General Industrial Storm Water Permits and the Construction Industry: What Does the Clean Water Act Require?

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I. INTRODUCTION

> Regulators, under unprecedented pressure, face a range of demands, often contradictory in nature: be less intrusive—but more effective; be kinder and gentler—but don't let the bastards get away with anything; focus your efforts—but be consistent; process things quicker—

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> and be more careful next time; deal with important issues—but do not stray outside your statutory authority; be more responsive to the regulated community—but do not get captured by industry.
>
> *Malcolm K. Sparrow*[1]

If regulators are to make a difference in improving and protecting water quality, they must focus their attention, time, and energy on significant problem areas. This article examines one such area: the use of "general permits"[2] to regulate storm water discharges from construction activities under the Clean Water Act (CWA).[3]

This article explores the connection between construction activities and water quality, and the baseline rules governing storm water permitting. It also analyzes the legal controversy, which has split the federal circuits,[4] of treating the Notice of Intent (NOI) to be covered by the terms of the general permit and accompanying Storm Water Pollution Prevention Plan (SWPPP) as the "functional equivalent" of a permit or permit application.[5] This controversy springs primarily from the fact that the CWA does not define the terms "permit" or "permit application."[6] In a broad sense, the central inquiry is one of statutory construction: What does the CWA require?

The functional equivalent theory is significant because its application to a NOI and accompanying SWPPP triggers the statutory entitlement to a public hearing and public availability.[7]

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1 MALCOLM K. SPARROW, THE REGULATORY CRAFT: CONTROLLING RISKS, SOLVING PROBLEMS, AND MANAGING COMPLIANCE 17 (2000).

2 General permits are an administrative mechanism developed by the EPA to regulate an entire group or category of similarly situated activities in the least burdensome manner for the permittee and administering agency. A "general permit may be written to regulate one or more categories or subcategories of discharges or sludge use or disposal practices or facilities, within the area described in paragraph (a)(1) of this section, where the sources within a covered subcategory of discharges are . . . [s]torm water point sources[.] . . ." 40 C.F.R. § 122.28(a)(2) (2004).

3 Clean Water Act §§ 101–607, 33 U.S.C. §§ 1251–1387 (2000). The CWA is commonly cited to both its original section numbers and the United States Code.

4 Envtl. Def. Ctr., Inc. v. United States Envtl. Prot. Agency [hereinafter EPA], 344 F.3d 832, 853 (9th Cir. 2003) (treating the Notice of Intent (NOI), in some regards, as the "functional equivalent" of a permit or permit application); Tex. Indep. Producers and Royalty Owners Ass'n v. EPA, 410 F.3d 964, 978 (7th Cir. 2005), reh'g denied en banc Aug. 26, 2005, (concluding that the terms "permit application" and "permit" do not include NOIs and SWPPPs).

5 Clean Water Act § 402(a)(1), 33 U.S.C. § 1342(a)(1) (2000) provides that "the Administrator [of the EPA] may, after opportunity for public hearing, issue a permit . . . ." *See also* discussion *infra* Part VII. The "Functional" Permit Theory.

6 Clean Water Act §§ 101–607, 33 U.S.C.S. §§ 1251–1387 (LexisNexis 2002); *see* Envtl. Def. Ctr., Inc. v. EPA, 344 F.3d 832, 853 (9th Cir. 2003) (interpreting congressional intent to aid in defining the scope of the term "permit").

7 Clean Water Act § 402(a)(1) sets forth the public hearing requirement: "the Administrator may, after opportunity for public hearing, issue a permit." Clean Water Act §

A public hearing and the opportunity for public comment is afforded when the "general permit" is promulgated by the U.S. Environmental Protection Agency (EPA) in the Federal Register, not typically at the time the individual NOI is submitted to the permitting agency by the owner or operator of the construction site.[8]

An active and involved public is crucial to the success of the construction storm water management program. Public hearings are generally recognized as an essential component to sound decision making and to the advancement of democratic ideals. However, it may be argued that a public hearing on an individual NOI and SWPPP is not required by the CWA. This argument ought not be construed as a general argument against public hearings or public participation. Providing a hearing upon filing a NOI may undermine the general permitting scheme by creating an undue administrative burden on the agency issuing construction storm water permits. Nevertheless, in those jurisdictions subscribing to the "functional equivalent" theory, administrative solutions must be found to deal with this requirement.

Any statute, including those that are well drafted and seemingly clear, may lead to a variety of argued-for statutory constructions. This situation is equally true with respect to the functional equivalent theory. Language is inherently a breeding ground for ambiguity. On some occasions, the ambiguity is intentional on the part of Congress, whereas at other times it is not. Oftentimes the varying interpretations or constructions become apparent only after viewed through the lens of creativity.

The proper statutory construction of the meaning of "permit" or "permit application" lies at the heart of the constructional issue that has divided the federal courts.[9] Like most questions of statutory construction, Congress has within its power the ability to settle the controversy by clarifying its intent. Alternatively, the Supreme Court of the United States may be asked to resolve the controversy, which is likely given the division between the federal circuits on the functional equivalent theory. The need for uniformity in administering the CWA, the economic impact of the

402(j) states: "A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction."

8 *See* ABA SECTION OF ENV'T, ENERGY, AND RES., THE CLEAN WATER ACT HANDBOOK 44–47 (Mark A. Ryan ed., 2d ed. 2003).

9 Envtl. Def. Ctr., Inc. v. EPA, 344 F.3d 832, 853, 858 (9th Cir. 2003) (treating the Notice of Intent (NOI) as "functionally equivalent" to a permit or permit application, and thus requiring it to be "available to the public" and "subject to public hearings."); Tex. Indep. Producers and Royalty Owners Ass'n v. EPA, 410 F.3d 964, 978–79 n.13 (7th Cir. 2005), reh'g denied *en banc* Aug. 26, 2005, (rejecting the functional equivalent theory).

theory on the regulated community, and the importance of public participation to the community also provide strong impetus to the need of settling the controversy.

The general goal of regulation is to abate and control the risks to society. The CWA, which is the principal regulatory statute designed to protect society and the integrity of our nation's waters, provides the legal structure for regulating storm water runoff.[10] Regulating discharges to waters of the United States from construction activities is an important chapter in the story of storm water management. But it is only part of the larger story of regulating storm water runoff from other industrial and municipal activities.

The federal National Pollutant Discharge Elimination System (NPDES)[11] of the CWA authorizes[12] the use of "general" permits for construction activities that discharge storm water[13] either directly to waters of the United States or indirectly through a municipal "separate" storm sewer system (MS4).[14] The principal tool or condition contained in the NPDES general storm water permit used to manage such discharges is the SWPPP.[15] The SWPPP identifies the potential sources of pollution that are expected from the construction site, describes the best management practices (BMPs)[16] to be used by the developer to reduce the

10 Clean Water Act § 101(a), 33 U.S.C. § 1251(a) (2000) declares Congress's objective to be "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The other important federal statute dealing with water quality is the Safe Drinking Water Act, 42 U.S.C.A. §§ 300f-300j-9 (West 2003). It directs the EPA to set primary and secondary maximum levels for contaminants in public drinking water systems.

In 1987, the CWA was amended to add specific provisions dealing with the regulation of storm water, which are contained in Section 402(p). Clean Water Act § 402(p), 33 U.S.C. § 1342(p) (2000).

11 Clean Water Act § 402, 33 U.S.C. § 1342 (2000).

12 40 C.F.R. § 122.28(a)(2)(i) (2004); *see also* Clean Water Act § 402(p)(6), 33 U.S.C. § 1342(p)(6) (2000).

13 Storm water is defined in the EPA regulations to include "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13); *see also* 40 C.F.R. § 122.26(b)(14) (dealing with discharges associated with industrial activities).

14 40 C.F.R. § 122.26(b)(8) (2004) (defining the term "separate" as a conveyance system that discharges directly to the receiving water without any pretreatment). In contrast, a combined sewer system conveys sanitary wastewater and storm water through a single set of pipes to a publicly owned treatment works (POTW) for treatment prior to discharge to a receiving water. *Id.*

15 The required content of the SWPPP is described in *NPDES General Permit for Storm Water Discharges from Construction Activities*, at ¶ 3.4 (2005), *available at* http://www.epa.gov/npdes/pubs/cgp2003_entirepermit.pdf (last visited Feb. 11, 2006) [hereinafter NPDES General Permit].

16 A BMP is a technique, process, activity, or structure used to reduce pollutants. It may be nonstructural, such as good housekeeping or simply preventive maintenance, or structural, such as bio-retention swales to promote infiltration. *Storm Water Management for Industrial Activities: Developing Pollution Prevention Plans and Best Management Practices* (EPA) Oct. 1992, at 8.

pollutants, and affirms that the developer will comply with the terms and conditions of the storm water permit.[17]

In regulating the pollutants in storm water discharges from construction sites, general permits, which regulate an entire group or category of similarly situated activities, are the norm throughout the United States.[18] The reason is straightforward: administrative necessity. The number of construction sites subject to the storm water provisions of the CWA is simply too large to be regulated by individually tailored NPDES construction storm water permits. This reality elevates the practical importance of general permits relative to individually issued permits.

The General Permit for Storm Water Discharges from Construction Activities (CGP) is promulgated by the EPA.[19] The CGP has gone through a series of updates and changes since the storm water provisions contained in Section 402(p) of the CWA were added to the law in 1987.[20] The first general storm water permit for construction activities was issued by the EPA in 1992.[21] This was followed by the 1998 CGP.[22] The 2003 CGP,[23] which supersedes the earlier permits and applies both to large and to small construction sites, became effective on July 1, 2003.[24] The CGP does not deal with or authorize post-construction discharges of storm water as these discharges are separately regulated.[25] As discussed later in this article, states may also administer the federal storm water discharge program under an EPA-approved program.[26]

Prior to the commencement of construction, the owner of the building site submits a NOI to be covered by the CGP[27] to the

17 NPDES General Permit, *supra* note 15, at ¶ 3.1.

18 The use of general permits was first suggested to the EPA in response to its attempt to exempt large categories of storm water discharges from NPDES permit requirements. *See, e.g.*, Nat'l Res. Def. Counsel v. Train, 396 F. Supp. 1393**,** 1395, 1401–02 (D.C. 1975), *aff'd*, Nat'l Res. Def. Counsel v. Costle, 568 F.2d 1369 (D.C. Cir. 1977).

19 *See* NPDES General Permit, *supra* note 15.

20 Clean Water Act § 402(p), 33 U.S.C. § 1342(p) (2000).

21 57 Fed. Reg. 41,176 (Sept. 9, 1992). Public comment on the permit was requested in 56 Fed. Reg. 40,948 (Aug. 16, 1991).

22 63 Fed. Reg. 7858 (Feb. 17, 1998) ("The Regional Administrators of Regions 1, 2, 3, 7, 8, 9 and 10 are today issuing final National Pollutant Discharge Elimination System (NPDES) general permits for stormwater discharges associated with construction activity."); 63 Fed. Reg. 36,490 (July 6, 1998) ("Region 6 is issuing the final [NPDES] general permits for stormwater discharges associated with construction activity in Region 6.").

23 NPDES General Permit, *supra* note 15, at ¶ 1.2.

24 68 Fed. Reg. 39,087 (July 1, 2003).

25 NPDES General Permit, *supra* note 15, at ¶ 1.3.C.

26 Clean Water Act § 402(b), 33 U.S.C. § 1342(b) (2000). *See also* discussion *infra* Part V. The Role of the States in Storm Water Regulation.

27 68 Fed. Reg. 39,087, 39,089 (July 1, 2003). The EPA's Construction General Permit also uses the term "operator" to describe the party responsible for complying with its terms. An operator is any party associated with a construction project that meets either

EPA or state-approved agency administering the storm water law with the certification, made under the penalty of law,[28] that the CGP will be implemented.[29] Permitting authorities vary in their treatment of NOIs. Some authorities automatically grant permit coverage upon submittal or receipt of the NOI or after a stipulated waiting period. Other permitting authorities require the operator to wait for confirmation that coverage has been granted.[30] In response to *Environmental Defense Center, Inc. v. EPA,*[31] the EPA "recommends," but does not require, that permitting authorities make NOIs available to the public at least thirty days before authorization to discharge.[32] This recommendation is typical of the "waiting period" approach.

Providing a public hearing for each construction activity seems at odds with the system of general permits. Consequently, a retooling of the current administrative practice is necessary to accommodate the view that the CWA requires a public hearing. Until the law is settled, administrative solutions must be found in those federal judicial circuits that require that a public hearing be provided on NOIs and SWPPPs in order to be able to move forward with regulating construction activities. These solutions must be found in a timely manner because the construction industry is both dynamic and one of the country's largest engines of economic growth. Administrative uncertainty as to the legal mandates adds delay and increased cost to construction projects, which inevitably must be borne by consumers.

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of the following criteria: 1) operational control over the construction plans and specifications, or 2) day-to-day operational control of those activities that are necessary to comply with a SWPPP or other permit conditions. *See* NPDES General Permit, *supra* note 15, at Appendix A-2.

28 *See, e.g.*, EPA, *Notice of Intent (NOI) for Stormwater Discharges Associated with Construction Activity Under a NPDES General* Permit, Form 3510-9 (Rev.6/03), *available at* http://www.epa.gov/compliance/resources/publications/monitoring/inspections/npdesinspect/npdesinspectappt.pdf.

29 *See, e.g.,* NPDES General Permit, *supra* note 15, at ¶ 2.4.

30 EPA National Pollutant Discharge Elimination System (NPDES) Storm Water Program Questions and Answers, **"**What does the submittal of an NOI mean?**"** 4 (January 21, 2004) (on file with author); *see also* NPDES General Permit, *supra* note 15, at ¶ 2.1(B) (authorizing the discharge seven calendar days after acknowledgment of the completed NOI). The EPA has proposed a new 30 day waiting period that begins on the day that the NOI is posted on its e-NOI web site. Proposed 2006 Multi-Sector General Permit, ¶ 3.3, *available at* www.epa.gov/npdes/ pubs/msgp2006_all-proposed.pdf.

31 344 F.3d 832 (9th Cir. 2003), *cert. denied*, Tex. Cities Coal. on Stormwater v. EPA, 541 U.S. 1085 (2004). The Phase II Rule was challenged in separate actions in the Fifth, Ninth, and D.C. Circuits, which were subsequently consolidated before the Ninth Circuit. *Id.* at 843.

32 Memorandum, "Implementing the Partial Remand of the Stormwater Phase II Regulations Regarding Notices of Intent & NPDES General Permitting for Phase II MS4s," dated April 16, 2006, from James A. Hanlon, Director, EPA Office of Wastewater Management to Water Management Division Directors, Regions I-X, *available at* http://www.epa.gov/npdes/pubs/hanlonphase2apr14signed.pdf (last visited Feb. 19, 2006) [hereinafter Hanlon, Memorandum].

Another reason why timely resolution is essential involves enforcement. If the issuance of the general permit is legally challengeable for the noncompliance with the public hearing requirement, litigation under the citizen suit provisions of the CWA is predictable.[33] Future EPA and state administrative enforcement practices also are potentially affected. Regulatory enforcement against storm water violators assumes a validly issued permit. The failure to provide a "required" public hearing on NOIs and SWPPPs squarely challenges the validity of this assumption.

II. INDUSTRY COMPLIANCE AND ENFORCEMENT

Failure to comply with the provisions of the CWA applicable to storm water management may trigger significant civil[34] and criminal sanctions.[35] The potential application of these sanctions to violators provides regulators with the necessary regulatory hammer to assure compliance with the law. This regulatory hammer is increasingly being used.

Industry compliance with the construction storm water regulations has been slow. The EPA estimated construction activities exceed 62,000 starts per year, but that fewer than 20,000 construction sites applied for storm water coverage in 1999.[36] States also recognized the compliance problem. In California, for example, the legislature acted by requiring Regional Water Boards to annually identify dischargers who had not obtained coverage under an appropriate storm water permit.[37] Non-filers were recognized as a serious compliance problem, but they were not the only concern: many builders who applied for industrial storm water permits were also found to be in non-compliance with their submitted NOI.[38] Additional regulatory action to assure compliance with the mandates of the CWA was needed. As a result, the EPA has increased its enforcement focus on development and

33 Clean Water Act § 505, 33 U.S.C. § 1365 (2000).

34 Clean Water Act § 309(d), 33 U.S.C. § 1319(d) (2000) (Any person who violates any section of this Title or any order issued by the Administrator shall be subject to a civil penalty not to exceed $25,000 *per day* for each violation.).

35 Clean Water Act § 309(c), 33 U.S.C. § 1319(c) (2000). For example, a criminal fine in the amount of $600,000 for industrial runoff from a collection pit to the Los Angeles and San Gabriel Rivers was imposed on a Southern California soft drink bottler, 7-Up/RC Bottling. Wendy Thermos, *Bottler to Pay $1 Million for Pollution of 2 Rivers; Runoff was harmful to humans and marine life*, L.A. TIMES, Nov. 11, 2005, at B5.

36 Memorandum from Walker B. Smith, Director, EPA Office of Regulatory Enforcement, 2003 Storm Water Compliance and Enforcement Strategy, at 12 (Aug. 14, 2003), *available at* http://www.epa.gov/compliance/resources/policies/civil/cwa/stwenf strategy2003.pdf [hereinafter Memorandum from Walker B. Smith].

37 CAL. WATER CODE § 13399.30(a)(1).

38 Memorandum from Walker B. Smith, *supra* note 36, at 1.

construction activities.[39]

Storm water regulation of these activities has been identified as an EPA enforcement priority, with particular attention on large-scale developers exhibiting a corporate-wide pattern of non-compliance.[40] Commercial developers of "big-box" stores and large national residential builders[41] are currently high profile enforcement targets.[42] The building industry is now in the enforcement cross hairs of the EPA and state regulators.

The EPA has initiated numerous enforcement actions seeking millions of dollars in civil penalties from developers and builders for failing either to secure a storm water permit, so-called non-filers, or for failing to comply with its terms. In 2004, for example, the U.S. Department of Justice and the EPA, along with the U.S. Attorney's Office for the District of Delaware, and the states of Tennessee and Utah reached a settlement for storm water discharge violations at Wal-Mart store construction sites across the country.[43] According to the factual allegations in the EPA's complaint, Wal-Mart constructs more than one hundred Wal-Mart, Wal-Mart Supercenter and Sam's Club stores per year.[44] As a result of this enforcement action, Wal-Mart agreed to pay a $3.1 million civil penalty and to reduce storm water run-off at its sites by instituting better control measures.[45]

States are also actively pursuing construction storm water violations. In 2005, the San Diego Regional Water Board issued a $1.2 million administrative civil liability complaint[46] to JRMC

39 *Region 4 Continues Systematic Enforcement of Storm Water Violations* (American Bar Ass'n Envt'l. Crimes & Enforcement Comm.), Oct. 2004, at 19. *See also* Memorandum Eric V. Schaeffer, Director, Office of Regulatory Enforcement to Water Management Division Directors Regions I-X (Jan. 18, 2000), *available at* http://www.epa.gov/compliance/resources/policies/civil/cwa/stmwtrstra.pdf.

40 Rafe Petersen, *Regulation of Stormwater Pollution: An Area of Increasing Importance to the Construction Industry*, 19 PROB. & PROP. 45 (2005); s*ee generally* Memorandum from Walker B. Smith, *supra* note 36, at 3.

41 United States v. Wal-Mart Stores, Inc., No. 04-301 (D. Del. Oct. 14, 2004) (order requiring all parties to submit further explanations as to why the court should approve consent decree).

42 *Id*.

43 Consent Decree, United States v. Wal-Mart Stores, Inc. (D. Del. 2004), *available at* http://www.epa.gov/compliance/resources/decrees/civil/cwa/walmart2-cd.pdf.

44 Complaint at ¶ 24, United States v. Wal-Mart Stores, Inc., *available at* http://cfpub.epa.gov/compliance/cases/ (Search: Wal-Mart II Storm Water Settlement).

45 Consent Decree, United States v. Wal-Mart Stores, Inc., *supra* note 43. This settlement was the second enforcement action resulting in a settlement with Wal-Mart for violations of the Clean Water Act. In 2001, Wal-Mart and several contractors entered into a settlement with the U.S. to address storm water violations at 17 sites in several states. The 2001 settlement included a penalty of $1 million and required Wal-Mart to develop a storm water training program for its contractors and to inspect and oversee storm water controls at construction sites. Complaint at ¶¶ 22–23, United States v. Wal-Mart Stores, Inc., *supra* note 44.

46 Complaint, No. R9-2005-0059 (Mar. 10, 2005); *see also* the 2005 news report on the

Real Estate, Inc. for alleged violations at the 186-acre Escondido Research and Technology Center (ERTC) construction site in Escondido, California.[47] The complaint alleged ongoing violations of the California Construction Storm Water Permit (CCSWP),[48]

> including: 82 days of sediment discharge to Escondido Creek directly or indirectly via the City of Escondido's Municipal Separate Storm Sewer System (MS4), 166 days of inadequately installed Best Management Practices (BMPs), at least 16 days of failure to collect and analyze storm water runoff and to submit monitoring reports, and failure to assess BMPs after storm events.[49]

III. THE CONSTRUCTION INDUSTRY AND WATER QUALITY

In late August of 2005, Hurricane Katrina devastated a portion of the coastal region of Louisiana, Mississippi, and Alabama that President Bush estimated to be larger than the size of Great Britain.[50] Several weeks later, Hurricane Rita slammed into Texas and Louisiana creating further havoc in the region.[51] The combined effects from these storm events have been immense in terms of human life, personal suffering, and economic loss.[52] Repairing the damage to the public infrastructure from these hurricanes will take years, and many parts of the coastal region will never be the same.

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developers of a 1,000-acre subdivision paying a $575,000 fine for violations of California storm water regulations, SACRAMENTO BEE (Sacramento, CA) *available at* http://www.sacbee.com/content/news/story/13737215p-14579232c/.

47 *See* SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD, EXECUTIVE OFFICER'S REPORT 9 (May 11, 2005), *available at* http://www.swrcb.ca.gov/rwqcb9/eo_report/reports/5-11-05%20eo.pdf.

48 Complaint, No. R9-2005-0059, *supra* note 46; National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated with Construction Activity (General Permit), Water Quality Order No. 99-08-DWQ. The CCSWP, part of Order No. 99-08-DWQ, is NPDES Permit No. CAS000002, "Waste Discharge Requirements (WDRS) for Discharges of Storm Water Runoff Associated with Construction Activity," *available at* http://www.swrcb.ca.gov/stormwtr/docs/finalconstpermit.pdf [hereinafter Order No. 99-08]. Revisions to Order 99-08 are currently being considered, and a revised storm water order is expected in 2007.

49 SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD, *supra* note 47.

50 Hurricane Katrina first made landfall just north of Miami, Florida on August 25, 2005, then again on August 29 along the Central Gulf Coast near New Orleans, Louisiana. To date, Katrina is considered the most destructive and costliest natural disaster in the history of the United States. *See* Wikipedia, *Hurricane Katrina*, http://en.wikipedia.org/wiki/Hurricane_Katrina (last visited Feb. 11, 2006); s*ee also* BBC News, *Bush Boosts Katrina Rescue Force: An Extra 17,000 Troops are Being Sent Into the Area of the Southern US Devastated by Hurricane Katrina*, Sept. 4, 2005, http://news.bbc.co.uk/2/hi/americas/4211528.stm.

51 Hurricane Rita first struck Florida, and then went on to strike Texas and Louisiana. "A day prior to landfall, the resultant storm surge also reopened some of the levee breaches caused by Hurricane Katrina a month earlier, and reflooded parts of New Orleans. Post-landfall damage was extensive in the coastal areas in southwestern Louisiana and extreme southeastern Texas." *See* Wikipedia, *Hurricane Rita*, http://en.wikipedia.org/wiki/Hurricane_Rita (last visited Feb. 11, 2006).

52 *Id*.

Extreme weather events provide important lessons about flood control management and coping with natural disasters. At the less extreme end of the weather spectrum, these storm events should also focus attention on the importance of effective storm water planning and management.[53]

These hurricanes are contemporary reminders of the importance of clean water as a basic human need, one that is also essential to the nation's health, economy, security, and ecology. A fundamental thesis can be advanced. Clean water is critical to human health and welfare, to preserving habitat and ecological diversity, and to insuring viable populations of wildlife and aquatic life. A corollary to this thesis is that controlling the pollution in storm water runoff is often directly linked to clean water. Unless effectively regulated, storm water runoff from construction activities has the potential to contaminate and degrade the nation's waters—our streams, creeks, lakes, reservoirs, and coastal waters.

The relationship between construction activities and water quality is important to understanding storm water regulation. Both the 2003 Pew Oceans Commission[54] and the 2004 U.S. Commission on Ocean Policy[55] documented serious declines in the health of oceans and coastal areas, the severe degradation of natural resources that depend on healthy oceans and coastal areas, and the threat to economic activities based on these resources.[56] The Pew Report recognized that runoff is a major component of this threat to our oceans.[57] Runoff from general development activities in our coastal regions is causing the decline of ocean wildlife and the collapse of ocean ecosystems.[58] The Pew Report, for example, cites estimates that the oil running off our streets and driveways and flowing into the oceans from storm water is equal to an Exxon Valdez oil spill every eight months.[59] The Commission also reports that "more than 13,000

53 *See, e.g.,* Carol Brzozowski, *Hurricanes: The Effects on Stormwater Management*, STORMWATER: THE JOURNAL FOR SURFACE WATER QUALITY PROFESSIONALS 9 (Mar./Apr. 2005), *available at* www.stormh2o.com/sw_0503_hurricanes.html.

54 PEW OCEANS COMMISSION, AMERICA'S LIVING OCEANS: CHARTING A COURSE FOR SEA CHANGE, (May 2003), *available at* http://www.pewoceans.org [hereinafter AMERICA'S LIVING OCEANS].

55 U.S. COMMISSION ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY (Jul. 22, 2004), *available at* http://www.oceancommission.gov/documents/full_color_rpt/000_ocean_full_report.pdf [hereinafter OCEAN BLUEPRINT].

56 AMERICA'S LIVING OCEANS, *supra* note 54, at v; OCEAN BLUEPRINT, *supra* note 55, at 1.

57 AMERICA'S LIVING OCEANS, *supra* note 54 at vi.

58 *Id.*

59 *Id.* In 1989, the grounding of the ship Exxon Valdez caused the release of over 11 million gallons of oil in Alaska's water and polluted some 1200 miles of shoreline. Largely in response to this event, Congress enacted the Oil Pollution Act of 1990 (OPA), which

beaches were closed or under pollution advisories in 2001 [from runoff,] an increase of 20 percent from the [previous year]."[60] The U.S. Commission Report also observes that increased development increases sediment flows and contributes to coastal water pollution.[61]

States have also recognized runoff as a major source of impaired water quality.[62] Every state and every major watershed in the United States is under similar assault from unregulated or under-regulated sources of runoff.[63] In northern Wisconsin, the runoff assault is from dairy farms, in North Carolina, it is from hogs, and in Oregon, it is from clear-cutting of forests.[64] Housing and urban development also contribute to the runoff problem in many watersheds throughout the nation.[65] The California legislature has stated that unregulated storm water runoff is a leading cause of contamination of its surface water and groundwater.[66]

In the *National Water Quality Inventory: 2000 Report*[67] to Congress, the EPA cites urban storm water runoff and discharges from storm sewers as primary causes of impaired water quality.[68] The *2000 Report* notes that "[t]hese sources contributed to 13 percent of impaired rivers and streams, 18 percent of impaired lakes, 55 percent of impaired ocean shorelines, and 32 percent of impaired estuaries." [69] Little doubt exists as to the connection

contains nine separate titles ranging from general provisions regarding oil pollution down to specific requirements. 33 U.S.C.A. §§ 2701–2761 (West 2001).

The U.S. Environmental Protection Agency estimates that American households generate 193 million gallons of used oil annually, some of which is improperly disposed of. It estimates that households improperly dump the equivalent of 17 Exxon Valdez oil spills each year. *See* EPA, *Featured Story: Stormwater Runoff*, *available at* http://www.epa.gov/Region9/water/npdes/stormwater-feature.html (last visited Feb. 24, 2006).

60 AMERICA'S LIVING OCEANS, *supra* note 54, at 4.

61 OCEAN BLUEPRINT, *supra* note 55, at 14–15.

62 *See, e.g.,* OLIVER A. HOUCK, THE CLEAN WATER ACT TMDL PROGRAM: LAW, POLICY AND IMPLEMENTATION 4 (Envtl. Law Inst., 2d ed. 2002).

63 *Id*. Basing regulation on watershed principles is further complicated by the fact that political boundaries and administrative institutions typically do not follow the natural topographical configuration of watersheds. In California, for example, "the average . . . county includes portions of six different watersheds." John T. Woolley et al., *The California Watershed Movement: Science and the Politics of Place*, 42 NAT. RESOURCES J. 133, 136 (2002).

64 HOUCK, *supra* note 62.

65 *Id.*

66 *See* STATE WATER RESOURCES CONTROL BOARDS & REGIONAL WATER QUALITY CONTROL BOARDS, STRATEGIC PLAN 7 (Nov. 15, 2001), *available at* http://www.waterboards.ca.gov/strategicplan/docs/01strategic_plan.pdf.

67 National Water Quality Inventory: 2000 Report (EPA Aug. 2002), *available at* http://www.epa.gov/305b/2000report/.

68 *Id.* at ES-3; EPA, United States v. Wal-Mart Stores, Inc. Fact Sheet, at 3 (May 12, 2004) (printed as revised Dec. 28, 2004), *available at* http://www.epa.gov/compliance/resources/cases/civil/cwa/walmart2-fs.pdf.

69 EPA, U.S. v. Wal-Mart Stores, Inc. Fact Sheet, *supra* note 68, at 3.

between storm water runoff and water quality.

The EPA maintains that uncontrolled storm water runoff from industrial facilities and construction sites harms both the environment and public health.[70] The EPA argues that "[s]everal studies reveal that storm water runoff from urban areas can include a variety of pollutants, such as sediment, bacteria, organic nutrients, hydrocarbons, metals, oil and grease."[71]

While the links between construction activities, storm water runoff, and impaired water quality seem well established, the construction industry argues that a more nuanced analysis is important to considering water quality priorities.[72] It argues that the EPA's position on the role of the construction industry confuses the categories of sources contributing to the storm water runoff problem.[73] The industry maintains that the category of "'urban runoff and storm sewers,'" which is the focus of much of the policy and priority discussion by the EPA, is entirely different from the category of "'storm water runoff from industrial and construction sites.'"[74] It contends that the admittedly dangerous content of urban runoff, which often includes "pathogens, oil and grease, and metals are seldom found in storm water runoff from construction sites."[75]

The construction industry seeks to buttress its claim that the EPA is firing at the wrong target by citing the EPA's own research. This research reveals that

> [c]onstruction activities during site development are not believed to be major contributors of these contaminants [oil and grease] to storm water runoff. Improper operation and maintenance of construction equipment at construction sites, as well as poor housekeeping practices (e.g., improper storage of oil and gasoline products), could lead to leakage or spillage of products that contain hydrocarbons, but these incidents would likely be small in magnitude and managed before off-site contamination could occur.[76]

In short, the building industry complains that often repeated generalizations about the runoff problem are misdirected against the construction industry, and that the scientific links between construction activities and the urban runoff, and the storm water

70 *Id.* at 2–4.

71 *Id.* at 2.

72 *See, e.g.,* letter from Gerald M. Howard, Executive Vice President & CEO, National Association of Home Builders, to Information Quality Guidelines Staff (July 9, 2004), at 3.

73 *Id.*

74 *Id.* (internal citations omitted).

75 *Id.* at 3–4.

76 EPA, *Environmental Assessment of Construction and Development Proposed Effluent Guidelines* (June 2002), at 2–11.

problem are substantially missing.[77] From the building industry's perspective, the bottom line is clear: "[i]f [the] EPA intends to continue to single out residential builders for enforcement attention, [the] EPA will need to provide a different justification."[78]

However, additional justifications for focusing on the construction industry do exist to support the mandate for regulatory action. Oftentimes, the first activity undertaken at a construction site involves preparing the land by removing unnecessary vegetation and grading.[79] This means that the exposed soil is highly susceptible to erosion from storm events. Additional construction activities typically follow that reduce the permeability of the soil to naturally absorb precipitation, such as building roads and sidewalks. Thus, and perhaps not surprisingly, erosion and sediment transfer to rivers, streams, and other receiving waters during and after construction is a well documented phenomenon affecting water quality.[80]

The water quality problems from erosion include increased turbidity, which results in the blockage of light as well as decreased oxygen, in the receiving waters.[81] This condition may result "in loss of in-stream habitat for fish and other aquatic species" and plants.[82] In addition, sediment-laden runoff carried to the receiving waters can "kill fish directly, destroy spawning beds, and suffocate fish eggs and bottom dwelling organisms."[83] Sediment discharges from construction sites to MS4 conveyance systems also have the potential to clog pipes and pumps, and impair the systems' effectiveness.

Most construction activities also alter the natural landscape through compaction and excavation.[84] These necessary building activities also increase the potential for runoff and erosion from construction sites, thus increasing the potential for sediment transport to the receiving waters.[85] In California, the State Wa-

77 Letter from Gerald M. Howard, *supra* note 72, at 8.

78 *Id.* at 11.

79 40 C.F.R § 122.26(15)(i) states that storm water discharges from "small construction activity does not include routine [road] maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility." *Id.* To the extent that road construction and maintenance involves the development of the land for agricultural activities, it may be exempt by exclusion from the definition of a PS. Clean Water Act § 502(14), 33 U.S.C. § 1362(14) (2000) (defining point source, or PS). *See also*, 63 Fed. Reg. 7858, 7876 (Feb. 17, 1998) (neither agricultural runoff nor development of land for agricultural purposes are regulated by the NPDES program).

80 *See, e.g.,* National Water Quality Inventory: 2000 Report*, supra* note 67, at Table A-4 (providing data from various locations, including site-specific data).

81 EPA, U.S. v. Wal-Mart Stores, Inc. Fact Sheet, *supra* note 68, at 3.

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.*

ter Board has found that construction activities[86] are a potential significant source of pollutants and have the reasonable potential to contribute to an excursion above the Water Quality Standards (WQSs)[87] for sediment.[88]

The movement of trucks and heavy construction equipment also can "track" soil to adjacent streets in much the same way that dirt and mud can be "tracked" into a house from outside during and after rain events unless preventive steps are taken. To the extent that pollutants other than sediment[89] are physically present, such as construction debris and other building-related detritus, they also may be carried off the site to the receiving waters by the storm water flows unless effectively controlled.[90]

Notwithstanding the protests from the building industry, the focus on the construction industry is appropriate for another reason. Many of the enforcement claims against the construction industry are for failing to file for NPDES permits as required by the CWA.[91] In these cases, the appropriateness of the focus is straightforward. The CWA requires that action be taken against such non-filers.[92] In addition, storm water source control and pollution prevention, as distinguished from remediating the water quality impairment after the fact, is desirable as a matter of public policy. The public benefits of prevention and control are only available after non-filers are brought within the regulatory framework of the NPDES storm water permitting program.

Once a construction company files a NOI, the next regulatory challenge becomes assuring compliance with the CGP requirements. This assurance normally is accomplished through inspection and, if necessary, enforcement. Regulatory enforcement actions challenging the adequacy of the BMPs employed at a

86 Typical construction activities with the potential to produce off-site sediment transfers include, for example, exposed soil areas, active grading areas, poorly stabilized slopes, the lack of perimeter controls, areas of concentrated flow to unprotected soils, and unprotected soil stockpiles. Order No. 99-08, *supra* note 48.

87 The CWA provides for WQSs and associated implementation plans. Clean Water Act § 303, 33 U.S.C. § 1313 (2000).

88 Order No. 99-08, *Water Discharge Requirements* (General Permit), at ¶ 8 (1999), *available at* http://www.swrcb.ca.gov/stormwtr/construction.html.

89 The Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (Jan. 11, 2002), which amended the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), encourages the development of contaminated commercial property. A "brownfield" is "real property the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." CERCLA § 101(39)(A), 42 U.S.C. § 9601(39)(A) (2000). Storm water runoff from "brownfield" re-development raises special concerns beyond sediment transfers.

90 U.S. v. Wal-Mart Stores, Inc. Fact Sheet, *supra* note 68, at 3.

91 Petersen, *supra* note 40, at 46.

92 Clean Water Act § 402(b)(7), 33 U.S.C. § 1342(b)(7) (2000).

particular construction site by an owner or operator often involve some degree of regulatory discretion in determining compliance.[93] But as the following photographs attest, some violations can be clearly identified.

Sediment from construction site to unnamed tributary of Santa Gertrudis Creek. Roripaugh Ranch Project, Riverside County, California, March 17, 2003.[94]

Storm drain inlet is not protected by adequate BMPs to prevent sediment from entering the storm drain. Pulte Homes Construction site, Eastlake, California,

93 Petersen, *supra* note 40, at 46. "The magnitude of this interpretation of a permit violation is seen when one considers that a large site may have hundreds of different BMPs in place." *Id.* at 47.

94 Source on file with author.

February 3, 2004.[95]

IV. THE CONSTRUCTION INDUSTRY AND CLEAN WATER ACT (CWA) STORM WATER REGULATION

The discretion invested in regulatory agencies to regulate the storm water discharges from construction activities requires an understanding of the structure of the CWA. The CWA provides that the "discharge"[96] of any "pollutant"[97] into "navigable waters"[98] from a "point source" (PS)[99] is unlawful unless it is in compliance with an NPDES permit.[100] These four touchstones (discharge, pollutant, navigable waters, and point source) are prerequisites to the application of the NPDES Program.[101] However, an important statutory exemption from the definition of PS

95 Source on file with author.

96 Clean Water Act § 502(12), 33 U.S.C. § 1362 (12) (2000) ("The term 'discharge of a pollutant' and the term 'discharge of pollutants' each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.").

97 The term "pollutant" is broadly defined in Clean Water Act § 502(6), 33 U.S.C. § 1362(6) (2000) ("The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.").

98 The constitutional basis for the Clean Water Act is the Commerce Clause. U.S. Const. Art. I, § 8. For much of the nation's history, Congress believed the commerce power applied only to navigable waters. Congress used this traditional touchstone in the CWA, but also stretched the meaning of "navigable waters." Thus, as used in the CWA the term "navigable waters" broadly "means the waters of the United States, including the territorial seas." Clean Water Act § 502(7), 33 U.S.C. § 1362(7) (2000). The term "navigable waters" has been broadly applied to "waters" that are not traditionally navigable. *See e.g.*, United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123–24 (1985) (holding that wetlands adjacent to navigable waters are subject to CWA jurisdiction).

Determining the precise boundaries of the meaning of the term "navigable waters" for jurisdictional purposes has proven illusive as evidenced by the varying interpretations of the meaning and application of the decision in *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers*. 531 U.S. 159 (2001). In 2006, the Supreme Court will hear two cases from the Sixth Circuit involving the touchstone of "navigable waters" and its application to wetlands. Carabell v. United States Army Corps of Engineers, 391 F.3d 704 (6th Cir. 2004), *cert. granted* Carabell v. United States Army Corps of Engineers, 126 S. Ct. 415 (2005) and United States v. Rapanos, 376 F.3d 629 (6th Cir. 2004), *cert. granted* Rapanos v. United States, 126 S. Ct. 414 (2005). The *Rapanos* case describes the varying interpretations of the SWANCC decision by the federal appellate courts. *Id.* at 638. The Supreme Court decisions in *Carabell* and *Rapanos* are apt to have important consequences to the building industry because the discharge of storm water to navigable waters is a prerequisite to the assertion of jurisdiction under the CWA.

99 Clean Water Act § 502(14), 33 U.S.C. § 1362(14) (2000) ("The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.").

100 Clean Water Act § 301(a), 33 U.S.C. § 1311 (2000).

101 Clean Water Act § 402, 33 U.S.C. § 1342 (2000) (describing the NPDES system).

exists for agricultural storm water discharges.[102]

In 1987, CWA Section 402(p) expressly designated storm sewer discharges to navigable waters as "point sources."[103] As a result, both MS4 and industrial storm water dischargers were expressly identified as being subject to the NPDES permit program requirements of the CWA.[104] This addition to the law was an important step in storm water regulation.

The EPA has defined storm water discharges associated with industrial activity in a comprehensive manner. The definition includes the addition of any pollutant from any system used for collecting and conveying storm water within eleven industrial categories.[105] Construction activities, subject to some statutory exceptions,[106] are subject to the industrial storm water permitting requirements of Section 402(p).[107] The most recent set of federal regulations, which went into effect in 2003, expanded the scope of coverage to construction activities that disturb from one to five acres.[108] Construction activities disturbing five acres or more were regulated prior to 2003.[109]

A NPDES permit contains various standard conditions, such as those relating to monitoring and reporting.[110] One of the most important permit conditions relates to the "effluent limita-

102 Clean Water Act § 502(14), 33 U.S.C. § 1362(14) (2000). The application of the agricultural exemption to runoff has created controversy. The EPA has narrowly construed this storm water exclusion to apply to the runoff from land applications of fertilizers only to the extent that the application is in accordance with proper agricultural practices. 66 Fed. Reg. 2960, 3029–30 (Jan. 12, 2001). *See also* Concerned Area Residents for the Env't v. Southview Farm, 34 F.3d 114 (2d Cir. 1994) (holding that runoff during a rain event from a Concentrated Animal Feeding Operation (CAFO) that was primarily caused by the excessive application of liquid manure to the land may violate the CWA notwithstanding the storm water exemption). This decision by the EPA applies to CAFOs which are included within the statutory definition of PS. Clean Water Act § 502(14), 33 U.S.C. § 1362(14) (2000) (identifying a CAFO as a point source).

In California, the term "waste discharge requirements" is the equivalent of the term "permits" as used in the CWA. CAL. WATER CODE § 13374. While federal law contains a general exemption for agricultural activities that do not fit within the CAFO category, state law may not be as generous. The California Water Code, for example, provides that anyone discharging or proposing to discharge waste that could affect water quality must file a Report of Waste Discharge (ROWD). CAL. WATER CODE § 13260. Unlike federal law, no automatic exemption from this requirement exists. Thus, a ROWD is required under state law for irrigation return flows and storm water runoff from agricultural lands unless a waiver is granted under the provisions contained in Water Code § 13269.

103 Clean Water Act § 402(p), 33 U.S.C. § 1342(p) (2000).

104 Clean Water Act § 402(p)(3)(A)-(B), 33 U.S.C. § 1342(p)(3)(A)-(B) (2000).

105 40 C.F.R. §§ 122.26(b)(14)(i)-(xi) (2004).

106 Clean Water Act § 402(l), 33 U.S.C. § 1342(l) (2000).

107 Clean Water Act § 402(p).

108 Small construction activities may apply for a waiver from the NPDES permitting requirements contained in the General Permit. NPDES General Permit, *supra* note 15 Construction Activities, at ¶1.4, Appendix D.

109 40 C.F.R. § 122 (2003).

110 *See* NPDES General Permit, *supra* note 15, at ¶¶ 4.3, 9(A)(1)(d).

tion" on the quantities or concentrations of pollutants that can be legally discharged pursuant to Section 301.[111] The term "effluent limitation" is broadly defined, and encompasses "any restriction . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters" of the United States.[112]

Two types of effluent limitation exist and operate in tandem. One type is prescribed by the EPA using nationally uniform, technology-based requirements.[113] When a technology-based effluent limitation has not been promulgated, which is the situation with respect to construction storm water regulation, the permitting authority must use its best professional judgment (BPJ) in formulating the effluent limitation.[114] The other type is a water quality-based effluent limitation (WQBEL) derived from the impact of the discharge on the receiving water.[115] Congress recognized that both types of limitation were necessary because meeting technology-based standards at a point of discharge was no guarantee that the water quality in the receiving water would not degrade below acceptable levels.[116] Technology-based requirements do not consider cumulative impacts of a discharge on the receiving water, whereas WQBELs do.[117]

Technology-based limitations, which are derived from technological and economic considerations for particular discharge categories,[118] are based on the pollution reducing performance achieved by using established pollution control technologies.[119] As a general matter, technology-based limitations, which vary by the nature of the pollutant being discharged, are commonly ex-

111 Clean Water Act § 301, 33 U.S.C. § 1311 (2000).

112 Clean Water Act § 502(11), 33 U.S.C. § 1362(11) (2000).

113 Clean Water Act §§ 301(b)(1)(A), (2)(A), 33 U.S.C. § 1311(b)(1)(A), (2)(A) (2000). The EPA is responsible for establishing effluent limitations for various types of point sources based on what the available technology could accomplish. This approach avoids the technical difficulty of evaluating individual effluent limits for discharges. JAMES SALZMAN AND BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY 129 (2003).

114 *See* Clean Water Act § 402(a)(1)(B) (The Administrator may issue a permit after an entity meets "such conditions as the Administrator determines are necessary to carry out the provisions of this Act."), 33 U.S.C. § 1342(a)(1)(B) (2000); *see also* 40 C.F.R. § 125.3(d) (2004) (listing factors that the permit writer must consider in setting case-by-case limitations).

115 *See* Clean Water Act § 301, 33 U.S.C. § 1311 (2000).

116 *See* EPA v. State Water Res. Control Bd., 426 U.S. 200, 205 n.12 (1976).

117 *See* Clean Water Act § 304(b)(4)(B), 33 U.S.C. § 1314(b)(4)(B) (2000).

118 *See* E. I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 128 (1977) (holding, among other things, that effluent limitations for existing plant sources for 1977 and 1983 are to be set by regulation with some allowances "made for variations in individual plants," but not solely on an individual basis during the permit issuance process).

119 *See* Clean Water Act § 301(b), 33 U.S.C. § 1311(b) (2000); *see also* 40 C.F.R. § 122.44 (2004).

pressed in numeric or narrative terms.[120] As one might expect, a numeric criterion establishes a quantitative limitation on pollutant concentrations or levels, whereas a narrative criterion is a descriptive, non-numeric limitation.[121]

The relevant technology used to determine a technology-based limitation depends on whether the discharged pollutant is classified as "toxic,"[122] "conventional,"[123] or "nonconventional."[124] Once the effluent limitation is determined for the type of pollutant based on the appropriate technology, such as Best Available Technology (BAT), the PS discharger may comply with the effluent limitation in whatever way it chooses.[125] The particular technology employed is left to the discretion of the discharger.[126]

This approach to determining an effluent limitation or compliance standard is considered "performance-based" because the EPA or state regulatory agency is concerned solely with performance, and not with the specific processes or management techniques employed by the discharger to meet the effluent limitation.[127] In fact, prescriptive performance methods, such as specifying the process or technique, may be precluded.[128]

In contrast, WQBELs[129] are based on the amount of pollutants allowed in a defined receiving water body[130] after taking into

120 BMPs may be used when "[a]uthorized under section 402(p) of the CWA for the control of storm water discharges [or when] [n]umeric effluent limitations are infeasible." 40 C.F.R. § 122.44(k)(2)-(3) (2004). The EPA recently decided against adopting effluent limitation guidelines for storm water discharges associated with construction activity, and instead decided to rely on "existing programs, regulations, and initiatives at the Federal, State, and local level." 40 C.F.R § 450 (2004).

The issue of whether direct discharges of toxic pollutants from non-construction, industrial storm water activities is subject to numeric limitations is currently on appeal before the California Court of Appeal for the Fourth Appellate District in Divers' Envtl. Conservation Org. v. State Water Res. Control Bd., San Diego Superior Court, Case No. GIC819689 (case no. D046112) (2005).

121 *See, e.g.,* 40 C.F.R. § 131.3(b) (2004).

122 Clean Water Act § 307(a)(1), 33 U.S.C. § 1317(a)(1) (2000) (referring to a list of toxic pollutants subject to the CWA).

123 Clean Water Act § 304(a)(4), 33 U.S.C. § 1314(a)(4) (2000) (conventional pollutants are pollutants that include, but are not limited to "pollutants classified as biological oxygen demanding, suspended solids, fecal coliform, and pH.").

124 Clean Water Act § 301(g)(4)(B)(iv), 33 U.S.C. § 1311(g)(4)(B)(iv) (2000) (Pollutants that are not specifically classified as "toxic" or "conventional" are considered "nonconventional.").

125 *See* Clean Water Act §§ 301(b)(2)(A), 307(a)(2), 33 U.S.C. §§ 1311(b)(2)(A), 1317(a)(2) (2000).

126 *See* Clean Water Act § 301(b)(2)(A), 33 U.S.C. § 1311(b)(2)(A).

127 Clean Water Act § 306(a)(1), 33 U.S.C. § 1316(a)(1) (2000).

128 CAL. WATER CODE § 13360 (2005) (prohibits waste discharge requirements from specifying the "design, location, type of construction, or particular manner" of compliance).

129 *See* Clean Water Act § 303(e)(3)(A), 33 U.S.C. § 1313(e)(3)(A) (2000).

130 *See* Clean Water Act § 303(d), 33 U.S.C. § 1313(d) (2000) (establishing states' roles in determining water quality standards).

account the beneficial uses of the receiving water and its assimilative pollutant capacity.[131] They are calculated based on the impact of the waste discharge.[132] Water Quality Standards (WQSs)[133] serve as a general baseline for deriving WQBELs.[134]

WQSs also serve an additional function beyond their connection to WQBELs. The CWA requires states to identify all water bodies for which technology-based effluent limitations are insufficient to meet WQSs.[135] Thus, WQSs also provide the baseline for remedial action under the Total Maximum Daily Load (TMDL) program.[136] The connection between WQSs and TMDLs is relevant to construction activities because sediment is a commonly recognized pollutant that has triggered Section 303(d), TMDL listings.[137]

WQBELs are established at levels designed to ensure that WQSs are not exceeded in the receiving water.[138] One of the factors in determining a WQBEL is the extent to which the assimilative capacity of the receiving waters will be allowed.[139] If a WQBEL is calculated without any allowance for assimilative capacity of the receiving waters, a discharge in excess of the WQBEL would constitute a permit violation without exceeding the WQS. Thus, the often repeated statement that "simply put, WQBEL's implement [WQSs]" [140] is potentially misleading.

The timing and variability of the pollutants in storm water discharges present a different set of concerns than those associated with a typical steady-state discharge common to many industrial wastewater discharges. Construction activities are both

131 *See* Clean Water Act § 304(b), 33 U.S.C. § 1314(b) (2000).

132 Clean Water Act § 102(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A) (2000) (mandating that state planning agencies establish a comprehensive pollution control plan).

133 In California, WQSs are established through regional water quality control management plans, commonly known as basin plans, which are adopted by the appropriate Regional Water Board after a public hearing. CAL. WATER CODE §§ 13240, 13244. Basin plans become effective upon approval by the State Water Board. CAL. WATER CODE § 13245.

134 *See* Arkansas v. Oklahoma, 503 U.S. 91, 106 (1992) (holding that the EPA's requirement that NPDES dischargers must comply with downstream states' WQS was a reasonable exercise of the agency's statutory discretion).

135 Clean Water Act § 303(d)(1)(A), 33 U.S.C. § 1313(d)(1)(A) (2000); *see also* 40 C.F.R. § 130(h) (2004).

136 Clean Water Act § 303(d), 33 U.S.C. § 1313(d) (2000). A TMDL is a written, quantitative plan and analysis for attaining and maintaining WQS for a specific body of water and pollutant. 40 C.F.R. § 130.2(i) (2005).

137 Water bodies listed under Section 303(d) for sediment are identified in Order No. 99-08, *supra* note 48, at Attachment 3, *available at* http://www.swrcb.ca.gov/stormwtr/construction.html (last visited Feb. 12, 2006).

138 *See* Clean Water Act § 303(d)(1), 33 U.S.C. § 1313(d)(1) (2000).

139 Clean Water Act § 303(d)(1)(D), 33 U.S.C. § 1313(d)(1)(D) (2000).

140 *See e.g.,* Cmtys. for a Better Env't v. State Water Res. Control Bd., 34 Cal. Rptr. 3d 396, 399 (1st Dist. 2005).

dynamic and itinerant. They are dynamic because the palette of potential pollutants changes as a construction project progresses toward completion.[141] But they are also itinerant because once the construction project is finished, the builder typically moves to a new location with different site-specific concerns.

Storm water permits attempt to take into consideration these different concerns by prohibiting discharges that cause or contribute to the exceedence of WQSs in the receiving water.[142] But this approach creates some regulatory uncertainty because WQSs do not easily translate into numeric WQBELs that can be applied at the discharge point or PS. Simply using the numeric component of a WQS would result in most, if not all, storm water discharges violating the WQBEL, which would expose the builders to regulatory enforcement actions.

Within this effluent limitation framework, Congress established a two-phased approach to storm water regulation when it added Section 402(p).[143] In 1990, the EPA adopted the Phase I final regulations for storm water discharges associated with industrial activities.[144] These regulations required construction sites larger than five acres to secure NPDES storm water permits for PS discharges to waters of the United States.[145]

The regulatory ratchet applied to construction activities was tightened by the Phase II Rule, which became effective in 2003.[146] It also requires discharges from "small construction sites," as well as dischargers from small MS4s, to be regulated.[147] To avoid "small" developers from gaming the system to avoid regulation, sites less than one acre that are part of a larger de-

141 *See* Lower Platte South Natural Resource District City of Lincoln Watershed Management, *Stormwater Pollution Prevention Plan (SWPPP) Guidance and Design Criteria*, at ¶ A4, *available at* www.lpsnrd.org/docs/Permits/swppp.pdf (last visited Feb. 12, 2006) (because project plans are subject to change, the SWPPP must be dynamic in order to be effective).

142 NPDES General Permit, *supra* note 15, at Part 1, ¶ 1.3.C.4; *see* Clean Water Act § 402(p)(3)(B)(iii), 33 U.S.C. § 1342 (p)(3)(B)(iii) (2000) (permits for discharges from municipal storm sewers shall require reduced discharge to the maximum extent practicable); *see also* Bldg. Ind. Ass'n of San Diego County v. State Water Res. Control Bd., 22 Cal. Rptr. 3d 128, 130–31 (2004), *reh'g denied* Jan. 4, 2005 (upholding the discretionary authority of California to prohibit MS4 discharges that cause or contribute to an exceedence of WQSs).

143 Clean Water Act § 402(p)(4), 33 U.S.C. § 1362 (p)(4) (2000).

144 55 Fed. Reg. 47,990 (Nov. 16, 1990) (codified as 40 C.F.R. § 122.26).

145 *See* National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990 (Nov. 16, 1990) (codified as 40 C.F.R. § 122.26(b)(14)(x)). The EPA's Phase I Rule regulating construction sites that were only in excess of five acres was found "arbitrary and capricious" in *Natural Res. Def. Council v. EPA*, 966 F.2d 1292, 1306 (9th Cir. 1992).

146 EPA, Phase II Storm Water Regulations, 64 Fed. Reg. 68,722 (Dec. 8, 1999) (codified as 40 C.F.R. pts 9, 122, 123, 124).

147 *Id.*

velopment plan are also subject to Phase II regulation.[148] Thus, for example, a developer cannot avoid storm water regulation by building a commercial structure on a one-half acre parcel that is part of a larger ten-acre retail center.

The Phase I and II storm water regulations are primarily "process-based," not "performance-based."[149] Performance-based standards have yet to be developed and applied to storm water discharges, and therefore the permitting authority must develop technology-based limitations based on its BPJ.[150] Unlike most discharges that are controllable at the PS, the makeup of a storm water discharge is highly variable depending on the severity of a particular storm event, the frequency of storm events, flow rates, absorption capacities of surrounding soils, pollutant types and concentrations, and so on. This variability makes storm water regulation more complex than the typical NPDES waste discharges from a PS.

The concentration of pollutants at the point of discharge may be sampled.[151] But getting a representative storm water sample is difficult because of variability in volume and pollutant loading. As a result, translating storm water discharge information into a workable numeric effluent limitation is difficult. Consequently, the EPA has not yet developed a set of technology-based numeric effluent limitations suitable for the regulation of storm water as it has for other types of PS discharges.[152] Rather, the EPA has determined that a "process-based" strategy using BMPs is effective to adequately meet WQSs.[153]

A discharger "may" be considered in compliance with the storm water permit by regulators so long as it is implementing its identified "process-based" narrative control measures, such as the siting, construction and operation of BMPs, contained in the SWPPP applicable to the construction site or, if discharging into an MS4, with the control measures identified in the MS4 storm water management plan (SWMP).[154] No guarantee exists with

148 40 C.F.R. § 122.26(b)(15) (defining "small construction activity").

149 Clean Water Act § 402(a)(1)(B), 33 U.S.C. § 1342(a)(1)(B) (2000); *see also* 40 C.F.R. § 125.3(d) (2004).

150 *See* Clean Water Act § 402(a)(1)(B), 33 U.S.C. § 1342(a)(1)(B) (2000); *see also* 40 C.F.R. § 125.3(d) (2004).

151 *See e.g.,* EPA, Load Calculation Protocol, Department of Environment and Conservation 2.2.1 (Feb. 2005).

152 61 Fed. Reg. 57,425, 57,426 (Nov. 6, 1996) (noting that the CWA does not mandate that effluent limitations be numeric).

153 EPA, National Pollutant Discharge Elimination System (NPDES) Storm Water Program Questions and Answers (Best Management Practices), Jan. 21, 2004, at 8 (on file with author).

154 *See* discussion *infra* Part VII. Dual Regulation of Construction Storm Water Activities.

respect to compliance, however.[155]

V. THE ROLE OF THE STATES IN STORM WATER REGULATION

One might reasonably think that the EPA is at the forefront of construction storm water permitting and enforcement. However, this view is not exactly the case.[156] The CWA recognizes that states are fully competent to manage their own water quality programs so long as they do not compromise federal clean water standards.[157] Upon application by a state, Section 402(b) of the CWA allows the EPA to authorize a state to exercise NPDES permitting authority providing the state has the adequate authority to carry out the federal program.[158] The EPA has authorized most states,[159] subject to continuing regulatory oversight by the EPA,[160] to administer this authority.[161] Although this oversight pertains to the state's administration of federal law, a legal reservoir of state constitutional authority, independent of the CWA authorization, exists to deal with state water quality issues.[162]

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155 *See* discussion *infra* Part VIII. The "Functional" Permit Theory: Divergent Views.

156 Construction industry storm water compliance assistance for each state is included in *Construction Industry Compliance Assistance: Status of the Storm Water Phase II Permits as of November 12, 2004*, *available at* http://www.cicacenter.org/ [click on stormwater icon] (last visited Feb. 13, 2006).

157 Clean Water Act § 101(b), 33 U.S.C. § 1251(b) (2000).

158 Clean Water Act § 402(b), 33 U.S.C. § 1342(b) (2000).

159 The following states have approved programs: Alabama; Arizona; Arkansas; California; Colorado; Connecticut; Delaware; Florida; Georgia; Hawaii; Illinois; Indiana; Iowa; Kansas; Kentucky; Louisiana; Maine; Maryland; Michigan; Minnesota; Mississippi; Missouri; Montana; Nebraska; Nevada; New Jersey; New York; North Carolina; North Dakota; Ohio; Oklahoma; Oregon; Pennsylvania; Rhode Island; South Carolina; South Dakota; Tennessee; Texas; Utah; Vermont; Virginia; Washington; West Virginia; Wisconsin; Wyoming. EPA, *State NPDES Program Authority, available at* http://cfpub2.epa.gov/npdes/statestats.cfm (last visited Feb. 13, 2006).

160 The EPA may withdraw its delegation based on the circumstances set forth in 40 C.F.R. § 123.63(a) (2005).

161 *See* CAL. WATER CODE § 13370(c) (2004). This section provides:

> It is in the interest of the people of the state, in order to avoid direct regulation by the federal government of persons already subject to regulation under state law pursuant to this division, to enact this chapter in order to authorize the state to implement the provisions of the Federal Water Pollution Control Act [CWA] and acts amendatory thereof or supplementary thereto, and federal regulations and guidelines issued pursuant thereto, provided, that the state board shall request federal funding under the Federal Water Pollution Control Act [CWA] for the purpose of carrying out its responsibilities under this program.

Id.

162 The California Supreme Court recently rejected the contention of the Natural Resources Defense Council (NRDC) that a state exercising the discretionary authority recognized by the CWA acts pursuant to federal law based on the theory that the CWA incorporates state water policy into federal law. City of Burbank v. State Water Res. Control Bd., 108 P.3d 862, 870 (2005) ("Nothing in the federal Clean Water Act suggests that a state is free to disregard or to weaken the federal requirements for clean water

Most states have EPA-approved programs.[163] This fact means that those states administering the industrial storm water provisions are, as a practical matter, at the forefront of both the permitting and the enforcement efforts. To the extent that an enforcement action against a large-scale, development operation involves multiple states, the EPA will assume the controlling enforcement role, although coordination with state regulators is essential.[164]

In late 2005, the EPA's state-authorization process hit a new legal obstacle. In *Defenders of Wildlife v. EPA*,[165] the Ninth Circuit held that the EPA had taken inconsistent positions during litigation on its legal obligation to consult, pursuant to Section 7 of the Endangered Species Act (ESA), with the federal Fish and Wildlife Service in deciding to transfer CWA permitting authority to Arizona.[166] Although the case was remanded to the EPA to articulate a coherent and consistent position, which is an arguable basis for narrowly applying the decision, the court was clearly of the opinion that the EPA was unreasonable in concluding that it was required to disregard the impact of the CWA permitting transfer on species protected by the ESA.[167] To the extent that the EPA does not comply with the federal consultation provisions of the ESA in deciding to approve an NPDES permitting transfer to the state, such a transfer may be in legal jeopardy.[168]

VI. THE CALIFORNIA "GENERAL CONSTRUCTION STORM WATER PERMIT"

The Porter-Cologne Water Quality Control Act is the principal law governing water quality in California.[169] It establishes a comprehensive program to protect water quality under the auspices of the State Water Board and nine semi-autonomous Regional Water Boards.[170] In Chapter 5.5 of Porter-Cologne, the legislature established a program to comply with the provisions

when an NPDES permit holder alleges that compliance with those requirements will be too costly.").

163 *See* EPA, *State NPDES Program Authority, supra* note 159.

164 National Science & Technology Center, Bureau of Land Management, Water Quality Law Summary, Chapter 4: *The Total Maximum Daily Load Program*, at 5, *available at* http://www.blm.gov/nstc/WaterLaws/Chap4.html (last visited Feb. 13, 2006).

165 Defenders of Wildlife v. EPA, 420 F.3d 946 (9th Cir. 2005).

166 *See id.* at 959–60 (noting that the EPA's positions in litigation were inconsistent, but that its positions during administrative processes were consistent).

167 *Id.* at 960–61.

168 Whether the *Defenders of Wildlife* decision will or should trigger the re-opening of earlier EPA transfers to other states is beyond the scope of this article.

169 CAL. WATER CODE §§ 13000–14958 (2005).

170 *See* CAL. WATER CODE § 13001 (2005), Order No. 99-08, *supra* note 48.

of the CWA.[171] As a result, California has been authorized by the EPA to administer the federal NPDES program, including its storm water provisions.[172] Porter-Cologne also contains a separate chapter on storm water enforcement practices that is supplementary[173] to the Chapter 5.5 provisions authorizing administration of the federal program.[174]

In California, construction activities are subject to CWA regulation through the General Construction Storm Water Permit (GCSWP).[175] A landowner whose development or building project disturbs one or more acres of soil, or whose project is less than one acre but is part of a larger common project, is required either to obtain an individual NPDES permit or to file a NOI with the State Water Board indicating the intent to be covered by the GCSWP.[176] It specifies that the landowner is responsible for obtaining coverage under the permit by signing the NOI.[177]

The GCSWP is similar to the federal CGP in that it relies on process-based BMPs to control storm water discharges.[178] However, unlike the CGP, the GCSWP contains a receiving water limitation that discharges "do not cause or contribute to an exceedence of any applicable water quality standard [WQS]."[179]

As with the federal CGP, the GCSWP requires a permittee to develop and implement an SWPPP, which has several substantive purposes. First, it identifies likely sources of sediment and other pollutants that will affect the water quality from the construction storm water discharge.[180] Second, it describes the BMPs that will be used to control, to reduce or to eliminate these sources.[181] Lastly, the SWPPP identifies the monitoring program that will be used to determine whether the BMPs are working.[182]

The GCSWP requires that the SWPPP be available at the construction site from the start of the construction activities through the termination of coverage under the permit.[183] But the

171 CAL. WATER CODE §§ 13370–13389 (2005).
172 *See* Order No. 99-08, *supra* note 48.
173 CAL. WATER CODE § 13399.25 (2005).
174 *Id.* at §§ 13399.25–13399.43.
175 *See* Order No. 99-08, *supra* note 48.
176 *Id.*
177 California EPA, State Water Resources Control Board, *Storm Water Program: Construction Frequently Asked Questions,* question number 3, *available at* http://www.swrcb.ca.gov/stormwtr/constfaq.html (last visited Feb. 13, 2006) [hereinafter Construction FAQs].
178 *See* Order No. 99-08, *supra* note 48.
179 *Id.*
180 *Id.*
181 *Id.*
182 *See* Construction FAQs, *supra* note 177, at question number 12.
183 Order No. 99-08 provides: "The SWPPP shall remain on the [construction] site

current permit only requires the SWPPP to be available on-site at the construction location.[184] This on-site requirement is unnecessarily restrictive in that it hinders private citizens and environmental groups from gaining ready access for the purpose of inspecting and determining the SWPPP's legal adequacy.

To improve public access to SWPPPs, the Executive Director of the State Water Board recently requested Regional Water Boards to assist members of the public in gaining access to them.[185] But a stronger nostrum is required than simply encouraging cooperation by Regional Water Boards. The permit itself should reflect the obligation to meet a broader public dissemination policy. With the electronic digitization of records, regulatory agencies should be required, at a minimum, to post NOIs as well as SWPPPs on officially maintained web sites to improve public access. The EPA recently proposed this approach for the 2006 industrial storm water permit applicable to areas of the United States not authorized to administer the NPDES permit program.[186]

Another concern is the uncertainty with respect to permit compliance. This concern has caused frustration for dischargers, regulators, and environmental groups.[187] The State Water Board has formed a Blue Ribbon panel to assess the potential for making the storm water program more performance-based, and thus more certain.[188] The panel is tasked with assessing whether it is technically feasible to establish numeric effluent limitations, or some other objective criteria, for inclusion in storm water permits generally, including the general construction storm water permit.[189]

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while the site is under construction, commencing with the initial mobilization and ending with termination of coverage under the permit." *Id.*

184 *Id.*

185 E-mail from Celeste Cantu, Executive Director, to Regional Water Board Executive Officers and Assistant Executive Officers (on file with author).

186 EPA, Office of Wastewater Management, *View Stormwater NOIs*, *available at* http://www.epa.gov/npdes/stormwater/noisearch (last visited Feb. 13, 2006).

187 California EPA, State Water Resources Control Board Water Quality, *Notice of Public Meeting: National Pollutant Discharge Elimination System (NPDES) Storm Water Program, Meeting of Storm Water Panel of Experts available at* http://www.waterboards.ca.gov/stormwtr/docs/panel_notice.pdf (last visited Feb. 14, 2006).

188 *Id.*; *see also* letter, "State Water Board Process for the Development of Quantitative Measurements for Stormwater Program Compliance" (Aug. 15, 2005), from Karen Ashby, Chair, California Stormwater Quality Association to Bruce Fujimoto, Chief, Storm Water Program, State Water Board, http://www.waterboards.ca.gov/stormwtr/docs/numericcom/casqa.pdf.

189 *Id.*

VII. DUAL REGULATION OF CONSTRUCTION STORM WATER ACTIVITIES

Construction storm water activities are directly regulated as industrial activities.[190] They are also potentially subject to regulation under the municipal discharge requirements of Section 402(p).[191] MS4 permittees,[192] usually local governments, are required to "effectively prohibit non-stormwater discharges" into their storm sewer conveyance systems.[193]

The MS4 requirements effectively create a dual system of regulation.[194] A MS4 permittee is required to enforce its local land use ordinances and accompanying construction permits in a manner that satisfies the above input "into" the conveyance system prohibition as well as the PS discharge requirements output "from" the system.[195] Thus, a construction storm water discharge may be regulated both on the basis of its connection or discharge into the MS4 and also as an industrial activity.

As a matter of regulatory theory, the MS4 and GCSWP programs are intended to complement and support each other in achieving the shared goal of minimizing pollutant discharges in runoff from construction sites.[196] MS4 regulation is based on the principle that local government controls most construction activities through the issuance of development and other land use

190 Clean Water Act § 402(p)(3)(A), 33 U.S.C. § 1342 (p)(3)(A) (2000).

191 Clean Water Act § 402(p), 33 U.S.C. § 1342(p) (2000).

192 The Clean Water Act does not define the term "municipal separate storm sewer." However, it is defined in the storm water regulations at 40 C.F.R. § 122.26(b)(8) (2004):

> Municipal separate storm sewer means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):
>
> (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States;
>
> (ii) Designed or used for collecting or conveying storm water;
>
> (iii) Which is not a combined sewer; and
>
> (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR section 122.2.

193 Clean Water Act § 402(p)(3)(B)(ii), 33 U.S.C. § 1342(p)(3)(B)(ii) (2000).

194 *See generally* 40 C.F.R. Parts 122, 123, and 124 (2004). The EPA places enforcement responsibility on local government to develop and implement regulatory mechanisms to control sediment and erosion and to use sanctions to ensure compliance. 40 C.F.R. § 122.34(b)(4)(ii)(A) (2004).

195 Clean Water Act § 402(p)(3)(B), 33 U.S.C. § 1342(p)(3)(B) (2000).

196 *See* Clean Water Act § 402(p)(3)(B)(ii), 33 U.S.C. § 1342(p)(3)(B)(ii) (2000).

permits.[197] As the lead permitting authority for construction activities, local government therefore has the principal responsibility for controlling the water quality consequences from storm water discharges resulting from its planning, construction, and land use decisions. One area that has received too little attention to date is the importance of coordinating standard MS4 and GCSWP permit requirements, such as monitoring and reporting, for purposes of regulatory consistency.[198]

In California, the State Water Board and Regional Water Boards look first to local government to enforce compliance with its applicable ordinances and permits under the MS4 permit.[199] State regulators have several non-exclusive options when confronted with a construction storm water violation. They may bring an enforcement action directly against the builder-developer of the construction activity for non-compliance with the terms of the GCSWP.[200] They also may bring an enforcement action against the local government for violating the MS4 permit requirements.[201]

VIII. THE "FUNCTIONAL" PERMIT THEORY: DIVERGENT VIEWS

In *Environmental Defense Center, Inc. v. EPA,*[202] the EPA generally prevailed against various administrative, statutory, and constitutional challenges to the Phase II Storm Water Rule regulating small MS4s and small construction sites.[203] However, the Ninth Circuit also held that the Rule was legally deficient in certain important respects.[204] The Rule allows operators to obtain coverage under the CGP simply by filing a NOI.[205] Coverage was available without regulatory review by the EPA, and also without public participation on the issuance of the specific NOI and accompanying SWPPP.[206] The court found that this process violated the express provisions of the CWA.[207] As a result, the court vacated those parts of the Rule that were procedurally defi-

197 40 C.F.R. § 122.26(b)(8) (2004).

198 The detailed analysis of this concern is beyond the scope of this article.

199 California EPA, San Diego Regional Water Quality Control Board, *Municipal Storm Water Permit—Frequently Asked Questions*, question number 12, *available at* http://www.swrcb.ca.gov/rwqcb9/programs/stormwater/faq.html (last visited Feb. 14, 2006).

200 Order No. 99-08, *supra* note 48.

201 *Id.*; Clean Water Act § 309(e).

202 344 F.3d 832 (9th Cir. 2003), *cert. denied*, Tex. Cities Coal. on Stormwater v. EPA, 541 U.S. 1085 (2004).

203 *Id*. at 840.

204 *Id*.

205 *Id*. at 853.

206 *Id*.

207 *Envtl. Def. Ctr., Inc.,* 344 F.3d at 855–56.

cient and remanded the matter to the EPA.[208]

In 2005, the Second Circuit decided *Waterkeeper Alliance, Inc. v. EPA*,[209] which dealt with the EPA Rule applicable to Concentrated Animal Feeding Operations (CAFOs) and Nutrient Management Plans (NMPs).[210] The court applied an "actual discharge" of pollutants standard to navigable waters.[211] But for our purposes, the Second Circuit's decision is arguably significant because it cites with approval the Ninth Circuit's reasoning on the failure to require permitting authority review of the NMP before issuing a permit.[212] According to the court, NMPs for CAFOs, which function similarly to SWPPPs for construction sites, should have been included as part of the permit.[213]

A split in the federal circuits occurred several months after the *Waterkeeper Alliance* decision.[214] The Seventh Circuit decided *Texas Independent Producers and Royalty Owners Association v. EPA*.[215] Unlike the Ninth Circuit, the Seventh Circuit held that construction-project NOIs are not the "functional equivalent" of a permit, and SWPPPs are not subject to the public participation requirements of the CWA.[216]

The "functional equivalent" theory is critical to the application of the "public hearing" and "public availability" requirements found in the CWA.[217] Section 402(a)(1) sets forth the public hearing requirement: "the Administrator may, after opportunity for public hearing, issue a permit."[218]

The precondition to the issuance of a permit is the opportunity for a public hearing.[219] For the 2003 CGP and its earlier versions, the opportunity for a public hearing was satisfied during the notice and opportunity to comment period.[220] The question of statutory construction is whether a public hearing is also required upon filing of a NOI, which depends on whether the NOI

208 *Id*. at 840.

209 399 F.3d 486, 507 (2d Cir. 2005) (holding in part that the EPA's failure to require substantive permitting agency review of Nutrient Management Plans (NMPs) for Concentrated Animal Feeding Operations (CAFOs), which are point sources under 33 U.S.C. § 1362(14) (2000), violated the CWA).

210 *Id*. at 486.

211 *Id*. at 505 (finding that in the absence of an "actual" addition of any pollutant to navigable waters from any point, there is no PS).

212 *Id*. at 500 n.18.

213 *Id*. at 500.

214 Tex. Indep. Producers and Royalty Owners Ass'n v. EPA, 410 F.3d 964, 978 (7th Cir. 2005).

215 *Id.*

216 *Id*. at 978 n.13.

217 *Id*.

218 Clean Water Act § 402(a)(1)**,** 33 U.S.C. § 1342(a)(1) (2000).

219 *Id*.

220 *See generally Envtl. Def. Ctr., Inc.,* 344 F.3d at 852–53.

should be considered the "functional equivalent" of a "permit" or "permit application."[221]

The public availability issue also turns on finding a permit or permit application. Section 402(j) states: "A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction."[222] The problem here also depends on finding the NOI a "permit" or "permit application."[223] If it is either, then presumably the SWPPP may be treated as a "portion thereof," and therefore also subject to the "available to the public" requirement.[224]

Regardless of whether NOIs or SWPPPs are treated as the functional equivalent of permits, they ought to be subject to the public availability provisions of CWA Section 308(b)[225] and the requirement that records, including a description of the SWPPP, be available to the public at reasonable times during regular business hours.[226] The posting of electronic copies of NOIs and SWPPPs on officially maintained web sites would aid public access to these important documents without imposing a significant administrative burden. Thus, the more significant legal questions are the application of the public hearing requirement and the public opportunity to meaningfully comment on the SWPPP.

A. *Environmental Defense Center, Inc. v. EPA*

A closer examination of *Environmental Defense Center, Inc. v. EPA*[227] is necessary. The focus was on the legality of the Phase II Rule (Rule).[228] Consequently, one might be tempted to argue that the "functional" permit theory should be limited to the operation of the Phase II Rule. One might argue that the functional permit analysis outside the Rule is *dicta* or that the permitting scheme under the Rule differs from the traditional permitting model.[229]

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221 *Id*. at 857 (holding NOIs are the functional equivalent to permit applications); *see Tex. Indep. Producers and Royalty Owners Ass'n*, 410 F.3d at 978 (holding NOIs are not permit applications).

222 Clean Water Act § 402(j), 33 U.S.C. § 1342(j) (2000).

223 *Tex. Indep. Producers and Royalty Owners Ass'n*, 410 F.3d at 978.

224 Clean Water Act § 402(j), 33 U.S.C. § 1342(j) (2000).

225 Clean Water Act § 308(b), 33 U.S.C. § 1318(b) (2000).

226 40 C.F.R. § 122.34(g)(2) (2004).

227 344 F.3d 832 (9th Cir. 2003), *cert. denied*, Tex. Cities Coal. on Stormwater v. EPA, 541 U.S. 1085 (2004) (denying cert. on the petition of whether the EPA's Phase II Stormwater Rule violated the Tenth Amendment by coercing local governmental entities either to enforce a federal program or to surrender their police powers).

228 *Id*. at 840.

229 *Id*. at 854.

This narrow view of the decision misses important additional considerations that arguably support its broader application. The Second Circuit's decision in *Waterkeeper Alliance v. EPA,*[230] which endorsed the Ninth Circuit's reasoning, suggests that the Ninth Circuit's reasoning in *Environmental Defense Center* has broader persuasive appeal than being limited to small MS4s.[231] The Second Circuit captures this point in the following statement: "The demand that permits authorizing municipal storm sewer discharges must 'require controls' is, in sum and substance, identical to the demand that permits authorizing discharges from *other* point sources must 'assure compliance with' applicable effluent limitations. Both provisions require regulation of discharges *in fact*."[232] In essence, the narrow focus on the Phase II Rule is a distinction without a difference to the broader point of necessary regulatory oversight to protect water quality.

The critical part of the Ninth Circuit's reasoning in *Environmental Defense Center* is found in the following statement adopting a functional equivalent theory: "[T]he EPA's failure to require review of the NOIs, which are the *functional equivalents* of permits under the Phase II General Permit option, and its failure to make NOIs available to the public or subject to public hearings contravene the express requirements of the Clean Water Act."[233] The finding that the NOI was the functional equivalent to a permit was critical because it provides the foundation for the conclusion that the Rule contravenes the CWA requirements that permits be "available to the public" and "subject to public hearings."[234]

Several considerations led the court to conclude that the NOI was the functional equivalent of a permit or permit application.[235] First is the substantive importance of the NOI pursuant to the Rule.[236] The NOI, the court reasoned, contains the substantive information necessary to determining whether the statutory effluent limitation standard of "maximum extent practicable" (MEP) has been met.[237] The CGP does not contain this information; only the NOI contains it.[238] Under the Rule, an operator satisfies the statutory requirement to reduce discharges to

230 399 F.3d 486 (2d Cir. 2005).
231 *See id*. at 500 n.18.
232 *Id*.
233 *Envtl. Def. Ctr., Inc.,* 344 F.3d at 879 (emphasis added).
234 *Id*. at 857.
235 *Id*.
236 *Id*.
237 *Id*. at 853.
238 *Id*. at 853–57.

the MEP upon implementing its identified SWPPP.[239] Thus, the court found that the Rule on the NOI "crosses the threshold from being an item of procedural correspondence to being a substantive component of a regulatory regime."[240]

The Rule states that "[c]ompliance with the conditions of the general permit and the series of steps associated with identification and implementation of the minimum control measures will satisfy the MEP standard."[241] This aspect of the Rule has an important substantive consequence. By merely implementing the BMPs chosen by the operator, the operator is deemed to meet the MEP effluent limitation requirement.[242] The court reasoned that all an operator needs to do is to decide for itself the steps needed to meet MEP and to implement them.[243] Without a mandatory system of regulatory review of the NOI and accompanying SWPPP, nothing prevents an operator from either misunderstanding or misrepresenting its own predetermined storm water compliance.[244] In the end, the Rule provides no system of regulatory review to assure that the storm water measures chosen and implemented by the operator *in fact* reduce the discharges to the MEP.[245]

Once the "functional permit" theory was found to apply, the Ninth Circuit pointed to the Rule's failure to provide for adequate public participation.[246] The public received neither notice nor the opportunity for a hearing on the NOI.[247] The EPA argued that the NOI was neither a "permit" nor "permit application," and therefore was not subject to the public hearing and public availability provisions of the CWA.[248] A NOI is legally distinguishable from a permit application because a NOI is submitted after the general permit has been promulgated by the EPA.[249] Assuming *arguendo* that the NOI should be considered a "permit" or "permit application," the EPA maintained that the public availability requirements were met through a combination of the public involvement minimum measures,[250] the Federal Freedom of Information Act,[251] and state freedom of information acts.[252]

239 40 C.F.R. § 122.34(a) (2004).
240 *Envtl. Def. Ctr., Inc.*, 344 F.3d at 853.
241 64 Fed. Reg. 68,722, 68,754 (Dec. 8, 1999).
242 *Envtl. Def. Ctr., Inc.*, 344 F.3d at 855 n.34.
243 *Id.* at 855.
244 *Id.*
245 *Id.*
246 *Id.* at 857.
247 *Id.* at 856.
248 *Id.*
249 *Id.* at 853, 857.
250 *Id.* at 857.
251 5 U.S.C.A. § 552 (West 1989).

The court rejected the EPA's public participation arguments.[253] It reasoned that the "technical issues" applicable to permitting should be decided in "'the most open, accessible forum possible, and at a stage where the [permitting authority] has the greatest flexibility to make appropriate modifications to the permit.'"[254] This openness was lacking, and as a result, the Rule violated the "clear intent of Congress."[255]

B. *Texas Independent Producers and Royalty Owners Association v. EPA*

The Seventh Circuit adopted a different view of the GCP in *Texas Independent Producers and Royalty Owners Association v. EPA*.[256] The Natural Resources Defense Council (NRDC) filed a petition to review the CGP.[257] The court found that the NRDC did not have standing to present a substantive challenge to the merits of the CGP,[258] but that it did have standing to present certain procedural challenges based on the failure to provide a public hearing on the NOI and SWPPP and the failure to mandate their public availability.[259] As might be expected, the procedural challenges were based on Sections 402(j) and 402(a)(1).[260] The court rejected the NRDC's procedural claims, which relied on a functional equivalent theory.[261]

The Seventh Circuit's reasoning turns on the application of the *Chevron v. Natural Resources Defense Council* decision.[262] In *Chevron,* the Supreme Court established a two-step judicial test for reviewing federal agency interpretations:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency,

252 *Envtl. Def. Ctr., Inc.*, 344 F.3d at 857.

253 *Id*.

254 *Id*. at 856–57 (quoting 44 Fed. Reg. 32,854, 32,885 (June 7, 1979)).

255 *Id*. at 857.

256 410 F.3d 964, 967 (7th Cir. 2005).

257 On July 1, 2003, the EPA issued its Final NPDES General Permit for Storm Water Discharges from Construction Activities (CGP). 68 Fed. Reg. 39,087 (July 1, 2003); *see also Tex. Indep. Producers*, 410 F.3d at 967.

258 *Tex. Indep. Producers*, 410 F.3d at 967.

259 *Id*. at 977.

260 *Id*., 33 U.S.C. §§ 1342(j), 1342(a)(1) (2000). The NRDC also claimed that the CGP violated the CWA for failing to ensure that the discharge meets the water quality and technology requirements of the CWA, and that the CGP violated the Endangered Species Act. *Tex. Indep. Producers*, 410 F.3d at 969–70.

261 *Id*. at 978 n.13.

262 *Chevron, U.S.A., Inc. v. Natural Res. Def. Council,* 467 U.S. 837 (1984).

must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a *permissible* construction of the statute.[263]

The Seventh Circuit applied the step-two deference of *Chevron*.[264] The Seventh Circuit reasoned that Congress had not spoken to the issue and, if it had, its directions were at best ambiguous.[265] This view that the Rule does not present a step-one analysis under *Chevron* is persuasive. Congress did not define what constitutes a "permit" or "permit application," nor did it provide any explanation of the manner in which NPDES permits and permit applications are to be made publicly available.[266] Thus, the challenge to properly applying *Chevron* was whether the determination that NOIs and SWPPPs were not "permits" or "permit applications" was a permissible statutory construction by the EPA.

The court found that arguments advanced by the EPA were a permissible construction of the CWA under *Chevron*.[267] The EPA argued that a fundamental distinction exists between a "general permit," which is proposed through the notice and comment process, and a "permit application," which is considered by the public at a hearing during the application process.[268] This distinction supports the view that no additional need exists either for public comment or notice with respect to general permits.[269]

The EPA also maintained that requiring the opportunity for an additional public hearing for each NOI and SWPPP was not sound as a matter of policy.[270] It "would eviscerate the administrative efficiency inherent in the general permitting concept."[271] Such a requirement would place too heavy a burden on the administration of the system of general permitting, and thus conflict with Congress' intent to allow the use of general permits.[272]

263 *Id*. at 842–43 (emphasis added).
264 *Tex. Indep. Producers*, 410 F.3d at 978.
265 *Id*.
266 *Id*.
267 *Id*.
268 *Id*.
269 *Tex. Indep. Producers*, 410 F.3d at 978.
270 *Id*.
271 *Id*.
272 *Id*.

As recognized in *NRDC v. Costle*,[273] the CWA allows the use of general permits: "Area-wide regulation is one well-established means of coping with administrative exigency."[274]

The Seventh Circuit was aware of the Ninth Circuit's "functional equivalent" theory and specifically rejected it:

> The Ninth Circuit's majority . . . found under step one of *Chevron* that Congress clearly intended NOIs to be subject to the public availability and public hearing requirements because NOIs are the functional equivalent of a permit application. . . . [T]he statutory language [CWA Sections 402(j) and 402(a)(1)] at issue addresses only "permit applications" and fails to include any mention of NOIs, SWPPPs, or other so-called "functional equivalents."[275]

In addition to rejecting it, the Seventh Circuit recognized that its opinion creates a split between the federal circuits.[276]

C. The Constructional Principle *"In Pari Materia"*

Certain principles of statutory construction undermine the *raison d'etre* for the functional permit theory. Section 402(p) authorizes the use of "system or jurisdiction-wide" permits for municipal discharges.[277] While this section does not expressly authorize them for industrial storm water discharges, Section 402(p)(6) does direct the EPA to establish a "comprehensive program" to regulate storm water discharges that may include "performance standards, guidelines, guidance, and management practices and treatment requirements . . . ."[278] The EPA's general permit program of construction storm water regulation arguably fits within this congressional direction. Similarly, given the administrative and technical complexity of storm water regulation, Section 402(p)(6) also provides the justification for applying step two of *Chevron*.[279]

The industrial storm water provisions of Section 402(p) incorporate the requirements of Section 301, which contains two regulatory strategies: WQSs and technology-based standards, which in the case of storm water regulation is MEP achieved through BMPs.[280] The Ninth Circuit did not consider the role played by WQSs as a regulatory oversight tool to ensure that wa-

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273 Nat'l Res. Def. Council, Inc. v. Costle, 568 F.2d 1369 (D.C. Cir. 1977).

274 *Id*. at 1381.

275 *Tex. Indep. Producers*, 410 F.3d at 978–79 n.13 (internal citations omitted).

276 *Id*.

277 Clean Water Act § 402(p)(3)(B)(i), 33 U.S.C. § 1342(p)(3)(B)(i) (2000).

278 Clean Water Act § 402(p)(6), 33 U.S.C. § 1342(p)(6) (2000).

279 Clean Water Act § 402(p)(6), 33 U.S.C. § 1342(p)(6) (2000); *see supra* note 263 and accompanying text.

280 Clean Water Act §§ 301(b), 402(p)(3)(B)(iii), 33 U.S.C. §§ 1311(b), 1342(p)(3)(B)(iii) (2000).

ter quality is *in fact* protected.[281] Section 301(b)(1)(C) states:

> not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedule of compliance, established pursuant to any State law or regulations, (under authority preserved by Section 510 [of this title]) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act.[282]

A NPDES permit cannot legally authorize a discharge in violation of WQSs regardless of the perceived substantive role played by the SWPPP under the Rule.[283] In short, the CWA requires that limitations necessary to meet WQSs be implemented.[284] Equally important, the CGP also recognizes this obligation.[285]

The storm water provisions added by Congress in 1987 require the EPA to issue storm water regulations to "protect water quality."[286] In doing so, Congress created a moratorium on storm water discharges occurring prior to October 1, 1994.[287] But the moratorium does not apply to a discharge that "contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States."[288]

The overview to the Rule itself recognizes the obligation to protect WQSs. It states: "[a]bsent evidence to the contrary, EPA presumes that a small MS4 program that implements the six minimum measures in today's rule does not require more stringent limitations to meet water quality standards [WQSs]."[289]

The language creates a presumption that additional limitations are not required. But it is a rebuttable presumption because the presumption applies "[a]bsent evidence to the contrary."[290] Consequently, evidence may be submitted by regulators or other interested parties to demonstrate that the "minimum measures" do not in fact meet WQSs.[291] Thus, if after

281 This failure by the Ninth Circuit is curious in light of *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1164 (9th Cir. 1999) (reasoning that only industrial dischargers were "expressly" required by § 1342(p)(3)(A) to comply with WQS).

282 Clean Water Act § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (2000); *see also* Clean Water Act § 303(e)(3)(A), 33 U.S.C. § 1313(e)(3)(A) (2000).

283 Clean Water Act § 301(a), 33 U.S.C. § 1311(a) (2000).

284 Clean Water Act § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (2000).

285 *See* NPDES General Permit *supra* note 15.

286 Clean Water Act § 402(p)(6), 33 U.S.C. § 1342(p)(6) (2000).

287 Clean Water Act § 402(p)(1), 33 U.S.C. § 1342(p)(1) (2000).

288 Clean Water Act § 402(p)(2)(E), 33 U.S.C. § 1342(p)(2)(E) (2000).

289 EPA, Regulations for the Revision of the Water Pollution Control Program, 64 Fed. Reg. 68,722, 68,753 (Dec. 8, 1999).

290 *Id*.

291 *Id*.

implementing the minimum control measures identified by the Rule, evidence exists that the discharger is nonetheless causing or contributing to non-attainment of WQSs, the builder may be required to take additional substantive steps by expanding or better tailoring its BMPs.[292] In short, the substantive effect of the Rule is not as complete as the Ninth Circuit reasons in *Environmental Defense Center, Inc. v. EPA*.[293]

In addition, the court failed to consider the existence or possible application of the federal antidegradation policy. The constructional principle *in pari materia* (part of the same material) counsels that legislation should be interpreted by the courts so that the respective parts of the law being construed are internally consistent.[294] In the context of storm water regulation, its application is based on the normative view that Congress was cognizant of the antidegradation or anti-backsliding provisions of the CWA[295] when it added Section 402(p) in 1987.

As part of the WQS program, a state is required to have an antidegradation policy that also limits the perceived determinative effect of the Rule.[296] The federal antidegradation policy provides:

> (a) The State shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy pursuant to this subpart. The antidegradation policy and implementation methods shall, at a minimum, be consistent with the following:
>
> > (1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.
> >
> > (2) Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected . . . . Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.
> >
> > (3) Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.[297]

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292 *Id*.; *see also* 40 C.F.R. § 122.34(b) (2004).
293 344 F.3d 832 (9th Cir. 2003).
294 *See e.g*., Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 711(1996).
295 Clean Water Act § 402(o)(1), 33 U.S.C. § 1342(o)(1) (2000).
296 40 C.F.R. § 131.12 (2004).
297 *Id*.

The implementation of this policy must ensure that existing beneficial uses and "high quality waters" are protected.[298] Thus, the antidegradation policy provides an additional regulatory instrument to assure regulatory oversight.

In California, the antidegradation policy is formally known as the Statement of Policy with Respect to Maintaining High Quality of Waters in California.[299] It restricts discharges that degrade surface and ground waters.[300] Under the policy, any actions that can adversely affect water quality in any surface and ground waters must "be consistent with the maximum benefit to the people of the State, will not unreasonably affect present and anticipated beneficial use of such water and will not result in water quality less than that prescribed in [water quality basin plans]."[301] This policy is consistent with federal requirements.[302]

The congressional grant of authority to the EPA to create a general permit system reasonably includes the authority to implement it without the imposition of a NOI public hearing obligation.[303] This point was made by the dissent in *Environmental Defense Center:*

> The majority's position fails to give deference to [the] EPA and imposes the majority's own wishes instead. EPA would have been justified in creating a system entirely reliant on general or area permits. Its imposition of NOIs is an indulgence to certain policy prerogatives, namely public involvement and the collection of additional information. But the power to create a general permit system necessarily implies the power to require subordinate steps for NOIs that do not quite reach the level of inquiry associated with actual permits.[304]

Finally, public policy should be considered. To the extent that the filing of a NOI or SWPPP triggers the need for a public hearing, this requirement eviscerates the administrative efficiency inherent in the general permitting concept that has been authorized by Congress. Providing a public hearing for each NOI or SWPPP would undoubtedly compromise important aspects of administrative efficiency.

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298 *Id*.

299 California State Water Resources Control Board, Resolution No. 68-16: *Statement of Policy with Respect to Maintaining High Quality of Waters in California*, *available at* http://www.waterboards.ca.gov/plnspols/wqplans/res68-16.pdf (last visited Feb. 19, 2006).

300 *Id*.

301 *Id*.

302 *See id*.

303 *See* Envtl. Def. Ctr., Inc., v. EPA, 344 F.3d 832, 882 (9th Cir. 2003) (Tallman, J., dissenting).

304 *Id.*

D. Administrative Compliance with the "Functional" Permit Theory

No evidence exists that *Environmental Defense Center, Inc. v. EPA*[305] has an appreciable effect on the actual administration of construction storm water permitting in California. This situation is somewhat reminiscent of Andrew Jackson's comment on the Supreme Court's decision in *Worcester v. Georgia,*[306] which held Georgia's anti-Cherokee statutes unconstitutional.[307] He remarked: "'John Marshall has made his decision, now let him enforce it.'"[308]

In response to the *Environmental Defense Center, Inc. v. EPA,*[309] the EPA "recommends" the following:

> [P]ermitting authorities include permit language explaining the process for requesting a public hearing on an NOI, the standard by which such requests will be judged, the procedures for conducting public hearing requests that are granted, and the procedures for permitting authority consideration of the information submitted at the hearing in determining whether to grant authorization to discharge to the submitter of the NOI. If a public hearing is requested, the permitting authority should consider both whether to grant a hearing and the range of options for the conduct of the hearing, including, for example, a single public hearing for consideration of multiple Phase II MS4 permittee NOIs.[310]

The EPA does not recommend any specific administrative action. Little disagreement exists with the recommendation that the process for requesting the public hearing should be explained.[311] But the critical issue is specifying the process to accommodate the requirement. Unfortunately, the EPA's recommendation is at such a level of generality that it falls short in being useful to those who have to implement the process.

Another aspect of the EPA's response is worth noting. The recommendation that "the permitting authority should consider . . . whether to grant a hearing"[312] seems at odds with the application of the functional permit theory. The EPA appears to

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305 344 F.3d 832 (9th Cir. 2003).

306 31 U.S. 515 (1832).

307 *Id*. at 595.

308 LEONARD BAKER, JOHN MARSHALL: A LIFE IN LAW 745 (1974) (internal citations omitted).

309 344 F.3d 832 (9th Cir. 2003).

310 Hanlon, Memorandum, *supra* note 32.

311 *See* N.C. Div. of Water Quality, *NPDES Program FAQs*, http://h2o.enr.state.nc.us/NPDES/faqs.html (last visited Feb. 19, 2006) (explaining procedures for requesting a public hearing); Utah Dep't of Envtl. Quality, *Environmental Permit Brochure*, http://www.deq.utah.gov/references/docs_rules/Permit.htm#wq (last visited Feb. 19, 2006) (explaining the same).

312 Hanlon, Memorandum, *supra* note 32.

be signaling its continuing support for the Rule, except in the Ninth Circuit where it has been judicially invalidated.[313] In short, this guidance to regulators may also be an invitation to the Supreme Court to resolve the issue.

Several administrative strategies may be suggested to respond to the application of the functional permit theory. The public hearing requirement might be satisfied by placing the NOI and SWPPP on the "uncontested items calendar" agenda of the permit-issuing agency.[314] This timesaving approach to administratively managing noncontroversial agenda items would satisfy the hearing requirement. The public hearing requirement might be easily accommodated because items on the consent calendar, more formally known as the uncontested items calendar, may be considered and voted on by one motion.[315]

A concern with using the "consent calendar" as the administrative mechanism to satisfy the public hearing requirement is the ease with which any item can be removed from it. The agenda notice for action items coming before the San Diego Regional Water Board, for example, states:

> *CONSENT CALENDAR: The agenda contains items listed on a consent calendar which is for matters considered routine or otherwise not requiring further deliberation. A committee or the Board will take action as recommended by one motion. There will be no individual discussion on such items prior to the vote unless an item is removed for discussion. If a member of the public wishes to talk about a consent calendar item, please notify the Chair before the calendar is called. Persons who wish to be heard on an item are encouraged to speak before the assigned committee.*[316]

Because any person can request a hearing, the possibility exists that NOIs may be routinely removed from the consent calendar by opponents of a particular project.[317] Easy removal would slow the permitting process since a hearing would be required. It would give advocates of slow-growth or no-growth a convenient, as well as powerful, mechanism to challenge construction projects.

Another concern is the management of the consent calendar. Although placing the matter for expedited consideration may avoid a lengthy formal or informal hearing, if the NOI is removed, items must be complete before the permit issuing agency

313 *See id.*

314 *See* CAL. CODE REGS. tit. 23, § 647.2(f) (2005).

315 *See id.*

316 San Diego County Water Authority, *Notice to the Public*, *available at* http://www.sdcwa.org/board/notice.phtml (last visited Feb. 19, 2006).

317 *See id.*

takes action at the public hearing.[318] This requires the administrative staff to review and to recommend action on every SWPPP for expedited consideration. Using the consent calendar may assist in meeting the hearing requirement, but it is no panacea.

A second approach might be to rely on the citizen-suit notice provisions as the mechanism to trigger the public hearing request.[319] Like most federal environmental statutes, the CWA grants citizens the right to file suit in federal court when there is an alleged failure to perform any act or duty under the CWA that is not discretionary.[320] Before filing suit, the CWA requires plaintiffs to provide 60 days' notice to the alleged violator, which in this case would be the permitting agency.[321] The notice requirement exists to allow the agency to take corrective action without the necessity of litigation.

This citizen-suit notice might be used by regulators as the basis for providing the mechanism to request the public hearing in particular cases. Upon receiving notice, the permitting agency could consider the request and grant the hearing as appropriate. But this strategy suffers the same shortcoming as using the consent calendar. The 60 days' notice could easily turn into a *pro forma* request by objectors to any and all construction projects.

A more fundamental concern exists. Using the citizen-suit notice provisions to request the public hearing might be seen as the systematic creation of a cumbersome procedural barrier, and one that is inconsistent with the core principle of the functional equivalent theory. In California, the Porter-Cologne law provides that the Regional Water Board shall prescribe waste discharge requirements "after any necessary hearing."[322] A hearing is necessary according to the application of the functional equivalent theory.[323] Thus, a hearing should be routinely available without the necessity of threatening litigation.

In the end, providing a hearing on every storm water NOI and SWPPP has the potential to bring the construction storm water permit issuing process to a grinding halt. Perhaps a more sensible solution exists by focusing on the substantive nature of

318 *See generally id.*

319 The availability of citizen suit enforcement actions was rejected as a substitute for the EPA's enforcement responsibility. *See e.g.,* Envtl. Def. Ctr., Inc. v. EPA, 344 F.3d 832, 855 n.32 (9th Cir. 2003). The argument being made here is that the citizen suit provision might be used as the basis for administering the request for a public hearing.

320 Clean Water Act § 505(a), 33 U.S.C. § 1365(a) (2000).

321 Clean Water Act § 505(b)(1)(A), 33 U.S.C. § 1365(b)(1)(A) (2000).

322 CAL. WATER CODE ANN. § 13263(a) (West 2005).

323 *See* Clean Water Act § 402(a)(1), 33 U.S.C. § 1342(a)(1) (2000) (providing that "the Administrator [of the EPA] may, after opportunity for public hearing, issue a permit"); *see also* discussion *infra* Part VIII. The "Functional" Permit Theory: Divergent Views.

the SWPPP. To the extent that the SWPPP is not treated as substantively determinative, the claim that the functional equivalent theory should apply is arguably unavailing.

MS4 storm water permits do not treat the Storm Water Management Plan (SWMP), which is functionally similar to the SWPPP, as satisfying the statutory requirement of MEP.[324] This policy approach could be incorporated into the construction storm water permitting program. In essence, the minimum measures that are treated as compliance with MEP by the Phase II Rule need to be viewed more flexibly, and less determinatively.

This approach goes to the *raison d'etre* for applying the functional permit theory. The absence of regulatory oversight was the trigger for the opportunity for a public hearing.[325] In other words, providing the opportunity for a hearing through the functional permit theory is the legal mechanism to assure oversight. The determination of whether a builder has reduced pollutants to the MEP by using various BMPs can only be made by the permit-issuing agency, not by the developer. Otherwise, the system is self-regulatory.

MEP ought to be viewed as a dynamic standard by regulators and developers alike. The standard should be treated as requiring developers to use whatever combination of pollution prevention, source control, and BMPs that are technologically and economically effective. To the extent that regulatory monitoring or on-site inspection reveals that additional or modified BMPs are needed to protect water quality, the ability of regulators to require corrective action by developers exists. In addition to having the authority to require corrective action, regulators have the authority under the CWA to take other enforcement action.[326]

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324 *But see* 33 U.S.C. § 1342(p)(3)(B)(iii) (2000) ("Permits for discharges from municipal storm sewers . . . (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable . . . ."); California EPA, State Water Resources Control Board, *Storm Water Program: Phase II Small MS4 General Permit Questions and Answer Document*, http://www.swrcb.ca.gov/stormwtr/smallms4faq.html (last visited Feb. 24, 2006) ("[P]ermits for [MS4] must require municipalities to reduce pollutants in their storm water discharges to the MEP. . . . MS4 permits 'shall require controls to reduce the discharges of pollutants to the maximum extent practicable, including management practices, control techniques and systems, design and engineering methods.'"); California EPA, State Water Resources Control Board, *Stormwater Program: Municipal Program*, http://www.swrcb.ca.gov/stormwtr/municipal.html (last visited Feb. 24, 2006) ("The MS4 permits require the discharger to develop and implement a Storm Water Management Plan/Program with the goal of reducing the discharge of pollutants to the maximum extent practicable (MEP). MEP is the performance standard specified in Section 402(p) of the Clean Water Act.").

325 *See* Envtl. Def. Ctr., Inc. v. EPA, 344 F.3d 832, 852 (9th Cir. 2003).

326 *See* Clean Water Act § 309, 33 U.S.C. § 1319 (2000).

IX. CONCLUSION

A compelling case exists that construction activities are a potential source of water quality impairment. Sediment runoff from construction sites, which exceeds natural erosion rates when land is cleared or altered during development, is one of the largest pollutant concerns.[327] But sediment runoff is not the only concern. Regulators are also concerned with a wide array of additional pollutants, such as nutrients used to fertilize landscaping, the application of toxic pesticides, and the generation of trash and other construction debris.[328] Some best management practices (BMPs) carry special concerns. Standing water in filtration basins, for example, may encourage vector production that may threaten public health.[329] The actual palette of pollutants depends on climatic conditions as well as the particulars at the construction site. The type of pollutant subject to off-site release also varies as the project progresses through its various phases toward completion, and thus is dynamic.

The Clean Water Act (CWA), which is based on Congress' authority under the Commerce Clause, sets out the requirements that must be satisfied by dischargers to comply with federal law. The jurisdictional prerequisites to regulation and enforcement are the discharge of a pollutant to waters of the United States from a point source (PS).[330] Thus, the CWA does not apply without these requirements (discharge, pollutant, navigable waters, and PS) being met.

The CWA regulates the pollutants in storm water discharges from construction activities under the permitting system established by National Pollutant Discharge Elimination System (NPDES) program.[331] Discharges of any pollutant into navigable waters from a point source are unlawful unless the discharge complies with an NPDES permit.[332] The failure to secure a required permit as well as the noncompliance with the terms of an NPDES permit are both unlawful, and subject the violator to civil and criminal sanctions.[333]

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327 EPA, *Storm Water Phase II Final Rule Fact Sheet Series, Small Construction Program Overview* (Jan. 2000), *available at* http://www.undeerc.org/watman/stormwater/factsheets/fact3-0.pdf.

328 EPA, U.S. v. Wal-Mart Stores, Inc. Fact Sheet, *supra* note 68, at 3–4.

329 *See* Swarna Muthukrishnan, Richard Field & Daniel Sullivan, *The Use of Best Management Practices (BMPs) in Urban Watersheds* (Sept. 2004), at 2–38, *available at* http://www.epa.gov/ORD/NRMRL/pubs/600r04184/600r04184chap2.pdf (last visited Feb. 19, 2006).

330 *See, e.g.,* Clean Water Act § 311(b), 33 U.S.C.S. § 1321(b) (LexisNexis 2002).

331 *See* Clean Water Act § 402, 33 U.S.C. § 1342 (2000).

332 *Id*.

333 *See* Clean Water Act § 309, 33 U.S.C. § 1319 (2000).

In 1987, the CWA was amended adding the industrial storm water provisions of Section 402(p).[334] Construction activities, which fall within the industrial category, that disturb one acre or more of land and meet the requirements of the CWA are now regulated.[335] Given the large number of construction sites subject to CWA regulation, most developers elect to be regulated by a "general permit" designed to regulate an entire group or category of activities. Although individually issued NPDES permits may be issued to developers, individual NPDES storm water permits are not the norm. Thus, the effective and efficient administration of the "general permit" storm water system is critically important to regulators, the building industry, and the community. It is also significant because construction storm water regulation has been elevated as an enforcement priority by regulators.[336]

A developer requests coverage under the general storm water permit by filing a Notice of Intent (NOI).[337] At this time, the implementation of best management practices (BMPs) is considered by regulators to be the most appropriate method of meeting the maximum extent practicable (MEP) standard.[338] A Storm Water Pollution Prevention Plan (SWPPP), which accompanies the NOI, identifies the proposed BMPs to reduce pollutants.[339] It also identifies the potential sources of pollution that are expected from the construction site, and contains the assurance that the developer will comply with the terms and conditions of the construction storm water permit.[340]

The states play an important role in administering the storm water law. Most states are authorized by the EPA to administer the NPDES program, subject to continuing oversight by the EPA.[341] As a result, the states tend to be at the forefront of administering the storm water program, including enforcement.[342]

334 Clean Water Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (Feb. 4, 1987).

335 Extension of National Pollutant Discharge Elimination System (NPDES) Permit Deadline for Storm Water Discharges for Oil and Gas Activity That Disturbs One to Five Acres, 70 Fed. Reg. 11,560 (Mar. 9, 2005), *available at* http://www.epa.gov/npdes/regulations/sw_oil_gas_final_rule.pdf.

336 EPA, *Compliance and Enforcement National Priority: Clean Water Act, Wet Weather, Storm Water* (Nov. 2004), http://www.epa.gov/compliance/resources/publications/data/planning/priorities/fy2005prioritycwastorm.pdf.

337 EPA, EPA's Electronic Stormwater Notice of Intent (eNOI) Home Page, http://cfpub.epa.gov/npdes/stormwater/enoi.cfm (last visited Feb. 20, 2006).

338 *See* 40 C.F.R. § 122.34 (2004).

339 *See* EPA, Storm Water Pollution Prevention Plans for Construction Activities, http://cfpub.epa.gov/npdes/stormwater/swppp.cfm (last visited Feb. 20, 2006).

340 *See id*.

341 Clean Water Act § 402(b), 33 U.S.C. § 1342(b) (2000); *see also* discussion *supra* Part IV. The Construction Industry and Clean Water Act (CWA) Storm Water Regulation.

342 *See* EPA, Authorization Status for EPA's Stormwater Construction and Industrial Programs, http://cfpub.epa.gov/npdes/stormwater/authorizationstatus.cfm (last visited Feb. 20, 2006) (providing a table listing which states have been authorized to implement

States also play an important role when acting to protect water quality based on state law considerations independent of the CWA. In such cases, a state may provide more protection than provided by the CWA even though the formal mechanism to providing this additional protection may be incorporated in the federal NPDES permit.[343]

In California, for example, any person discharging or proposing to discharge waste that could affect the water quality of the waters of the state is subject to regulation.[344] This grant of regulatory authority—"could affect the water quality"—is broader than the "discharge to navigable waters" Commerce Clause requirement of the CWA.[345] A legal reservoir of independent state constitutional authority exists to provide greater water quality protection than that available under federal law.

The CWA requires the opportunity for a public hearing on a "permit" or "permit application."[346] But actually providing a public hearing for each construction activity seems at odds with the nature of a general permit system. The federal circuits are divided as to whether this hearing requirement applies to a NOI and accompanying SWPPP.[347] The failure of Congress to define "permit" or "permit application" is the starting point to understanding the controversy that led to the functional permit theory.[348] Ultimately, the functional equivalent permit theory must be addressed by Congress or the Supreme Court of the United States.

This article has examined the divergent views on this theory. In *Environmental Defense Center, Inc. v. EPA*,[349] the Ninth Circuit considered the NOI and accompanying SWPPP the functional equivalent to a "permit" or "permit application."[350] The

the NPDES storm water program).

343 *See* City of Burbank v. State Water Res. Control Bd., 108 P.3d 862, 870 (2005) (rejecting the argument that state exercising the discretionary authority recognized by the CWA acts pursuant to federal law based on the theory that the CWA incorporates state water policy into federal law).

344 CAL. WATER CODE ANN. § 13260(1) (West 2005).

345 *See* CAL. WATER CODE ANN. § 13260(a)(1) (West 2005); *see also* Clean Water Act § 401(a)(1), 33 U.S.C. § 1341(a) (2000).

346 Clean Water Act § 402(a)(1), 33 U.S.C. § 1342(a)(1) (2000) (providing that "the Administrator [of the EPA] may, after opportunity for public hearing, issue a permit . . . .").

347 *See* Envtl. Def. Ctr., Inc. v. EPA, 344 F.3d 832 (9th Cir. 2003), *cert. denied*, Tex. Cities Coal. on Stormwater v. EPA, 541 U.S. 1085 (2004), *accord* Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486 (2d Cir. 2005), *but see* Tex. Indep. Producers and Royalty Owners Ass'n v. EPA, 410 F.3d 964 (7th Cir. 2005) *reh'g denied* en banc Aug. 26, 2005.

348 *See* discussion *supra* Part VIII. The "Functional" Permit Theory: Divergent Views.

349 344 F.3d 832 (9th Cir. 2003), *cert. denied*, Tex. Cities Coal. on Stormwater v. EPA, 541 U.S. 1085 (2004).

350 *Id*. at 858.

Phase II Rule did not provide for regulatory oversight, which led the court to conclude that the Rule constituted an impermissible self-regulatory regime.[351] In other words, the functional permit theory became the legal mechanism to assure regulatory oversight by providing the opportunity for a public hearing. The court applied the Supreme Court the first step of the two-part test set forth in *Chevron v. Natural Resources Defense Council* and found that this lack of oversight contravened the express requirements of the CWA.[352]

In 2005, the Seventh Circuit decided *Texas Independent Producers and Royalty Owners Association v. EPA*.[353] It rejected the functional permit theory as it applies to storm water regulation.[354] Because Congress had not defined the critical terms "permit" or "permit application," the court reasoned that the critical issue was the application of step two of *Chevron*: whether the EPA's construction of the CWA requirements was "permissible."[355]

Several considerations led the court to conclude that the EPA's position was permissible and should be sustained. First, the opportunity for a public hearing was granted when the permit was promulgated by the EPA for notice and comment in the Federal Register.[356] The public had the opportunity at this time to weigh in on the proposed permit when it was promulgated.[357] Furthermore, Congress did not specify that a NOI or SWPPP should be considered a "permit" or "permit application."[358] Rather, it assigned the EPA the task of developing a comprehensive storm water program.[359] Second, granting a public hearing on each NOI and accompanying SWPPP was simply unworkable as an administrative matter given the large number of construction activities subject to possible regulation.[360] Finally, granting a public hearing on each NOI and SWPPP would undermine the general permitting scheme approved by Congress.[361] Thus, the functional permit theory appears not to further Congress' intent but to be inconsistent with it.

When pared to the core, the functional permit theory is

351 *Id*. at 852.
352 *Id*.
353 410 F.3d 964 (7th Cir. 2005), *reh'g denied* en banc Aug. 26, 2005.
354 *Id*. at 978.
355 *Id*.
356 *Id*.
357 *See id*.
358 *Id*.
359 Tex. Indep. Producers and Royalty Owners Ass'n v. EPA, 410 F.3d 964, 968 (7th Cir. 2005), *reh'g denied* en banc Aug. 26, 2005.
360 *See id*. at 978.
361 *Id*.

based on the perceived substantive importance of the SWPPP. I have argued that its substantive importance is minimized, and thus the *raison d'etre* for its existence, when additional factors involving regulatory oversight and enforcement are taken into account. The role of Water Quality Standards (WQSs) and the federal antidegradation policy were not considered in considering the appropriateness of the theory. When they are taken into account, the Rule proposed by the EPA is significantly less "self-regulatory" than envisioned by the Ninth Circuit.[362] I have also argued that the Seventh Circuit's analysis is more persuasive based on the application of *Chevron*. The Rule is a "permissible" construction by the EPA furthering the intent of Congress to promote the use of general permits.[363]

The division between the federal circuit courts on the role of the functional equivalent theory leaves developers, regulators, and the community with no clear answer to the question: What does the CWA require? Pending resolution of the answer either by Congress or the Supreme Court, I have suggested several solutions for coping with the requirement to provide the opportunity for a public hearing in those federal circuits applying the theory.

Perhaps the most promising approach is for regulators to treat the minimum BMP measures more flexibly, and less determinatively in meeting the statutory requirement of "maximum extent practicable" (MEP).[364] In doing so, this would require developers to recognize that implementing the BMP measures identified in the applicable construction SWPPP is no assurance that regulators will treat the developer in compliance with the CWA. This approach inevitably results in some uncertainty with respect to compliance. Thus, the regulatory challenge that lies ahead to reduce uncertainty is a scientific one: the formulation of a more certain regulatory standard for storm water discharges.

362 *See id*.
363 *Id*.
364 *See* 40 C.F.R. § 122.34 (2004).