will "cause or contribute to the violation of water quality standards."[205] The regulation further provides that if a load allocation has been performed, the permittee has the burden of demonstrating the existence of adequate remaining allocations to allow for the new discharge.[206] If this provision were implemented as written, it would essentially preclude issuance of NPDES permits to all new significant dischargers in the absence of an authorized TMDL containing either a growth allowance or an applicable WLA.

That may be what it says, but that is not how it has been implemented by EPA. Section 122.4(i) was first promulgated in 1983 and has largely been ignored since then.[207] It was not until the early 2000s that the implications of this provision began to be felt. In several cases, courts have indicated that section 122.4(i) precludes issuance of NPDES permits to new sources of pollution to impaired waters until states adopt TMDLs.[208] In *Friends of the*

source." 40 C.F.R. § 122.2. This article will use "new dischargers" to refer to sources that have not previously received an NPDES permit, regardless of whether technically classified as a new or existing source.

[203] *See generally* Gaba, *supra* note 28.

[204] *See* 40 C.F.R. § 130.2(h) (defining waste load allocation to include "existing or future" discharges).

[205] *Id.* § 122.4(i).

[206] *Id.*

[207] *See* Environmental Permit Regulations, 48 Fed. Reg. 14,146, 14,158 (Apr. 1, 1983).

[208] In *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), the Court upheld EPA's issuance of an NPDES permit in Arkansas that had the potential to affect compliance with water quality standards in Oklahoma. In doing so, the Court endorsed an EPA position that the Clean Water Act did not absolutely preclude issuance of permits to new sources that may theoretically cause violation of state water quality standards. *Arkansas v. Oklahoma*, however, involved compliance with an absolute prohibition on degradation applicable to a Class 3, Outstanding National Resource Water, under Oklahoma's anti-degradation provision. Neither EPA nor the

Wild Swan v. EPA,[209] the Ninth Circuit, expressly relying on section 122.4(i), upheld a district court order that, according to the court of appeals:

> restricts the issuance of new permits or increased discharges for WQLSs [water quality limited segments, i.e., impaired waters], which are already in violation of state water quality standard [sic]. This comports with the regulatory requirement precluding issuance of new permits for new sources that will cause or contribute to a violation of water quality standards.[210]

At least one other court has read section 122.4(i) to prohibit issuance of NPDES permits to new dischargers in the absence of an applicable TMDL.[211]

EPA has not, however, responded to these cases by issuing any general policy statements regarding its interpretation of the requirements imposed by section 122.4(i). In a recent brief, EPA has taken the position that section 122.4(i) prohibits the permitting of new dischargers only if there is no applicable WLA *and* the permit writer concludes that the discharge will "cause or contribute" to violation of water quality standards.[212] This seems a correct statement of the regulation, but begs the question of the circumstances in which a new discharger will not cause or contribute to violation of standards in impaired waters. Certainly, EPA cannot avoid the requirements of section 122.4(i) simply by failing to make a determination of whether the discharger will meet the "cause or contribute" standard.[213]

The problem of new dischargers on impaired waters applies to all NPDES permits, whether individual or general, but given the scope and number of sources potentially authorized, the impact of section 122.4(i) is particularly problematic under a general permit. To date, general permits have not directly addressed the implication of this provision. General permits that exclude coverage for sources discharging into impaired waters would seem to avoid the problem. General permits that include a flat prohibition on violation of water quality standards would also seem to be consis-

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Court considered the significance of section 122.4(i) and the opinion does not address issues relating to the discharge by new or expanded sources into impaired waters. *See* Gaba, *supra* note 28, at 678-81.

[209] 74 F. App'x 718 (9th Cir. 2003).

[210] *Id.* at 724.

[211] *See* Sierra Club v. Hankinson, 939 F. Supp. 872, 874 (N.D. Ga. 1996) (requiring compliance with the requirements of section 122.4(i)); *see also* San Francisco Baykeeper v. Browner, 147 F. Supp. 2d 991, 995 (N.D. Cal. 2001) (identifying section 122.4(i) in context of a review of whether EPA has a non-discretionary duty to develop TMDLs where state has failed to provide adequate submission).

[212] EPA Brief, *supra* note 6, at 50. Section 122.4(i) places an affirmative obligation on the discharger to document it will not "cause or contribute" to a violation unless the permit writer "waives" this requirement. This waiver is authorized only if the permit writer affirmatively determines that it already has sufficient information to evaluate the request. 40 C.F.R. § 122.4(i)(2) (2006).

[213] EPA Brief, *supra* note 6, at 50.

tent with the general prohibition in the regulation. Both of these approaches have, as discussed above, significant problems.[214]

EPA's 2006 Proposed MSGP purports to implement the requirements of section 122.4(i). The proposed permit, explicitly citing section 122.4(i), provides that "new dischargers" into an impaired water for which there is no approved TMDL must demonstrate that their discharge will not "cause or contribute" to violation of water quality standards by either (1) eliminating exposure to storm water of any pollutant for which the water body is impaired or (2) obtaining "written clarification" from the relevant state or tribal authority that the proposed discharge "is not expected to cause or contribute to violation" of water quality standards.[215] The proposal provides that this "notification" must be included in the "storm water pollution prevention plan" that the source must maintain on-site.[216] These new discharger provisions of the proposed permit apply to any source that has not previously been covered under an NPDES permit.[217] All dischargers, whether existing or new dischargers, must comply with the "assumptions and requirements" of any approved TMDL.

Under this proposed permit, new dischargers of pollutants are thus authorized on impaired waters in three circumstances. First, new dischargers are authorized to discharge into streams with approved TMDLs if they comply with the applicable WLA.[218] This is the requirement that applies to all sources discharging into water bodies with an approved TMDL. Second, new dischargers are authorized to discharge into impaired waters without an approved TMDL if they, in effect, eliminate any discharge of those pollutants for which the stream is impaired. No discharge of the pollutants presumably means the source could not be causing or contributing to a violation of standards.

Lastly, the permit authorizes a discharge into impaired waters without an approved TMDL if the permittee obtains "written clarification" from a state agency that its discharge will not cause or contribute to a violation of water quality standards.[219] EPA provides no guidance on the circumstances under which a state may determine that a new discharger, discharging pollutants for which the water is impaired, will *not* "cause or contribute" to a

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[214] See *supra* notes 163-165 and accompanying text for a discussion of prohibition of discharge to impaired waters, and notes 178-183 and accompanying text for a discussion of a prohibition on violation of water quality standards.

[215] PROPOSED 2006 MSGP, *supra* note 184, at 9.

[216] *Id.*

[217] *Id.* at A-3 (definition of "new discharger").

[218] *Id.* at 11.

[219] *Id.* at 9. It is important to note that the permit does not prohibit discharges that violate water quality standards; it only requires that the permittee obtain state "clarification." If the permittee obtains "written clarification" stating that the discharge does not have the "reasonable potential" to "cause or contribute" to violation of water quality standards, the "permit shield" should insulate the permittee from liability if its discharges in fact contribute to violations of water quality standards. Thus, this "clarification" approach is substantially different from a prohibition on discharges violating water quality standards.

violation under section 122.4(i). As noted, EPA's guidance on issuance of individual permits suggests a rather complex modeling process to determine whether a discharge has a "reasonable potential" to "cause or contribute" to violations of water quality standards.[220] In the context of a new discharger it is hard to imagine that any discharge of pollutants at concentrations that exceed some de minimis impact on water quality or, alternatively, at levels that exceed water quality criteria can ever be said not to cause or contribute to violations.[221]

Rather shamelessly, the permit purports to place on state agencies the responsibility to consider the individual requests by each new discharger and to make individualized determinations of the effect of those dischargers. Thus, EPA has shifted the administrative burden of permit writing from itself to state agencies. If a new discharger requests a state determination, it seems to be precluded from discharging under the general permit until it receives some specific determination by the state. This will result in either gridlock or lip service authorization for discharge.

Perhaps worse, the permit relies on some mechanism of informal contact with the state to satisfy the substantive water quality standards requirements. The permit merely requires "written clarification" from the state; it specifies no procedures regarding how this clarification is to be obtained.[222] Much like its requirement for assuring that permittees satisfy the "assumptions and requirements" of a WLA,[223] the permit substitutes a private, informal process to determine the substantive requirements of the permit.

2. *Resolving the New Discharger Issue*

Issuance of NPDES permits to new dischargers into impaired waters raises special problems for compliance with water quality standards. Section 122.4(i) seems to impose a prohibition on issuance of permits to significant new sources/new dischargers in the absence of an applicable TMDL. Section 122.4(i) has, however, largely been ignored for the last twenty-five years.[224] The issues associated with new dischargers are not unique to general permits, and EPA needs to develop a coherent policy and meaningful regulations independent of the general permit program.

At this point, section 122.4(i) is something of a time bomb. The uncertainties regarding its scope and applicability make any permit approach

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[220] *See supra* notes 158-162 and accompanying text.

[221] In the context of the "anti-degradation" requirements, EPA has stated that the prohibition on "degradation" of high quality waters need not apply to any theoretical degradation resulting from increased pollutant loads from new dischargers but may be applied only to discharges that result in some undefined class of "significant degradation." *See* Gaba, *supra* note 28, at 681-84. Perhaps similar logic may restrict the scope of a determination that a discharge will "cause or contribute" to water quality standards violations.

[222] PROPOSED 2006 MSGP, *supra* note 184, at 9.

[223] *See supra* note 157 and accompanying text.

[224] *See supra* note 208 and accompanying text.

problematic. If this section is taken as written and as recently interpreted by the courts,[225] general permits simply cannot authorize the discharge by new dischargers into impaired waters unless (1) there is an approved TMDL that provides a specific WLA or growth allowance for sources covered by the permit; or (2) the permit writer determines that the new dischargers will not "cause or contribute" to violations of water quality standards.

The approach suggested above with regard to the general problem of authorizing discharges to impaired waters would also help resolve the issue of new dischargers in general permits. Both "De minimis" and "TMDL-based" general permits should satisfy the specific requirements of section 122.4(i). An "Expedited Standard Permit" would shift to the permit writer the responsibility to determine whether individual sources would cause or contribute to violations of water quality standards.

C. Authorizing Discharges Under the Anti-Degradation Policy

1. *The Problem of Anti-Degradation*

The third problem for general permits involves compliance with an EPA-mandated "anti-degradation" policy. Under this anti-degradation policy, a version of which is included as an enforceable element of all states' water quality standards, permit requirements vary depending upon the classification of the water body into which the source is discharging.[226] Tier 1 waters are basically "impaired waters" subject to the requirements discussed above.[227] Tier 2 waters are "high quality" waters with water quality better than necessary to meet the statutory goal of "fishable/swimmable" uses.[228] In general, discharges into Tier 2 waters that will result in "significant degradation" are prohibited unless the permit writer undertakes a public review process and concludes that the discharge is justified as "necessary to accommodate important economic and social development."[229] Tier 3 waters are

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[225] *Id.*

[226] *See* 40 C.F.R. § 131.12 (2006). See generally Gaba, *supra* note 28, at 671-88 for a discussion of the elements of EPA's anti-degradation policy.

[227] The anti-degradation policy adds the additional requirement that no discharge can result in loss of an existing use. 40 C.F.R. § 131.12(a)(1). The classification of waters by "tiers" was applied by EPA to clarify the regulatory requirements contained in section 131.12. *See generally* EPA, WATER QUALITY STANDARDS HANDBOOK, EPA-823-B-94-005a, at 4-1 to -2 (2d ed. 1994), *available at* http://www.epa.gov/waterscience/standards/handbook/handbookch4.pdf; *see also* Gaba, *supra* note 28, at 672-73.

[228] 40 C.F.R. § 131.12(a)(2); EPA, *supra* note 226, at 4-2. The Tier 2 requirements apply to waters that exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water. This level of water quality is identified as a statutory goal in § 101(a)(2) of the Clean Water Act. 33 U.S.C. § 1251(a)(2) (2006).

[229] 40 C.F.R. § 131.12(a)(2). EPA has never fully defined what level of degradation will trigger Tier 2 requirements; it has, however, authorized state requirements that apply Tier 2 review only where a discharge will result in "significant degradation" of water quality. *See* Water Quality Standards Regulation, 63 Fed. Reg. 36,742, 36,783 (July 7, 1998) (advanced notice of proposed rulemaking). EPA has stated that "[a]pplying antidegradation requirements

those designated by the state as "outstanding national resource waters" ("ONRWs"). Degradation of Tier 3 waters is absolutely prohibited.[230]

The application of the anti-degradation policy is, at best, obscure, and EPA has provided little guidance on a number of fundamental questions. These questions include, among others, the standards that are to be applied in classifying water bodies as Tier 2 "high quality" waters; the determination of what constitutes "significant degradation" that will trigger anti-degradation review; and the criteria for determining whether a discharge is justifiable as "necessary to accommodate important economic and social development."[231] Indeed, it is fair to say that the anti-degradation policy itself has little substantive content.[232] Rather, it triggers a political process by mandating more elaborate public participation procedures and requiring permit writers to publicly acknowledge the trade-off of water quality for economic development.

Until recently, general permits have largely ignored the special issue of compliance with anti-degradation requirements. In some, the permit has excluded coverage for those permittees discharging into a Tier 3 ONRW.[233] Such a permit condition, enforceable only by the permittee's own identification of the status of the water into which it will discharge, is fine as far as it goes; if properly implemented by the permittee it should satisfy the specialized requirement for Tier 3 ONRW waters. But as far as it goes isn't very far. Designation of waters as ONRWs is at the discretion of states,[234] and it presumably applies to only a small portion of waters to which general permits may apply.

The 2006 Proposed MSGP has a broader, if vague, approach to compliance with anti-degradation requirements. The proposed permit states that "[n]ew dischargers, as defined in Appendix A, are not authorized for discharges that do not comply with the applicable State or Tribal anti-degrada-

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only to activities that will result in significant degradation is a useful approach that allows States and Tribes to focus limited resources where they may result in the greatest environmental protection." *Id.*; *see also* Gaba, *supra* note 28, at 677-84.

[230] 40 C.F.R. § 131.12(a)(3).

[231] *See* Gaba, *supra* note 28, at 671-88.

[232] EPA, for example, has generally rejected the position that the anti-degradation policy mandates imposition of additional controls on point sources or non-point sources on Tier 2 waters beyond those technology-based controls already required. *Id.* at 687. *But see* Columbus & Franklin County Metro. Park Dist. v. Shank, 600 N.E.2d 1042 (Ohio 1992) (holding that anti-degradation policy requires imposition of limitations equivalent to new source performance standards on new discharger). Only the application of the anti-degradation policy to discharges into Tier 3 waters, waters that the state has designated as ONRWs, has a significant substantive component. Degradation of water quality in Tier 3 ONRWs is absolutely prohibited. *See* Gaba, *supra* note 28, at 674. Even this substantive component is ambiguous since the extent of degradation which will trigger the Tier 3 prohibition is unclear. Beyond this, EPA has acknowledged that designation of ONRWs is at the discretion of the states and cannot be mandated as a requirement of the Clean Water Act. *See id.* at 674 n.134.

[233] *See, e.g.*, 2003 CONSTRUCTION GENERAL PERMIT, *supra* note 127, at 18-19 (outlining requirements imposed by New Mexico prohibiting new discharges into Outstanding National Resource Waters).

[234] *See* Gaba, *supra* note 28, at 674 n.134.

tion policy for water quality standards."[235] In other words, permittees are not authorized to operate under the general permit unless someone determines that the discharge will comply with the applicable anti-degradation policy. No further detail is provided. The Fact Sheet accompanying the proposal does not even mention this provision.[236]

The requirement is, on its face, simply silly. The elements of compliance with the anti-degradation policy involve a number of difficult factual conclusions, public participation requirements and substantive political judgments by the permit writer. The permit provides no information about how these issues are to be resolved. Apparently this is to be done by each permittee through some unidentified and informal contact with the state to determine whether the water into which the point source will discharge is classified as high quality and whether the discharge will result in sufficient degradation to trigger anti-degradation review.

Even if it were possible to assume that these potentially difficult technical issues could easily be resolved and documented, the anti-degradation policy requires a public process in which the permit writer makes the political judgment of whether the discharge is "necessary to accommodate important economic or social development." This requirement, by definition, cannot be satisfied by private, informal contact with state or tribal officials.

2. *Resolving the Anti-Degradation Issue*

The anti-degradation provisions of water quality standards, if properly addressed, pose no conceptual barrier to the use of general permits. Discharges into Tier 3 ONRWs should simply be prohibited under a general permit. The anti-degradation procedural requirements applicable to Tier 2 "high quality" waters must be met, but compliance, perhaps unfortunately, does not require any additional substantive restrictions on dischargers. As noted above, the anti-degradation requirements applicable to Tier 2 waters essentially provide a mechanism—public participation and state certification of the need for the discharge—that ensures political attention to the permit process.

What the general permit process must include is proper public notice that the general permit may authorize discharges into Tier 2 waters in order to provide minimal satisfaction of the public review process required for such discharges. Further, the final general permit must contain a determination that authorization of the discharge is necessary for "economic and so-

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[235] PROPOSED 2006 MSGP, *supra* note 184, at 9. The MSGP defines a "new discharger" as "an operator applying for coverage under this permit for discharges not covered previously under an NPDES general or individual permit." *Id.* at A-3.

[236] EPA, 2006 PROPOSED REISSUANCE OF NPDES STORMWATER MULTI-SECTOR GENERAL PERMIT FOR INDUSTRIAL ACTIVITIES: FACT SHEET, http://www.epa.gov/npdes/pubs/msgp2006_factsheet-proposed.pdf (last visited Apr. 25, 2007) (on file with the Harvard Environmental Law Review).

cial development." This would reflect a formal state determination for state-issued general permits. For federally-issued general permits, EPA should require states to provide such a determination for the administrative record. This may be currently necessary through the state certification requirements of section 401.[237]

D. Development of Effluent Limitations by the Permittee

1. *The Problem of Unreviewed, Unapproved Permittee-Developed Plans*

Under section 402 of the Clean Water Act, the permit writer, whether a state or the EPA, is responsible for including necessary technology-based effluent limitations in NPDES permits.[238] Based on the information developed as part of the individual permit process, the permit writer must determine the applicable technology-based standards and include appropriate effluent limitations as enforceable provisions of the NPDES permit.[239] In those categories where EPA has promulgated national technology-based limits, the inclusion of the requirements in a general permit raises no particular problems. The general permit will simply specify the applicable limitations.

Many general permits, however, do not contain specific technology-based limitations. Rather, the permits contain an obligation for the permittees themselves to develop plans based on "best management practices" ("BMPs") specifying how they will limit the discharge of pollutants. Although the general permit may contain requirements relating to the elements of the plans, the actual content of the plan is determined by the permittee.[240] In most cases, these permittee-developed plans are neither reviewed nor approved by the permit writer prior to authorization for discharge under the general permit.

The use of these permittee-developed plans is, in many ways, inherent in the concept of general permits. As noted, the original rationales for development of the general permit program focused on two factors: the particular problems of regulating storm water and agricultural point sources and the

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[237] CWA § 401, 33 U.S.C. § 1341 (2006). See *supra* note 26 for a discussion of the requirements of section 401.

[238] The EPA Administrator is required to "prescribe" permit conditions. CWA § 402(a)(2), 33 U.S.C. § 1342(a)(2); *see also* 40 C.F.R. § 122.43(a) (stating that in addition to mandatory conditions included in all permits, the director of the permit program "shall establish conditions, as required on a case-by-case basis, to provide for and assure compliance with all applicable requirements of CWA and regulations").

[239] In the absence of nationally promulgated technology-based limits, permit writers must engage in a case-by-case determination of applicable limitations based on "best professional judgment." *See supra* note 31.

[240] These plans take various forms, including "storm water pollution prevention plans" ("SWPPPs") in most storm water construction and multi-sector general permits, the implementation of "minimum measures" in municipal storm water permits, and "Nutrient Management Plans" in CAFO general permits.

administrative burdens associated with issuance of large numbers of NPDES permits.[241] The reliance on unreviewed, permittee-developed plans reflects both of these concerns. In most cases, the character of storm water and agricultural discharges make use of end-of-pipe effluent limitations difficult, and EPA therefore depends on operational restrictions based on BMPs to control the discharge of pollutants from storm water discharges and CAFOs. In most cases, general permits rely on the selection by the permittee of appropriate BMPs based on their specific conditions. The issue of administrative burden suggests why these self-selected plans are generally not reviewed by permit writers prior to the permittee being eligible for coverage under the general permit. Individualized review of permittee plans would require vastly more resources by the permit writers and require submission of substantially more information as a predicate for coverage under the general permit. In other words, development of site-specific BMPs by the permittees allows broad coverage by the permit with minimum use of resources by the permit writer.

Administrative practicality and efficiency do not, however, automatically translate into legality, and both the Ninth and Second Circuits have rejected the provisions of two different general permit schemes that rely on unreviewed, permittee-developed plans. In *Environmental Defense Center v. EPA*,[242] environmental petitioners challenged aspects of the EPA general permit applicable to small municipal separate storm sewer systems ("MS4 GP"). In the MS4 GP, EPA implemented the statutory requirement that MS4s reduce pollutants to the "maximum extent practicable" through a provision that required permittees to select and implement a set of "minimum measures" to minimize the discharge of pollutants from the storm water system.[243] These minimum measures, essentially a set of BMP restrictions, were to be selected by the permittee from a list of potential BMPs identified in the general permit. The minimum measures selected by the permittee were neither submitted for review by EPA nor was their adequacy ever evaluated by EPA. The only check on the adequacy of the plans was the possibility that, after authorization for discharge under the general permit, EPA might determine a plan was inadequate and require revision.

The environmental petitioners argued that reliance in the general permit on these permittee-selected limitations constituted a "failure to regulate" by EPA, and the court agreed. The court apparently found no general obligation for EPA to review the Notice of Intent submitted by permittees as a prerequisite for coverage under the general permit. The court noted that in most cases

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[241] *See supra* Part III.A.

[242] 344 F.3d 832 (9th Cir. 2003).

[243] Municipal storm sewers are subject to unique permit requirements under the Clean Water Act. CWA § 402(p)(3)(B)(iii), 33 U.S.C. § 1342(p)(3)(B)(iii) (2006). This section requires that permits for municipal storm water discharges, unlike all other point sources, include restrictions that will ensure that discharges will be limited to the "maximum extent practicable." In effect, Congress replaced otherwise applicable technology-based and water quality standards-based requirements with a single technology-based obligation to control discharges. *See supra* note 128.

the NOI constituted no more than "formal acceptance of terms elaborated elsewhere."[244]

The court, however, held that the permit writer was obligated to review and approve permittees' BMP plans since these defined the substantive obligations under the permit.[245] Citing only to section 402(p)(6) of the Clean Water Act, the court concluded that Congress "unambiguously" intended that all NPDES permits contain controls that reduced discharges to the maximum extent practicable. EPA's failure to review the permittees' decisions regarding the content of any plan meant that EPA had not ensured that the provisions applicable to individual permittees ensured reductions to the maximum extent practicable. According to the majority, "misunderstandings" or "misrepresentations" by permittees could result in their developing plans that might reduce discharges "far less than the maximum extent practicable."[246] The court concluded that EPA's discretionary authority to review the adequacy of plans did not save the permit scheme; according to the court, every permittee must be subject to adequate controls and this could apparently only be ensured by EPA's review of every permittee's self-selected plan. One judge, in dissent, found that the provisions of the Clean Water Act regarding the requirements for general permits were ambiguous, and therefore concluded that, under principles of *Chevron* deference to administrative interpretation of ambiguous statutes, EPA's position should be upheld.

Waterkeeper Alliance v. EPA[247] involved a challenge both to EPA's effluent limitation guideline regulations and the general permit provisions applicable to CAFOs. One element of the regulations was a requirement that permittees develop a "nutrient management plan" ("NMP") that would limit the amount and rate of application of animal wastes as fertilizers. For point sources operating under a CAFO general permit, the NMPs developed by permittees, like the "minimum measure" plans at issue in *Environmental Defense Center,* were not subject to regulatory review or approval prior to the authorization to discharge under the general permit. Like the court in *Environmental Defense Center,* the court in *Waterkeeper* concluded that this violated the requirements of the Clean Water Act.[248]

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[244] *Envtl. Def. Ctr.*, 344 F.3d at 853.

[245] In a curious footnote, the court states that "EPA identifies no other general permitting program that leaves the choice of substantive pollution control requirements to the regulated entity. . . ." *Id.* at 856 n.33. In fact, there are a number of significant general permits that rely on unreviewed, permittee-developed plans to establish substantive controls. Both the Construction and Multi-Sector General Permits require permittees to develop SWPPPs that contain the BMPs that will be employed at the sites. 2003 CONSTRUCTION GENERAL PERMIT, *supra* note 127, at 9; 2000 MULTISECTOR GENERAL PERMIT, *supra* note 110, at 64,812-13. The CAFO General Permit requires permittees to develop site-specific nutrient management plans. Thus, the holding in *Environmental Defense Center,* although limited to small MS4s, has potentially broad implications for EPA's General Permit program.

[246] *Envtl. Def. Ctr.*, 344 F.3d at 855.

[247] 399 F.3d 486 (2d Cir. 2004).

[248] *Id.* at 502. The court noted that the Clean Water Act requirements applicable to CAFOs differed from the specific requirements applicable to municipal storm water discharge under

The court in *Waterkeeper* relied on two distinct rationales in reaching this conclusion. First, the court concluded that the Clean Water Act required that the permit writer "ensure" that NMPs result in necessary reduction in discharge. Plans prepared by the permittee might, in the court's view, be inadequate and not "in fact" produce reductions in discharges required under the Act. The court cited with approval the language of the opinion in *Environmental Defense Center* that unreviewed, permittee-developed plans could be based on "misunderstanding or misrepresentation." The court rejected EPA's argument that the NMPs were not effluent limitations, but simply "planning tools."[249] Whether the NMPs themselves or the obligation to prepare NMPs contained in the general permit constituted effluent limitations, the court concluded that government review of the plans was necessary to ensure that permittees "in fact" met the requirements of the Act. The court also rejected EPA's argument that the guidelines for developing NMPs were sufficiently specific that permittees had little discretion in designing the plans. The court concluded that in the absence of government review, permittees might still fail to prepare NMPs or develop inadequate plans.

Second, the court apparently relied on a strange structural argument relating to the permittee-developed BMP plans. The court stated that the Clean Water Act "unquestionably" requires that applicable effluent limitations must be included in the NPDES permit. Since the NMPs imposed the restrictions on the land application discharges, they met the statutory definition of an effluent limitation. It followed that the NMPs must be included in the NPDES permit itself, and thus, in the court's view, the NMPs, separately developed by the permittee and not reviewed and not directly included in the permit by the permit writer, violated the requirements of the Clean Water Act.

The environmental concerns regarding unreviewed, permittee-developed BMP plans suggested in *Environmental Defense Center* and *Waterkeeper* are self-evident. Reliance on controls that have been developed by the very permittees who are regulated, without any process of government review prior to an authorization to discharge, seems the opposite of regulation—the fox is placed in charge of designing the security system for the chicken coop. The potential for "misunderstanding or misstatements" by permittees, recognized by both courts, is a rather polite characterization of the potential for abuse under a permit system that relies on permittees to establish their own pollution control obligations. A concern with effective

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section 402(p). The court concluded, however, that the distinction under the statute was irrelevant for purposes of determining the legitimacy of unreviewed, permittee-developed plans. *Id.* at 500 n.18.

[249] *Id.* at 501. It is hard to imagine what EPA meant by this statement. Is it suggesting that violation of the NMP itself does not constitute a violation of the permit? As discussed below, this suggestion itself is enough to require EPA to specify in the general permits themselves that compliance with BMP plans is a specific obligation of the permit. *See infra* notes 256-260 and accompanying text.

implementation of the Clean Water Act makes review and approval of these plans by the permit writer the prudent course.[250]

It is one thing to say that there are advantages to government approval of BMP plans; it is quite another, however, to say that the Clean Water Act mandates such approval. The legal analysis of the courts, in both *Environmental Defense Center* and *Waterkeeper*, is remarkably simplistic on this issue. The majority in *Environmental Defense Center* relied exclusively on its conclusion that the *permit writer* must ensure that the actual plans developed by permittees satisfy the statutory requirement for pollution reduction. The language of the statute is, however, far less direct. The Act requires that "*permits* . . . shall require controls to reduce the discharge of pollutants to the maximum extent practicable . . . ."[251] As a purely linguistic matter, the general permit at issue explicitly required such controls. The issue before the court was whether the controls, required by the permit itself, may be developed by the permittee without prior EPA review, and the statutory language is silent on this question. The statutory language relied on by the court in *Waterkeeper* to justify its conclusion is similarly limited. The Clean Water Act, although authorizing the Administrator to issue permits only "upon condition that" the "discharge" will meet applicable requirements, specifically provides that the "permits" contain conditions that are adequate to "assure compliance."[252]

The Clean Water Act requires only that the NPDES permit itself contain conditions that "ensure" compliance with the requirements of the Act, and the adequacy of permit conditions need not be judged by whether they have been reviewed and approved by permit writers. Permittees may "in fact" violate permit conditions through "misunderstanding or mischaracterization" whether or not the conditions have been reviewed and approved by permits. Permittees, for example, may misunderstand or mischaracterize the site-specific efforts necessary to meet applicable numerical effluent limitations in their permits, or the sampling and monitoring requirements of their permits. In other words, government review of permit conditions does not ensure compliance.

The mechanism that ensures compliance is the threat of sanctions for non-compliance. If a permittee that fails to develop a BMP plan, or that develops and implements an inadequate BMP plan, is subject to civil or

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[250] The permit writer's imprimatur helps ensure that the plans properly implement applicable requirements. But it also is of benefit to the permittee since it gives greater certainty regarding their obligations under the permit. Indeed, if the permit writer has approved all applicable plans, the permit shield provision of section 402(k) may limit government enforcement to compliance with the approved plan. If the permit writer later determines that a plan is inadequate, the only option might be a permit modification through revision of the plan rather than enforcement for violation of the requirements of the permit.

[251] CWA § 402(p)(3)(B)(iii), 33 U.S.C. § 1342(p)(3)(B)(iii) (2006) (emphasis added).

[252] *Id.* § 402(a), 33 U.S.C. § 1342(a).

criminal liability, the permit can be said to assure compliance.[253] The growing numbers of citizen suits relating to the adequacy or implementation of BMP-based SWPPP plans attest to the fact that unreviewed plans can be effectively enforced.[254]

2. *Resolving the Issue of Permittee-Developed BMP Requirements*

For certain types of point sources, particularly industrial and municipal storm water and CAFO discharges, site-specific BMP plans may be the most appropriate form of effluent limitation. No one disputes that permittee-developed BMP plans, if reviewed and approved by the permit writer and incorporated as an effluent limitation in an individual NPDES permit, can satisfy the requirements of the Clean Water Act. The issue is whether the Clean Water Act requires such a process. As discussed above, there is reason to question the adequacy of the analysis in both *Environmental Defense Center* and *Waterkeeper* on the legality of such provisions.

If the issue is whether the permit condition, rather than the permit writer, adequately assures compliance with the requirements of the Act, EPA must include conditions that ensure a credible threat of sanctions for noncompliance. To ensure the enforceability of permittee-developed plans, any general permit requiring an unreviewed, permittee-developed effluent limitation plan should contain at least three elements: (1) assurance that both the obligation to develop an adequate plan and the elements of the plans themselves constitute enforceable effluent limitations; (2) placement of the burden of proof on the permittee with regard to the adequacy of the plan; and (3) sufficiently specific criteria for development of the plan to allow the imposition of sanctions for failure to develop an adequate plan.

First, both the obligation to develop the plans and the contents of the plans themselves must be enforceable as an "effluent limitation" or other condition of the permit. As a condition of the permit, both the government, through its civil, criminal and administrative enforcement authority and citizens, through a citizen suit, could bring enforcement actions if plans were not developed, the plans did not meet the substantive requirements of the permit, or the permittee did not comply with its own plan.

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[253] Given the nature of enforcement under the Clean Water Act, the permittee can be subject to civil sanctions even if the inadequacy of the plan results from misunderstanding. *Id.* § 309 (a)-(b), 33 U.S.C. § 1319(a)-(b). Indeed, under the Act, criminal liability can be imposed based on negligent violations of the permit and this raises the possibility of criminal sanctions for some class of inadequately prepared plans. *See id.* § 309(c)(1)(A), 33 U.S.C. § 1319(c)(1)(A).

[254] *See, e.g.*, Natural Res. Def. Council v. Sw. Marine, 236 F.3d 985 (9th Cir. 2000); Ecological Rights Found. v. Pac. Lumber Co., 230 F.3d 1141 (9th Cir. 2000); Citizens Against Retail Sprawl v. U.S. Army Corps of Eng'rs, No. 04-CV-328E(SR), 2005 WL 3534178 (W.D.N.Y. Dec. 23, 2005); Waterkeepers N. Cal. v. AG Indus. Mfg., No. CIV-S-00-1967MCEPAN, 2005 WL 2001037 (E.D. Cal. Aug. 19, 2005); Cal. Sportfishing Prot. Alliance v. Diablo Grande, Inc., 209 F. Supp. 2d 1059 (E.D. Cal. 2002); City of New York v. Anglebrook P'ship, 891 F. Supp. 900 (S.D.N.Y. 1995).

This point seems self-evident, but EPA has taken confusing positions on this issue. On the one hand, the CGP requires that permittees not only develop a BMP plan, but also that they "implement and maintain" the plan.[255] Presumably a violation of a permittee's own plan would constitute a violation of the permit.

On the other hand, EPA has taken the position that BMP plans are not effluent limitations but simply "planning tools." This was the position taken by the government in *Waterkeeper*.[256] In its brief in *Texas Independent Producers and Royalty Owners Ass'n v. EPA*,[257] the government goes on at some length to claim that the BMP plans required in the Construction General Permit are simply "planning tools" used to meet the otherwise applicable substantive requirements of the permit, including compliance with water quality standards.[258] It seems obvious that the government has made this argument to avoid the implications, both with respect to government review obligations and public participation requirements, which might arise from characterizing the BMP plans as "effluent limitations."[259]

The government's argument is, however, not only substantively unnecessary; it is, as a matter of policy, affirmatively dangerous. If the BMP plan is, in fact, an enforceable "effluent limitation" under the permit, a permittee that violates its own plan faces possible sanctions. Enforcement can be based on a comparison of actual site practices with the requirements of the BMP plan. By characterizing the BMP plans as simply "planning tools," however, the government seems to be saying that a permittee that violates its own BMP plan is not violating the permit. The government's position suggests that even if a permittee does not comply with its own plan, there is no permit violation absent specific proof that the discharge is violating the substantive standards in the permit. In the case of the CGP, this might, for example, be discharges that violate water quality standards. This interpretation makes the BMP plans themselves meaningless and complicates enforcement.[260] To en-

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[255] 2003 CONSTRUCTION GENERAL PERMIT, *supra* note 127, at 15.

[256] *See* 399 F.3d 486, 501 (2d Cir. 2005).

[257] *See* EPA Brief, *supra* note 6, at 45. The case involved challenges to EPA's CGP. It is discussed *infra* note 274 and accompanying text.

[258] The brief states that the SWPPP, the set of BMP controls defined by the permittee, "is simply a planning tool that is intended to enhance compliance with the water quality-based effluent limitations in Section 4.5.A and other sections of the CGP." EPA Brief, *supra* note 6, at 45. The government analogizes this requirement to the provisions of a typical NPDES permit that specifies a numerical limitation on a discharge but does not mandate how that number is to be met.

[259] As noted, the Clean Water Act requires that "permits" be made publicly available. *See supra* note 41. If permittee approved plans are substantive components of the NPDES permit, it is hard (or at least harder) to argue that they need not be made publicly available and they need not be subject to some form of government review.

[260] The court in *Waterkeeper* seemed troubled by the government's planning tool argument. The court, concluding that the NMP plans at issue in the CAFO rules were "effluent limitations," stated that

> [t]he requirement to develop a nutrient management plan constitutes a restriction on land application discharges only to the extent that the nutrient management plan

sure compliance with the requirements of the Act, permittee-developed BMP plans must be enforceable requirements of the permit, and general permits should expressly state that the permittee plans constitute effluent limitations under the permit.

Certainly, it should not be a problem that the plans, mandated by the general permit, are not physically published as part of the general permit. With deference to the court in *Waterkeeper*, if the general permit explicitly cross-references the plans and establishes them as enforceable requirements of the permit, the permit in all meaningful senses "contains" the limitation. EPA regulations specifically authorize the inclusion of permit conditions through cross-reference.[261] There are separate concerns, discussed below, regarding necessary public notice and public participation, but the physical location of the plans simply does not seem significant for enforcement purposes.[262]

Second, the burden of proof should be placed on the permittee to establish that the plans meet the requirements of the permit. Although the government or citizen in a citizen suit may have the ultimate burden of proof in establishing a violation of an effluent limitation, there are numerous examples of EPA shifting the burden of proof to a person alleging compliance with certain EPA regulatory requirements. In its regulations implementing the hazardous waste provisions of the Resource Conservation and Recovery Act, EPA places the burden of proof on a generator claiming that its hazardous wastes are recycled rather than abandoned.[263] Under the Clean Water Act, EPA has expressly placed the burden of proof on any permittee claiming that non-compliance is based on an "upset."[264] Given that a permittee has an option of obtaining an individual permit in which plans may be approved by the permit writer, the election to seek coverage under a general permit should warrant placing the burden of proof on the permittee in a dispute over the adequacy of their plan to meet the requirements of the permit.

Third, the requirements for permittee-developed plans contained in the general permit must include sufficient objective criteria such that the adequacy of the plan can subsequently be assessed. In other words, it must be possible for government enforcement officials (or citizens in the context of a citizen suit) to determine whether a permittee-developed plan violates the

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actually imposes restrictions on land application discharges. To accept the EPA's contrary argument—that requiring a nutrient management plan is itself a restriction on land application discharges—is to allow semantics to torture logic."

399 F.3d at 502.

[261] 40 C.F.R. § 122.43(c) (2006).

[262] *See infra* note 266 and accompanying text for a discussion of the public notice and public participation issues associated with general permits.

[263] *See* 40 C.F.R. § 261.2(f) (requiring generator to demonstrate certain elements establishing recycling in any enforcement action).

[264] *See* 40 C.F.R. § 122.41(n) (establishing an upset as an "affirmative defense" with the burden of proof on the permittee).

requirements of the permit. In *Waterkeeper*, the court rejected EPA's argument that unreviewed, permittee-developed BMP plans were acceptable if there were sufficient technical criteria to limit the permittees' discretion. In rejecting this argument the court noted that, regardless of the specificity of the requirements, they were still implemented based on site-specific conditions identified by the permittee. It was, apparently, the application of the BMP requirements to the permittee's site-specific conditions that required government review. The court stated that the CAFO rule does not ensure that the CAFOs will "in fact" develop plans that comply with all applicable requirements.

The court, however, never addressed the issue of whether the application of the permit criteria to site-specific conditions was sufficiently clear to justify imposition of sanctions for an improper plan. In other words, the court never considered whether the threat of enforcement action for "misunderstanding or mischaracterization" was sufficient to assure compliance. It is possible to imagine a set of permit requirements that are so vague that sanctions for non-compliance would raise due process concerns. The court in *Waterkeeper* did not, however, base its holding on this concern, and the court simply did not consider whether technical criteria that were sufficiently detailed to allow an after-the-fact determination of the adequacy of the plan adequately "assured compliance" through the threat of sanctions.

Development of sufficiently specific criteria for assessment of permittee plans is not a simple process. EPA has used benchmark monitoring values in its MSGP to test the adequacy of BMPs imposed by the permittee.[265] Discharges that exceed these benchmark values do not, however, constitute a violation of the permit. Violation of the benchmark values simply triggers an obligation to reassess and possibly revise the existing set of BMPs. Permittees may be able to operate for some period of time without adequate plans and without liability. After-the-fact monitoring may allow the government to require a revision of the plan, but until modified, the permit essentially imposes no substantive limitation on discharge that assures compliance with water quality standards.

The difficulty of developing enforceable effluent limitations applicable to storm water or other non-point source like discharges is one of the reasons which led to use of general permits in the first place. But if EPA, for practical and administrative reasons, cannot develop specific enforceable discharge limits, it must either develop objective criteria to assess the adequacy of permittee BMP plans or it must review and approve a permittee-developed plan prior to authorization for discharge under the permit.

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[265] *See* 2000 Multisector General Permit, *supra* note 110, at 64,816.

E. Public Participation in the Permit Process

1. The Problem of Public Participation

A central element of the federal NPDES program is the strong emphasis on public participation.[266] Several provisions of the Clean Water Act establish mandatory public participation requirements. Copies of NPDES "permit applications" and copies of issued permits must be made available to the public, and the NPDES permit issuance process must include an opportunity for a public hearing.[267] Further, data on discharges must generally be made available to the public.[268] Finally, private citizens have substantial rights to bring citizen suits to enforce requirements of the Act, and, with certain limitations, to intervene in government enforcement actions.[269]

Although general permits themselves go through a public notice and comment process, application of the general permit to individual permittees raises three significant public participation issues: public availability of permittees' NOIs to be covered under the general permit, public availability of any permittee-developed BMP plan, and the right to a public hearing on any permittee's coverage under a general permit.

EPA and the courts have taken inconsistent positions on several of these issues. EPA has no general requirement that the public be given access either to NOIs or permittee BMP plans, and most general permits do not mandate public disclosure.[270] Although EPA, in its 2000 and 2006 Proposed MSGP, has required that both NOIs and BMP plans be made available to the public, EPA has adopted no regulation or policy requiring that all general permits provide such public disclosure. Further, EPA has never established any right to public hearing on individual coverage under a general permit.

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[266] One of the basic goals and policies of the Clean Water Act is that:

> [p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

CWA § 101(e), 33 U.S.C. § 1251(e) (2006). EPA has promulgated regulations generally requiring public participation in the implementation of its programs. *See* 40 C.F.R. §§ 25.1-.14 (2006).

[267] *See supra* notes 39-43 and accompanying text.

[268] CWA § 308(b), 33 U.S.C. § 1318(b).

[269] *Id.* §§ 505(a)-(b), 33 U.S.C. §§ 1365(a)-(b).

[270] The 2003 CGP, for example, requires only that the SWPPP be available to certain government entities. *See* 2003 CONSTRUCTION GENERAL PERMIT, *supra* note 127, at 12. For the federally issued CGP, NOIs are, however, now made available through an EPA website. *See* EPA, View Stormwater NOIs, http://www.epa.gov/npdes/stormwater/noisearch (last visited Mar. 17, 2007) (on file with the Harvard Environmental Law Review).

EPA's policies on public participation have been challenged in two cases. In *Environmental Defense Center v. EPA*,[271] the Ninth Circuit case involving EPA's MS4 general permit, environmental petitioners claimed that both the failure to provide public access to a permittee's Notice of Intent and BMP plan and the absence of a public hearing violated the public participation requirements of the Act. The majority agreed. In the court's view, it was the NOI, and not the general permit itself, that contained information about the substantive limitations that would be applicable to the permittee.[272] In such a case, the court concluded that an NOI was equivalent to a permit application and therefore the Act required that NOIs and plans be made publicly available and a public hearing be provided.[273]

In *Texas Independent Producers and Royalty Owners Ass'n v. EPA*,[274] the Seventh Circuit rejected a similar challenge to EPA's Construction General Permit. Petitioner Natural Resources Defense Council ("NRDC") argued that both the failure to require that the NOIs and SWPPPs be publicly available and the absence of an opportunity for a public hearing violated the requirements of the Clean Water Act. The government claimed that neither the NOIs nor the SWPPPs constituted permit applications or permits and therefore the statutory requirements for public access did not apply. Relying on *Chevron* deference to administrative interpretations of ambiguous statutory provisions, the court simply deferred to the government's interpretation of the Act. The court accepted as reasonable the government's position that the notice and comment process of issuing the general permit provided adequate public participation and that mandatory hearings on each NOI would "eviscerate" the administrative advantages of general permits.[275] The court acknowledged that its position was contrary to the holding of the Ninth Circuit in *Environmental Defense Center.*

2. *Resolution of the Public Participation Issues*

General permits can satisfy the public participation requirements of the Clean Water Act by relatively simple changes to the program. There is simply no basis for not requiring that both NOIs and permittee-developed effluent limitation plans be publicly available. Further, no aspect of the general permit program would be providing the same standard for conduct of a public hearing that applies to individual NPDES permit issuance. With defer-

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[271] 344 F.3d 823 (9th Cir. 2003).

[272] *Id.* at 853.

[273] The court rejected the federal government's argument that the Freedom of Information Act ("FOIA") ensured the necessary public access. As the court noted, FOIA only applies to documents in the possession of the federal government, and EPA does not have all NOIs submitted to state or Tribal governments that are delegated permit issuance authority. *Id.* at 854.

[274] 410 F.3d 964 (7th Cir. 2005).

[275] *Id.* at 978.

ence to the court's holding in *Texas Independent Producers*, EPA simply cannot justify minimizing public participation as it has. Adequate public participation will simply not "eviscerate" the program.

a. Availability of NOIs and Permittee-Developed Plans

EPA should require that all NOIs and permittee-developed plans be made publicly available. Both the NOIs and permittee plans contain information and requirements that are typically included in permit applications and permits themselves, and the Clean Water Act mandates that both these documents be publicly available. NOIs do more than simply notify EPA of a permittee's intent to be covered. Several EPA general permits provide that a permittee is not eligible for coverage until some time after submission of an NOI.[276] This period of time gives EPA the opportunity to review the adequacy of the NOI and determine whether to require the permittee to submit an individual permit application.[277] Thus, the NOI serves the function of a permit application, not a mere notice function. Further, as discussed above, permittee-developed plans must be considered "effluent limitations" and enforceable elements of the permit. If the contents of the permittee-developed plans are specifically enforceable as effluent limitations under the permit, then it is hard to justify a conclusion that they are not part of the permit itself and therefore required by the Clean Water Act to be publicly available.

No administrative advantage of general permits hinges on non-disclosure of NOIs or permittee-developed plans. For NOIs, all that is required is to make NOIs received by the government publicly available. EPA, for example, now posts NOIs submitted under the CGP and MSGP on publicly available web sites.[278] EPA has also indicated that it will include such a provision in MS4 GPs in response to *Environmental Defense Center*.[279] Ensuring public access to permittee-developed plans would also be administratively simple to implement. All that would be necessary is to include in the general permit a requirement that permittees make such plans available to the public upon request. EPA has included such a provision in its

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[276] *See, e.g.*, 2003 CONSTRUCTION GENERAL PERMIT, *supra* note 127, at 5 (permittees not eligible for coverage until seven calendar days after acknowledgement of receipt of the NOI is posted on EPA's website). The 2000 MSGP provides that coverage begins two days after postmarked date of submission of the NOI but further provides that "[a]uthorization to discharge is not automatically granted two days after the NOI is mailed if your NOI is materially incomplete (e.g., critical information left off, NOI unsigned, etc.) or if your discharge(s) is not eligible for coverage by the permit." 2000 Multisector General Permit, *supra* note 110, at 64,809. In other words, the submission of a NOI performs more than a ministerial function.

[277] *See, e.g.*, 2003 CONSTRUCTION GENERAL PERMIT, *supra* note 127, at 5.

[278] *See* EPA, *supra* note 270.

[279] *See* Memorandum from James A. Hanlon, Dir., Office of Wastewater Management, EPA, to Water Management Dirs., Regions I-X, EPA, Implementing the Partial Remand of the Stormwater Phase II Regulations Regarding Notices of Intent & NPDES General Permitting for Phase II MS4s (Apr. 16, 2004), *available at* http://www.epa.gov/npdes/pubs/hanlonphase2apr14signed.pdf.

2000 MSGP and its proposed 2006 MSGP.[280] Although the court in *Texas Independent Producers*, relied, in part, on EPA's argument that mandatory *public hearings* would "eviscerate" the general permit program, nowhere did it discuss any rationale advanced by EPA for the rejection of *public disclosure* of NOIs or permittee-developed plans.

In the absence of public disclosure of this information, the role of the public in supervision of permit issuance and enforcement, supplemental though it may be, is eliminated. No one, other than the discharger and the government, would have access to the information necessary to determine whether the discharger is eligible for coverage under the permit or has complied with the mandatory requirements for SWPPP development. Effluent limitations based on BMPs do not generate the effluent monitoring data that is otherwise subject to public disclosure under the Act. In the absence of public disclosure of the plans, any possible supervision through citizen suits is essentially eliminated.

Given the specific provisions and the role of public participation in the Clean Water Act, there is simply no rational explanation for failure to mandate public disclosure of NOIs and permittee-developed plans. Indeed, it is hard to imagine any reason for denying public access to NOIs or permittee plans other than to shield permittees from the public scrutiny that is a core element of the Clean Water Act. The alternative of relying on individual permit issuance, including any expedited standard permit model discussed above, would certainly involve public disclosure of permit applications and, if implemented properly through inclusion of the permittee-developed plan as a specific element of the permit, the plans themselves would be subject to disclosure as elements of the NPDES permit.

b. Public Hearings on NOIs

The conclusion of the court in *Environmental Defense Council* that public hearings must be provided as part of coverage under a general permit is more problematic. If hearings are required for *each* NOI, the administrative advantages of a general permit would obviously be compromised. Under EPA regulations applicable to individual NPDES permits, however, public hearings have never been available as of right for every permit application. A public hearing is held on request only if the permit writer determines that there is a "significant degree of public interest."[281] As noted, this limitation

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[280] 2000 Multisector General Permit, *supra* note 110, at 64,815; PROPOSED 2006 MSGP, *supra* note 184, at 25. EPA's decision to mandate public disclosure in federally issued general permits would not adequately resolve the issue. As the court noted in *Environmental Defense Center*, the federal Freedom of Information Act that may make documents in the possession of the federal government available to the public does not apply to documents held by the states. 344 F.3d at 857. In the absence of a mandatory federal requirement that states with delegated NPDES authority provide public access to NOIs and permittee-developed plans, the right of public participation is simply not assured.

[281] 40 C.F.R. § 124.12(a) (2006).

on the right to a public hearing in the individual NPDES permit context has been upheld by the Supreme Court.[282] Providing for a public hearing on NOIs if there is significant public interest would be consistent with the requirements for individual permits and would hardly disrupt the implementation of the general permit program.

Furthermore, under its existing general permit regulations, individuals already have the right to petition the permit writer to exclude the discharger from coverage under the general permit, and, if excluded, the permittee would be subject to the procedures applicable to individual permit issuance.[283] Although the standards for granting a public hearing in the context of an individual permit process and granting a petition to exclude a permittee from coverage under a general permit differ, in both cases individuals may request, but cannot assure, a process that includes a public hearing. The courts in *Environmental Defense Council* and *Texas Independent Producers* considered neither the discretionary nature of public hearings nor the right to petition for issuance of individual permits in assessing the requirement for public hearings in the general permit context.

Given the limited scope of the right to a public hearing in the context of individual permit issuance and the availability of a right to petition to exclude a source from coverage under a general permit, there seems little justification for not providing the same right to a public hearing on an NOI that exists in the context of individual permit issuance.

F. Compliance with Other Statutory Requirements

In addition to the substantive requirements imposed by the Clean Water Act, the issuance by EPA of an NPDES permit may trigger obligations under other federal statutes. The National Environmental Policy Act ("NEPA"), for example, may require the preparation of an environmental impact statement for certain NPDES permits.[284] The Endangered Species Act ("ESA") may require an assessment of whether the permitted activity will jeopardize the continued existence of an endangered or threatened species.[285] The National

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[282] *See* Costle v. Pac. Legal Found., 445 U.S. 198 (1980); *see also supra* note 42 and accompanying text.

[283] 40 C.F.R. § 122.28(b)(3)(i); *see also supra* note 115 and accompanying text.

[284] National Environmental Policy Act § 102, 42 U.S.C. § 4332 (2006). Only NPDES permits issued to either municipal sewage treatment plants receiving certain federal funding or to "new sources" may require preparation of environmental impact statements under the NEPA. CWA § 511(c)(1), 33 U.S.C. § 1371(c)(1). The term "new source" is a term of art under the Act and refers only to those sources constructed after promulgation of federal new source performance standards. *See supra* note 202. Thus, the applicability of NEPA even to EPA-issued permits is limited.

[285] Federal agencies must, in consultation with either the U.S. Fish and Wildlife Department or the National Marine Fisheries Service (collectively, "the Services"), insure that any action "authorized, funded or carried out by [any federal] agency is not likely to jeopardize" the continued existence of an endangered or threatened species or the destruction or adverse modification of critical habitat. Endangered Species Act § 7(a)(2), 16 U.S.C. § 1536(a)(2).

Historic Preservation Act ("NHPA") may require assessment of the impact of the activity on items on the National Register of Historic Places.[286] The difficulty of ensuring the necessary site-specific review mandated by these statutes in the context of a general permit is obvious.

As significant as application of NEPA,[287] ESA,[288] and NHPA may appear, the applicability of these statutory requirements to general permits is limited since the requirements of these statutes apply only to certain federal actions. An EPA-issued general permit constitutes federal action triggering

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Applicable regulations of the Services require that a federal agency must undertake either formal or informal consultation with the relevant Service if the proposed action "may affect" an endangered or threatened species. 50 C.F.R. § 402.14(a) (2006). Thus EPA-issued NPDES permits may require a review of the potential impact of the permitted activity on endangered or threatened species, consultation with the appropriate federal service, and possible mitigation steps that will authorize the action. *See* 40 C.F.R. § 122.49(c). Additionally, under section 10 of the ESA, private parties may receive a permit authorizing actions that might otherwise constitute an unlawful "take" of endangered species. Endangered Species Act § 10, 16 U.S.C. § 1539(a).

[286] The NHPA requires that the head of any federal agency having licensing authority must, "prior to the issuance of any license, take into account the effect of the undertaking" on any site, building, structure, or object that has been included or is eligible for inclusion on the National Register. National Historic Preservation Act § 106, 16 U.S.C. § 470f. EPA-issued NPDES permits may be subject to consultation obligations under the NHPA. *See* 40 C.F.R. § 122.49(b).

[287] *See,* e.g., District of Columbia v. Schramm, 631 F.2d 854 (D.C. Cir. 1980); Chesapeake Bay Found. v. Virginia State Water Control Bd., 453 F. Supp. 122 (E.D. Va. 1978) (holding that NEPA obligations do not apply to permits issued by states to "new sources" and EPA's decision not to exercise its discretionary authority to veto state permits was not a "federal action" triggering NEPA requirements).

[288] The Fifth Circuit has held that EPA cannot condition delegation of NPDES permit authority to states on a requirement that the state submit permits to EPA for an ESA review. Am. Forest & Paper Ass'n v. EPA, 137 F.3d 291 (5th Cir. 1998). In 2001, EPA entered into a Memorandum of Agreement ("MOA") with the Services regarding "enhanced coordination under the Clean Water Act and Endangered Species Act." Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act, 66 Fed. Reg. 11,202, 11,207 (Feb. 22, 2001). In the context of state-issued NPDES permits, the MOA essentially provides that EPA will use its authority over water quality standards to minimize impacts on listed species. *Id.* at 11,215-16. Although EPA states that it will use its authority to review state-issued permits to comment on impacts of listed species, the agency limits its substantive veto authority to violations of Clean Water Act obligations. *Id.* at 11,216. The implication of the MOA is that the adequacy of endangered species review in state-issued general permits is linked to the adequacy of the permit's water quality standards provisions.

There is, however, continuing dispute over whether EPA's review and approval of a state NPDES permit program is itself subject to ESA review and the extent to which the ESA provides substantive authority to take action not otherwise authorized by the Clean Water Act. In *Defenders of Wildlife v. EPA*, 420 F.3d 946 (9th Cir. 2005), *cert. granted*, 127 S.Ct. 853 (Jan. 5, 2007) (No. 06-549), the Ninth Circuit held that EPA's delegation of permit authority to Arizona was arbitrary and capricious, in part because EPA had relied on inconsistent legal positions regarding the applicability of the ESA consultation process to state delegation. *Id.* at 959-60. The court found that the ESA contained a grant of authority, independent of the Clean Water Act, that required EPA to ensure that delegation did not jeopardize the continued existence of listed species. Although it disagreed with the logic of *American Forest & Paper Ass'n*, *supra*, the court stated that it was not directly faced with the same issue addressed in that case, i.e., EPA's ability to impose continuing ESA consultation requirements as a condition of state delegation. *Id.* at 971.

application of these statutes. However, following delegation of permit issuance authority to states, courts have generally held that NPDES permit issuance is no longer a federal action.[289] Thus, state-issued general permits may not be subject to NEPA, ESA, and presumably NHPA requirements. Since EPA is the permit issuer in only a handful of states, the application of these statutory requirements to general permits is limited.[290] Further delegation will only diminish the significance of these statutes further.

Nonetheless, in the limited context of EPA-issued general permits, the problem of compliance remains, and EPA has struggled with the proper mechanism for ensuring that an EPA-issued general permit complies with the requirements of these statutes. EPA's treatment of its NEPA obligations in these general permits is interesting. The CGP simply does not apply to "new sources" as defined in the Clean Water Act, and thus the EIS requirements of NEPA do not apply.[291] Statutory new sources wishing to be covered by the 2000 MSGP, however, must submit an "environmental information document."[292] EPA is to use this information to conduct an environmental review under NEPA to determine whether an EIS is required and whether any environmental mitigation obligations are necessary. This process must be completed prior to submission of the NOI by the permittee.[293] Obviously, EPA's obligation to review and make site-specific determinations regarding the applicability and obligations under NEPA undercuts its general position that site-specific review of information in an NOI would "eviscerate" the general permit program. On the other hand, the scope of new source EIS review under the Clean Water Act is limited.

EPA, in its recent CGP and MSGP permits, has imposed rather elaborate review obligations on the permittee to satisfy the provisions of the ESA and NHPA. Under both the CGP and MSGP, EPA requires the prospective permittee to undertake, prior to submission of an NOI, a review of whether its storm water related activities may affect endangered or threatened species or designated critical habitat. Permittees are not eligible for coverage unless they certify in the NOI that their activities meet one of several criteria. These criteria include, among others, (1) a determination by the permittee that there are no endangered or threatened species or critical habitat in the project; (2) completion of formal or informal consultation between the permittee and Fish and Wildlife Service regarding the potential to jeopardize an endangered or threatened species; and (3) coverage under a section 10 "incidental take" permit issued by FWS.[294] Much like its procedures that purport to sat-

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[289] *See, e.g., Schramm*, 631 F.2d at 862; *Chesapeake Bay Found.*, 453 F. Supp. at 125.

[290] *See supra* note 16.

[291] *See* 2003 CONSTRUCTION GENERAL PERMIT, *supra* note 127, at C-1 to -2; *supra* note 284.

[292] Final Reissuance of NPDES Storm Water Multi-Sector General Permit for Industrial Activities, 65 Fed. Reg. 64,746, 64,612 (Oct. 30, 2000) (fact sheet).

[293] *Id.*

[294] 2003 CONSTRUCTION GENERAL PERMIT, *supra* note 127, at 4-5; 2000 Multisector General Permit, *supra* note 110, at 64,808–09.

isfy water quality standards requirements, the general permit does not provide for review by EPA of the determinations made by the permittee.

In *Texas Independent Producers*, the NRDC challenged the adequacy of the procedures in the CGP to satisfy the ESA. Among other things, NRDC claimed that the ESA required independent assessment of compliance by EPA. The court accepted EPA's position, however, that submission of an NOI and development of an SWPPP by the permittee did not constitute "federal action" that triggered ESA requirements.[295] It further concluded that EPA satisfied its ESA obligations when it undertook consultation as part of the issuance of the CGP itself, developed the provisions in the CGP relating to endangered species review in consultation with the Service, and received concurrence by the Service that the General Permit was not likely to adversely affect a listed species.[296]

Although the court in *Texas Independent Producers* concluded that the ESA does not apply to individual authorization under a federally issued general permit, the application of the ESA to individual permittees is still significant. Since EPA has made endangered species review a prerequisite to permit coverage, a prospective permittee who does not properly undertake such a review should be subject to government enforcement and citizen suits under the Clean Water Act. Furthermore, information relating to the existence of endangered species should be a basis for a petition requesting that a prospective permittee be required to obtain an individual permit. This may be an appropriate resolution of the issue in the limited context of federally issued general permits.

V. Conclusion

General permits have been part of the NPDES program beginning with the promulgation of EPA's first general permit regulations in 1979. Since that time, thousands of point sources have been authorized to discharge subject only to the substantive and procedural requirements of such permits. EPA has expanded its reliance on general permits over the years without, it appears, addressing the substantial legal and policy issues that are implicated by their use. The recent series of cases that potentially undercut the basis of general permits is a testament to this inattention.

Some of the troubling aspects of general permits are easily resolved. EPA must simply assure that EPA and state-issued general permits provide for public access to Notices of Intent and any permittee-developed effluent limitation plans. Effective review and enforcement of compliance with Clean Water Act requirements require this minimal level of public participa-

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[295] 410 F.3d at 979. According to EPA, "[s]ubmitting an NOI is simply a notification to EPA" and does not constitute a federal action authorizing discharge. EPA Brief, *supra* note 6, at 64.

[296] 410 F.3d at 979.

tion. Further, reliance on permittee-developed effluent limitations based on "best management practices" seems an appropriate means of implementation of technology-based obligations in general permits. If the permit requirements are sufficiently definite and the plans are enforceable as effluent limitations, the potential for enforcement by government and citizen suits should adequately assure that the plans are both properly developed and adequately implemented. Government review of these plans prior to permit coverage would certainly be useful, but may not be required under the Clean Water Act.

The most troubling aspect of the broad use of general permits is EPA's failure to adequately assure compliance with water quality standards. EPA's most recent proposed approaches either effectively ignore water quality standards or provide lip service through requiring permittees, rather than the permit writer, to identify these complex and confusing requirements based on informal contacts with regulators. Rather than encouraging development of TMDLs, EPA effectively discourages their development by exempting permittees from any water quality standards-based requirements on streams without approved TMDLs. Although they may limit the use of general permits, there are mechanisms available to ensure that general permits meet the water quality standards requirements of the CWA.

It is hard to dispute that there are administrative advantages, both to the government and the permittee, through use of general permits, but such efficiency considerations cannot trump the substantive requirements of the Clean Water Act.