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Still Dirty after Twenty-Five Years: Water Quality Standard Enforcement and the Availability of Citizen Suits

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Still Dirty After Twenty-Five Years: Water Quality Standard Enforcement and the Availability of Citizen Suits

Michael P. Healy*

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INTRODUCTION

When Congress enacted the Federal Water Pollution Control Act, commonly known as the Clean Water Act, it established a pollution control regime that imposed a baseline level of technology-based pollution control, and was designed to ensure that water quality would not fall below certain standards. Twenty-five years after the enactment of the Clean Water Act, success may be claimed with regard to technology-based controls. Achieving water quality standard (WQS) compliance has proved much more difficult. Indeed, evaluated from a variety of perspectives, the enforcement of the water quality-based system of pollution control must be viewed as a failure.

In light of this failure, this Article considers whether the Clean Water Act permits citizen suit enforcement of state WQSs and whether allowing such suits constitutes good public policy. The Article concludes that the text, legislative intent, and broad purpose of the Act only allows citizen suits when compliance with state WQSs is a condition of a point source's National Pollution Discharge Elimination System (NPDES) permit. Only in this circumstance is it good public policy to allow citizen suits to enforce WQSs.

The Article begins its analysis by describing the regulatory structure of the Clean Water Act and focusing particularly on how the Act was designed to protect the quality of the nation's waters. Several provisions of the Act require that permits allowing discharges into waters include limitations that are more stringent than those normally required by the applicable technology-based standards. The Article also discusses how and why this scheme for ensuring WQS compliance has failed. Empirical evidence indicates that many of America's waterways fail to meet the applicable WQSs. This is in part because the...
Act has not been implemented and administered in a manner that ensures that WQSs are met. Moreover, even if the Act were implemented more effectively, it would be quite difficult to ensure that WQSs are met.

After describing the degraded quality of waters, notwithstanding twenty-five years of technology-based emissions limitations on point sources, the Article considers the role that direct citizen enforcement of WQSs might play in promoting WQS compliance. In a recent controversial decision, *Northwest Environmental Advocates v. Portland*, the Ninth Circuit Court of Appeals held that a citizen suit may be brought to enforce WQSs.\(^7\) After describing the Ninth Circuit decision and the strong dissenting views of some members of the court,\(^8\) this Article considers the legal issue of whether and under what circumstances the Clean Water Act authorizes citizens to enforce WQSs.\(^9\) It then discusses whether and when such actions ought to be permitted as a matter of public policy.\(^10\) The Article concludes that citizen suit enforcement of WQSs should be allowed only when the defendant source's NPDES permit requires WQS compliance as a permit condition. Although this is a somewhat limited scope, enforcement in that circumstance should help to improve water quality in some cases. More importantly, however, the availability of citizen suits should help to encourage all interested parties to transform the WQSs for waterways into specific effluent limitations for the point sources along those waterways, and to include more stringent emissions limitations in the point sources' NPDES permits. Compliance with these specific limitations will be easier to monitor and evaluate than is compliance with WQSs. Penalties for noncompliance will also be fairer to permitted point sources.

I

THE BASIC STRUCTURE OF THE CLEAN WATER ACT\(^11\)

This section describes how the Clean Water Act is structured to protect the quality of the nation's waters. After describing the basic regulatory regime adopted in 1972, which focused on technology-based limitations on discharges, the Article will discuss how Congress sought to supplement this approach by requiring the adoption of

\(7\) Northwest Environmental Advocate v. Portland, 56 F.3d 979, 981 (9th Cir. 1995), cert denied, 116 S. Ct. 2550 (1996).
\(8\) See infra Part III.
\(9\) See infra Part IV.
\(10\) See infra Part V.
\(11\) Portions of this part of the Article closely parallel portions of my previous Article, which considers state certification of compliance with WQSs. See Michael P. Healy, *The Attraction and Limits of Textualism: The Supreme Court Decision in PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 5 N.Y.U. ENVTL. L.J. 382, 405-10 (1996).
WQSs to further limit emissions from point sources. Indeed, when Congress amended the Clean Water Act in 1987, it employed water quality-based limitations as a means for ensuring that waters are protected from toxic pollutants. The discussion that follows will therefore illustrate that the Clean Water Act places great importance on WQSs and is structured to ensure that they are met.

A. The Function of WQSs in the Clean Water Act\textsuperscript{12}

Congress enacted the basic regulatory structure now evident in the Clean Water Act as part of the Federal Water Pollution Control Amendments of 1972.\textsuperscript{13} In the 1972 Act, Congress substantially revised the nation's program for water pollution control, which had previously been governed by the Water Quality Act of 1965.\textsuperscript{14} The 1965 Act had relied principally on state-established WQSs to define the clean water goals and standards.\textsuperscript{15} The 1965 Act proved to be ineffective in controlling water pollution.\textsuperscript{16} Congress therefore decided to change the WQS-based system to one involving mandatory technology-based effluent limits for point sources of pollution.\textsuperscript{17}

The regulatory scheme adopted in 1972 sought to improve water quality primarily by limiting discharges into regulated waters through technology-based controls and setting a goal of zero discharge of pollutants.\textsuperscript{18} When it adopted this technology-based regulatory scheme, Congress also established the NPDES permitting system as the "primary mechanism" for imposing those controls and their related effluent limits.\textsuperscript{19} Accordingly, the Act requires that before a point source

\begin{footnotesize}
\begin{enumerate}
\item \textit{Frederick Anderson et al., Environmental Protection: Law and Policy} 354 (2d ed. 1990) ("The heart of the 1965 Act's regulatory program was water quality standards.").
\item See \textit{id.} at 354-55; U. S. ENVTL. PROTECTION AGENCY, \textit{Training Manual for NPDES Permit Writers} 1-4 to 1-5 (March 1993) [hereinafter \textit{NPDES Training Manual}]. This ineffectiveness resulted from inaction by the state and inadequate federal enforcement authority. \textit{See Percival, supra} note 3, at 881-82.
\item \textit{See NPDES Training Manual} at 1-5 (describing the shift in regulatory focus accomplished by the 1972 statute); S. CONF. REP. NO. 92-1236 (1972) \textit{reprinted in} 1972 \textit{U.S.C.C.A.N.} 3776 (accompanying the 1972 FWPCA) ("The legislation recommended by the Committee proposes a major change in the enforcement mechanism of the Federal water pollution control program from water quality standards to effluent limits.").
\item \textit{See Anderson, supra} note 15, at 355-56; \textit{cf.}, Westvaco Corp. v. United States EPA, 899 F.2d 1383, 1384 (4th Cir. 1990) ("Unlike technology-based limitations, water quality standards are not developed based on an evaluation of the capability of pollution control technologies but on the physical attributes of the water segment necessary to support the designated uses.").
\item \textit{NPDES Training Manual, supra} note 16, at 3-3:
\end{enumerate}
\end{footnotesize}
may discharge pollutants into waters of the United States, the source must obtain an NPDES permit. The permit limits the amount of pollution that a source may discharge into the receiving waters, based on the source's technological capabilities.

Notwithstanding its new focus on technology-based limitations, Congress decided to include water quality-based controls in the 1972 Act as a supplemental limit on pollution. The Act therefore includes a provision requiring states to define WQSs, followed by federal review and approval. In the years since Congress shifted from a water quality-based system to a technology-based system of regulation, Congress has never abandoned WQSs as an important tool for controlling water pollution. The Water Quality Act of 1987, for example, "placed greater emphasis on attaining state water quality standards." As will be discussed in greater detail below, the 1987 Act sought to improve the control of toxic water pollution by requiring compliance with more specific, numerical water quality criteria and by requiring

Effluent limitations are the heart of the NPDES permit. They act as the primary mechanism to control the discharges of pollutants to waters of the United States. In general, the majority of the permit writer's time is spent determining and developing appropriate effluent limitations based on technology and water quality factors.

20. Pursuant to the Clean Water Act 33 U.S.C. §§ 1311 and 1342, a point source is required to obtain a permit before it may discharge pollutants into waters of the United States. See also 33 U.S.C. § 1362(14). The Act defines a "point source" broadly to "mean[] any discernible, confined and discrete conveyance." Id. The definition specifically includes such conveyances as a "pipe, ditch, [or] channel." Id.


22. Id. § 1311(b)(1)(C).

23. Id. § 1313(c)(2) states that WQSs:

[S]hall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this [Act]. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

24. Westvaco Corp., 899 F.2d at 1385; accord Hecla Mining Co. v. EPA, 12 F.3d 164, 165 (9th Cir. 1993). See Natural Resources Defense Council v. EPA, 915 F.2d 1314, 1318 (9th Cir. 1990) (stating that in 1987, Congress decided that "a renewed emphasis on water quality-based standards was necessary.").


Subsection (d) requires that during State review, revision, or adoption of water quality standards, the State must adopt criteria for all priority toxic pollutants for which water quality criteria have been published under section 304(a). The State's criteria are to be based on specific numerical criteria. Where numerical criteria are not available, the State shall use biological monitoring or assessment methods.

See also H.R. REP. No. 102-839, at 72 (1992) stating that:

It is also the Committee's intent that groundwater should be protected to ensure that groundwater that is closely hydrologically connected to surface waters does not interfere with the attainment of surface water quality standards, which is necessary to protect the integrity of associated ecosystems. The beneficial uses will be determined under applicable state law, and may include, but are not limited to, agricultural, industrial, commercial, and drinking water uses.
states to develop "individual control strategies" for waters that fail to comply with those numerical criteria for toxic pollutants. In the 1987 Act, Congress also codified a policy that EPA had developed to prevent degradation of water quality. That policy was intended to ensure the maintenance of water quality sufficient to support existing uses of the waters.

The preceding discussion has illustrated that, although the Clean Water Act relies on technology-based effluent limits on point sources as the primary means of protecting the nation's waters, the Act continues to recognize that state WQSs play an important supplementary role in protecting and enhancing the quality of those waters. A leading commentator has noted that the technology and water quality-based standards established by the Act "should be recognized as reflecting fundamentally conflicting regulatory philosophies." Technology-based standards are based on the source's technological capacity to control pollution, while water quality-based standards are based on the environmental effect of the discharged pollution.

B. The Content of State WQSs

EPA regulations under the Clean Water Act provide that state WQSs must include three core "elements." The standards must include "[u]se designations" for waters subject to the Act, "[w]ater quality criteria sufficient to protect the designated uses," and an acceptable "antidegradation policy." These elements are intended to be broadly protective of the quality of a state's waters. Each element will be discussed in greater detail below.

EPA regulations relating to the state's designation of uses give states the authority to define those uses within established con-

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Congress also amended the Clean Water Act in 1977. Those amendments modified significantly the technology-based regulatory scheme, see Gaba, supra note 12, at 1186 n.104, but "left the water quality standards program unchanged. Id. at 1186.

27. See id. § 1313(d)(4)(B).
28. See 40 C.F.R. § 131.12 (1994). This antidegradation component of state WQSs is described infra in Part II.B.
29. RODGERS, supra note 3, at 259.
30. See 40 C.F.R. § 131.6 (1994). For a general discussion of state WQS setting, see American Paper Inst., Inc. v. EPA, 996 F.2d 346, 349 (D.C. Cir. 1993). One court has held that:
31. 40 C.F.R. § 131.6(a) (1994).
32. Id. § 131.6(c).
33. Id. § 131.6(d).
straints. For example, EPA regulations foreclose uses that would allow discharges of plainly dangerous levels and types of pollutants. The regulations also ensure that designated uses are at least as protective of water quality as existing uses.

Water quality criteria, meanwhile, are defined by the state and reviewed by EPA in light of the uses designated by the state. The criteria are required to "represent[ ] a quality of water that supports a particular use. When criteria are met, water quality will generally protect the designated use." The criteria may be "expressed as constituent concentrations, levels, or narrative statements." According to the NPDES Training Manual, "[n]arrative criteria are statements that describe the desired water quality goal, such as, 'All State waters must, at all times and flows, be free from substances that are toxic to humans or aquatic life.'" In recent years, EPA has increasingly shown an interest in strengthening state water quality criteria in an effort to promote greater protection of water resources and the biologic resources that depend on those waters.

34. See id. § 131.10.
35. Id. § 131.10(a) ("In no case shall a State adopt waste transport or waste assimilation as a designated use.").
36. See id. §§ 131.10(g-h).
37. See id. § 131.11 ("States must adopt those water quality criteria that protect the designated use.").
38. Id. § 131.3(b). State WQSs may be quite significant in their potential impact on discharges from point sources. See Albuquerque v. Browner, 865 F. Supp. 733, 741 (D. N.M. 1993) (discussing WQS for arsenic that is more stringent than the existing background level for that toxin in the waterway); In re Miami-Dade Water & Sewer Auth. Dep't, 24 Envtl. L. Rep. (Envtl. L. Inst.) 40,034, 40,035 (E.P.A. E.A.B. July 27, 1992) stating that:

For the purposes of this appeal, a key aspect of Florida's toxicity standard is that the effluent is to be tested at precisely 30% full strength. The toxicity testing required by the standard, therefore, does not reflect the actual dilution that will take place once the effluent mixes with the receiving waters.

39. 40 C.F.R. § 131.3(b).
40. NPDES TRAINING MANUAL, supra note 16, at 6-3 ("To supplement numeric criteria for toxicants, all states have also adopted narrative criteria for toxicants.").
41. For example, following the lead of certain states, EPA has encouraged other states to develop new water quality criteria that will ensure protection of the ecosystems that depend on the regulated waterway. See Federal Energy Regulatory Comm'n Hydropower Licensing Program: Hearing Before the House Comm. on Env't, Energy and Natural Resources of the House Comm. on Gov't Operations, 102d Cong. 88 (1993) for the statement that:

EPA has recently begun to emphasize that States should also include more specific criteria for habitat protection, criteria to help prevent contamination of sediments and criteria for the protection of wildlife. Some States are way ahead of us on this and we are using them as examples for other States to move forward. (statement of Martha G. Prothro, Deputy Assistant Administrator, Office of Water, U.S. Envtl. Protection Agency). See also NPDES TRAINING MANUAL, supra note 16, at 6-3 ("The science that forms the basis of water quality criteria development is constantly evolving. For example, two new areas where criteria are being developed include biological and sediment criteria.").
The third core WQS element, an antidegradation policy, must meet minimum requirements established by EPA regulations. These requirements include the full protection of both existing uses and “high quality waters constituting an outstanding National resource.” The antidegradation policy must also provide for some, more limited, protection of other waters where quality exceeds the level needed to protect existing uses.

C. WQSs and the Clean Water Act Scheme for NPDES Permitting

This section describes the five regulatory devices that Congress has included in the Clean Water Act in an attempt to ensure compliance with state WQSs, and particularly those standards concerned with toxic pollutants. These devices, which are largely redundant, demonstrate the extent to which the Act seeks to protect water quality against degradation.

1. Section 301’s “More Stringent Limitations” Requirement

When it adopted the technology-based regulatory approach in 1972, Congress understood that the statutory scheme was incomplete in its protection of waters affected by pollution:

Congress recognized that even if all the firms discharging pollutants into a certain stream segment were using the best available technology [controls], the stream still might not be clean enough to meet the water quality standards set by the states. To deal with this problem, Congress supplemented the “technology-based” limitations with “water-quality-based” limitations.

Section 301(b)(1)(C) of the Clean Water Act requires that each NPDES permit include “any more stringent limitation[s], including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulation.”

42. See 40 C.F.R. § 131.12(a).
43. Id. § 131.12(a)(1).
44. Id. § 131.12(a)(3).
45. Id. § 131.12(a)(2).
46. Natural Resources Defense Council v. EPA, 915 F.2d 1314, 1317 (9th Cir. 1990) (citations omitted).
47. 33 U.S.C. § 1311(b)(1)(C). EPA has broadly construed this language. See In re Miami-Dade Water & Sewer Auth. Dep’t, 24 Envtl. L. Rep. (Envtl. L. Inst.) at 40,036 (citation omitted), where the Environmental Appeals Board stated that it:

[Interpret[s] the section as requiring a permit limitation to ensure compliance not just with the three types of State standards listed in the statute but, as also provided in the statute, with any more stringent ‘State law or regulations’ that might be violated by the discharge. The three types of standards listed in the statute—water quality standards, treatment standards, and schedules of compliance—are merely examples of a larger class of State requirements that might trigger the need for a permit limitation under section 301(b)(1)(C).]
The Act thus provides that "[o]nce water quality standards have been set, NPDES permit limitations must be established to assure compliance, regardless of the availability or effectiveness of treatment technologies."\textsuperscript{48} These tightened NPDES limitations will be referred to throughout this Article as "more stringent limitations."\textsuperscript{49} One court has summarized the basic effect of this regulatory structure as follows: "Of course, the water quality standards by themselves have no effect on pollution; the rubber hits the road when the state-created standards are used as the basis for specific effluent limitations in NPDES permits."\textsuperscript{50}

As was discussed previously, WQSs, and more specifically water quality criteria, can take a variety of forms, including narrative standards.\textsuperscript{51} The more stringent limitations requirement of section 301(b)(1)(C) also applies to qualitative and narrative state WQSs.\textsuperscript{52} Indeed, EPA has promulgated regulations that describe three methods for translating narrative WQSs into defined permit limits on the dis-

\textsuperscript{48} Westvaco Corp. v. EPA, 899 F.2d 1383, 1384 (4th Cir. 1990).

\textsuperscript{49} Congress provided that any more stringent limitations on point sources that were needed to meet state water quality standards were to be included in permits by July 1, 1977. 33 U.S.C. § 1311(b)(1)(C). This deadline was intended to give permit writers an opportunity to identify the necessary permit requirements. See In re J&L Specialty Products Corp., 25 Envtl. L. Rep. (Envtl. L. Inst.) 40,230, 40,233 (E.P.A. E.A.B. June 20, 1994) ("as a general rule, NPDES permits issued after July 1, 1977, must require compliance with water quality-based effluent limitations immediately upon the effective date of the permit"). See id. at 40,234 ("Once the grace period has lapsed. EPA must ensure that all permits contain limitations necessary to meet whatever state water quality standards are in effect at the time of permit issuance, regardless of when [i.e., before or after July 1, 1977] the standards were adopted or revised." (citation omitted)).

\textsuperscript{50} American Paper Inst. Inc. v. EPA, 996 F.2d 346, 350 (D.C. Cir. 1993). Cf. Scott v. Hammond, 741 F.2d 992, 995 (7th Cir. 1984) stating that:

Water quality standards are not themselves directly enforced by the EPA. Rather, permits prescribing conditions are issued for individual sources of pollutants. CWA § 402, 33 U.S.C. § 1342. If the conditions of a permit are violated, the EPA may issue a compliance order or bring a civil action against the violator. CWA § 309, 33 U.S.C. § 1319.

(footnote omitted).

\textsuperscript{51} See supra Part I.B.

\textsuperscript{52} American Paper Inst., 996 F.2d at 350 ("On its face, section 301 imposes this strict requirement as to all standards—i.e., permits must incorporate limitations necessary to meet standards that rely on narrative criteria to protect a designated use as well as standards that contain specific numeric criteria for particular chemicals."); U.S. Envtl. Protection Agency, National Pollution Discharge Elimination System; Surface Water Toxics Control Program, 54 Fed. Reg. 23,868, 23,871 (1989) ("effluent limits . . . must achieve any state narrative water quality criteria as well as numeric water quality criteria.").
charge of pollutants. Those regulations were upheld in a legal challenge as a reasonable exercise of EPA's gap filling responsibilities under the Act. As a result, the effluent limitations included in a source's NPDES permit may be based on technology-based standards or on numerical or narrative water quality-based standards or on a combination of these standards.

2. The Total Maximum Daily Load Requirement

Section 303(d) of the Clean Water Act supplements the section 301 more stringent limitations requirement by establishing a four step process for reducing point source pollutant discharges when the receiving waters violate the state's WQSs. The example of the Columbia River will be used throughout this section to illustrate the operation of section 303(d).

The first step of the process established under section 303(d), requires states to "identify those waters which, taking into account technology-based reduction of pollutant discharge, will fail to meet the water quality standard established for those waters." States were

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53. See 40 C.F.R. §§ 122.4(d)(1)(vi)(A-C); see also 54 Fed. Reg. 23,868, 23,875 ("State narrative water quality criteria provide the legal basis for establishing effluent limits under paragraphs (d)(1)(v) and (d)(1)(vi) of today's regulations."); NPDES TRAINING MANUAL, supra note 16, at 6-6 to 6-7 ("EPA's regulation at 40 CFR 122.44(d)(1) establishes grounds for determining if there is an excursion of the numeric or narrative water quality criteria. At a minimum, the permitting authority must make this determination at each permit reissuance and must develop permit limits that will control the discharge.").

54. See American Paper Inst., 996 F.2d at 353 (footnote omitted), where the court stated that:

[T]he agency's initiative seems a preeminent example of gap-filling in the interest of a continuous and cohesive regulatory regime; the EPA has plugged an obvious hole in the CWA scheme in a way that is both reasonable and consistent with (1) Congress' long-standing directive that permits contain limitations necessary to meet all water quality standards and (2) Congress' more recently expressed preference, evident in section 303(c)(2)(B), for numeric criteria. In sum, we see no problem with the agency's efforts.


The text of the Clean Water Act listing requirement has raised two issues about its proper scope. First, the statute specifically refers only to the listing of waters that are impaired due to the inadequacy of best practicable technology, a technology-based standard does not apply to toxic pollutants. See 33 U.S.C. § 1313(d)(1)(A). Based on this text, one court of appeals had suggested in dicta that the Act did not require states to list waters where quality is impaired by toxics. Natural Resources Defense Council v. EPA, 915 F.2d 1314, 1322 n.9 (9th Cir. 1990):

EPA suggests that prior to the enactment of section 304(1), states already were required, albeit without a statutory deadline, to submit the information requested. It cites CWA § 303(d), but that section requires states to identify only those waters for which limitations based on the best practicable technology would not be stringent enough to implement the water quality standards. Those waters for which limitations based on the more demanding best available technology—the required level of technology to control toxics—were insufficient did not have to be listed.
required to complete this listing of water quality-limited waters by the middle of 1974 and to update the listing "from time to time thereafter."\(^\text{57}\) As an example, Oregon, Washington, and Idaho have listed the Columbia River as a water quality-limited water because levels of dioxin in the river exceeded the applicable WQSs.\(^\text{58}\)

The second step in the section 303(d) process involves determining the total maximum daily load (TMDL) for each impaired water

That court later held, however, that EPA had acted reasonably in interpreting the listing requirement to apply to waters impaired by toxics. See Dioxin/Organochlorine Ctr. v. Clarke, 57 F.3d 1517, 1527 for the statement that:

The EPA argues that "[w]e interpret section 1313(d) as requiring TMDLs where existing pollution controls will not lead to attainment of water quality standards." We take this as an assertion that when a state has listed a water as impaired by toxic pollutants, the EPA has authority to implement TMDLs for that toxic pollutant under § 1313(d) even before technological limitations have been developed and implemented pursuant to § 1311(b)(1)(A) or (B). We hold that the EPA's interpretation is reasonable and not contrary to congressional intent.

The second uncertainty about the scope of the listing requirement is whether listing is required only after technology-based standards have been established and a determination has been made that those standards are inadequate to protect water quality. The Ninth Circuit has suggested in dictum that the listing of waters impaired by non-toxic pollutants is not required until after technology-based standards have been established and shown to be inadequate. See Clarke, 57 F.3d at 1528. See also 4 LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SER., ENVTL. POLICY DIV., A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977: A CONTINUATION OF THE LEGISLATIVE HISTORY OF THE FEDERAL WATER POLLUTION CONTROL ACT at 1405 (1978) [hereinafter A LEGISLATIVE HISTORY]. A district court has rejected this narrow reading of the requirement, concluding that EPA's broad interpretation was reasonable because the Act mandated the listing of impaired waters well before the statutory deadline for instituting technology-based standards. See Dioxin/Organochlorine Ctr. v. Rasmussen, 37 Env't Rep. Cas. (BNA) 1845, at *4 (W.D.Wash. 1993), aff'd, 57 F.3d 1517 (9th Cir. 1995):

[T]he Act contemplated the issuance of the first TMDL's well before the July 1, 1977 deadline for the establishment of best practicable technology effluent limitations, 33 U.S.C. § 1311(b)(1)(A), or the deadline of March 31, 1989 for the establishment of effluent limitations based on the best available technology economically feasible. 33 U.S.C. § 1311(2). These terms reinforce the notion that TMDL's were to be undertaken swiftly if water quality standards were being violated. See also, id. at *3 ("Congress did not write that a state 'shall only' identify waters as requiring a TMDL if technology-based effluent limitations are not stringent enough, and the Court will not read into this section such a prohibition.").

57. See Dioxin/Organochlorine Ctr., 37 Env't Rep. Cas. (BNA) at *4:

The Act required states to identify water requiring TMDL's and set appropriate loads for those waters within 180 days after the EPA first identified the pollutants suitable for TMDL's, and from time to time thereafter. 33 U.S.C. § 1313(d)(2). The pollutants suitable for TMDL's were to be identified within one year after October 18, 1972, and from time to time thereafter. 33 U.S.C. § 1314(a)(2).

But see Alaska Ctr. for the Env't v. Browner, 20 F.3d 981, 983 & n.1 (9th Cir. 1994), which stated that "the first such submission [of the listing of impaired waters] was due no later than June 26, 1979," because that date fell "180 days after the date of publication of the first identification of pollutants under § 1314(a)(2)(D)."

58. See Dioxin/Organochlorine Ctr. v. Clarke, 57 F.3d at 1520 ("Oregon, Washington, and Idaho also identified the Columbia River as 'water quality limited' pursuant to § 1313(d)(1)(A), finding that the levels of dioxin being discharged into the Columbia River violated the applicable state water quality standards.").
listed by the state. A TMDL defines the maximum amount of a pollutant that a body of water can receive from all point and nonpoint sources each day before a violation of a state WQS will occur.\(^5\) A TMDL is required for each pollutant that is impairing a receiving water.\(^6\) In drafting the Act, Congress recognized that defining TMDLs may be complex and inexact, particularly when scientific studies are unavailable. Congress therefore specifically allowed states to account for scientific uncertainty and permitted them to provide for a "margin of safety" when setting TMDLs.\(^6\)

In the case of the Columbia River, a TMDL was established for dioxin to ensure compliance with the applicable water quality criteria.\(^6\) Interestingly, that limit on the total mass or load of dioxin that could be discharged into the Columbia River each day was designed

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59. See Alaska Ctr. for the Env't v. Reilly, 762 F. Supp. 1422, 1424 (W.D. Wash. 1991): TMDLs are the greatest amount of a pollutant the water body can receive daily without violating a state's water quality standard. The TMDL calculations help ensure that the cumulative impacts of multiple point source discharges are accounted for, and are evaluated in conjunction with pollution from other nonpoint sources.

See also Dioxin/Organochlorine Ctr. v. Clarke, 57 F.3d at 1520:
A TMDL defines the specified maximum amount of a pollutant which can be discharged or "loaded" into the waters at issue from all combined sources. Thus a TMDL represents the cumulative total of all "load allocations" which are in turn best estimates of the discrete loading attributed to nonpoint sources, natural background sources, and individual waste load allocations ("WLAs"), that is, specific portions of the total load allocated to individual point sources.

See generally NPDES TRAINING MANUAL, supra note 16, at 6-9.

60. See Dioxin/Organochlorine Ctr. v. Clarke, 57 F.3d at 1524 ("regulations pertaining to TMDL implementation specifically provide that TMDLs may be developed on a specific pollutant basis, 40 C.F.R. § 130.7(c)(1)(ii)").

61. See Natural Resources Defense Council v. Fox, 909 F. Supp. at 157:
This enactment by Congress of specific deadlines, to the day, demonstrates a congressional intent that TMDLs be established promptly. Although these tight deadlines might mean that initially established TMDLs would be based on less than ideal data, that fact was considered and addressed by Congress, as demonstrated by the statutory direction to use "a margin of safety which takes into account any lack of knowledge." Id. § 1313(d)(1)(C).

See also Alaska Ctr. for the Env't v. Reilly, 762 F. Supp. at 1429 n.8 (citation omitted), where the court stated that:
In addressing concern about what happens if the State or EPA does not have enough data to establish a scientifically precise TMDL, [EPA Region X's Chief of the Office of Water Planning, Thomas Wilson] notes that the statute builds in a margin of safety requirement to be used to account for any lack of knowledge.

In other words, Congress says ignorance is no excuse for inaction. Just add a margin of safety to compensate for the lack of knowledge and keep moving. No other program has such a strong statutory endorsement for action in the face of an incomplete database.


[T]he EPA analyzed the flow volumes at various points in the River to determine the River's loading capacity, which represents the total maximum daily load of dioxin that could be released into the river without causing the concentration of dioxin to exceed 0.013 ppq. The EPA calculated that only 5.97 milligrams per day could be released . . . .
to ensure compliance with a standard set at so low a concentration that violations of the standard may not have been detectable.\textsuperscript{63} In other words, an important practical effect of the extremely low concentration defined by the water quality criteria is that it necessitated a very low TMDL for dioxin.

States were required to submit their initial TMDLs in the middle of 1974 at the same time they submitted their initial list of impaired waters.\textsuperscript{64} States are required to establish and periodically update TMDLs for all of their listed water quality-limited waters based on their own priority rankings.\textsuperscript{65} Each state submits its TMDLs, along with its list of impaired waters, to EPA.\textsuperscript{66} EPA is required to review the submission and decide within thirty days whether the submission is sufficient to ensure that state WQSs will be met.\textsuperscript{67} If EPA concludes that the submission is inadequate, the agency must establish TMDLs itself.\textsuperscript{68}

\begin{itemize}
  \item \textsuperscript{63} See Longview Fibre Co. v. Rasmussen, 980 F.2d 1307, 1309 (9th Cir. 1992) ("Because dioxin is immeasurably diluted at a concentration of 0.013 parts per quadrillion, the total maximum daily load is a regulatory device applied to control how much dioxin the pulp mills discharge into the water, rather than what can be measured in the water after the discharges.").
  \item \textsuperscript{64} See § 1313(d)(1)(D)(2) (1994).
  \item \textsuperscript{65} See Alaska Ctr. for the Env't v. Browner, 20 F.3d at 983:

    Under the statutory scheme, states are required to identify the specific waters that remain polluted despite the point source controls, and designate them as 'water quality limited.' These states are then required to establish a priority ranking for their water quality limited segments, and establish TMDLs . . . according to that ranking. 33 U.S.C. §§ 1313(d)(1)(A), (C). The Act requires the states to develop these lists of water quality limited segments and TMDLs and submit them to the EPA periodically.

  \item \textsuperscript{66} National Wildlife Fed'n v. Adamkus, 1991 WL 47374, at *1 (N.D. Ill. 1991) ("The State is required to submit the identity of WQLSs and TMDLs to the EPA for review.").
  \item \textsuperscript{67} See id. ("The EPA then determines whether the States' submissions are adequate to implement the relevant water quality standards."); Alaska Ctr. for the Env't v. Browner, 20 F.3d at 983 ("Upon receipt of the state's listings, the CWA requires the EPA to review the state's submissions within 30 days and either approve or disapprove them.").
  \item \textsuperscript{68} See Adamkus, 1991 WL 47374, at *1 ("If the EPA disapproves of the state's identification of water quality limited segments or its listing of TMDLs, the agency must establish its own list of water quality limited segments and TMDLs within 30 days. 33 U.S.C. § 1313(d)(2).") In fact, EPA made the TMDL determination for dioxin in the Columbia River at the request of the affected states. See Dioxin/Organochlorine Ctr. v. Clarke, 57 F.3d at 1520 ("the states requested the EPA to issue the proposed and final TMDL as a
Courts have also interpreted the Clean Water Act as providing that when a state has failed to submit TMDLs to EPA for an extended period, the state is treated as having constructively submitted a determination that no TMDLs are needed for any of its waters. Under these circumstances, EPA is required to review this "determination" and to promulgate federal TMDLs if the state has water quality-limited waters within its borders. For example, in Scott v. Hammond, federal action under the authority of § 1313(d)(2)). See also Longview Fibre Co. v. Rasmussen, 980 F.2d at 1310:

In the case at bar, all three states declined to adopt total maximum daily loads, and asked that EPA do so as a federal action. The EPA action is in the form of a disapproval of action by the states and imposition of standards by the EPA, under 33 U.S.C. § 1313, although the states requested the disapproval.

69. For example, until a citizen suit was brought against EPA in the mid-1980s, "the State of Alaska had never submitted any TMDLs to the EPA, and . . . the EPA had done nothing to establish any TMDLs." Alaska Ctr. for the Env't v. Browner, 20 F.3d at 983. One court has surmised that Congress anticipated that states might neglect their obligation to submit TMDLs, but urged that such inaction should not be permitted to undermine the Act's effectiveness:

The House Conference Report indicates that the TMDL proposal originated in the House as part of the Federal Water Pollution Control Act Amendment of 1972. See H.R. CONF. REP. NO. 92-1465, 122 (1972). The original House Report on the 1972 legislation expresses the states' obligation to submit TMDL's as a mandatory duty. See H.R.REP. NO. 92-911, 106 (1972). ("The State shall establish . . . the total maximum daily load.") The problem of state nonfeasance in submitting proposed TMDL's is not contemplated in the House Report. However, the Senate Report on the same legislation identified states' failures to fulfill their responsibilities under the existing legislation as a major problem which the Senate hoped to overcome by passing the 1972 amendments. See S.Rep. No. 92-414, 1-10, reprinted in 1972 U.S.C.C.A.N. 3668, 3669-3677. Thus, we are confident that Congress did not intend for state inaction to preclude adoption of TMDL's.

Scott v. Hammond, 741 F.2d 992, 998 n.13 (7th Cir. 1984).

70. See Hammond, 741 F.2d at 996 ("if a state fails over a long period of time to submit proposed TMDL's, this prolonged failure may amount to the 'constructive submission' by that state of no TMDL's."). See id. at 997-98:

[We think the states' inaction here, in view of the short statutory deadlines, may have ripened into a refusal to act. A refusal to act would amount to a determination that no TMDL is necessary and none should be provided. In effect, we may have a 'constructive submission' of no TMDL's.") See also Natural Resources Defense Council v. Fox, 909 F. Supp. at 160:

[The continued failure of a state to establish TMDLs creates a continuing duty of the Administrator to disapprove of the state's actions and to promulgate TMDLs. Because the state is directed to create TMDLs and submit them to the EPA from time to time, the continued failure to do so is also a repeated failure to do so, triggering separate duties of the Administrator to respond.

71. See Hammond, 741 F.2d at 998, where the court stated that:

As a matter of law, under CWA § 303(d)(2), 33 U.S.C. § 1313(d)(2), a state determination to set no TMDL's must be reviewed by the EPA, and the EPA is then required to approve or disapprove the submission. If EPA disapproves, it must set its own TMDL's. Id. If the district court determines that the states have made a "constructive submission" of no TMDL's, the failure of the EPA to act would amount to failure to perform a nondiscretionary duty and is properly raised by this complaint.

See also Alaska Ctr. for the Env't v. Reilly, 796 F. Supp. 1374, 1379 (W.D. Wash. 1992), aff'd 20 F.3d 981 (9th Cir. 1994) ("A state's inaction triggers the EPA's affirmative duty to step into the state's role and begin the TMDLs process.") (citation omitted); cf. Alaska Ctr.
the court reviewed a claim that was based, in part, on the failure of Indiana and Illinois\(^7\) to list portions of Lake Michigan as water quality impaired and their failure to identify TMDLs for that lake.\(^7\) The court in that case held that a state's failure to submit the lists required by section 303(d) triggered a nondiscretionary duty on the part of EPA to establish TMDLs for the state.\(^7\)

The third step in the TMDL process involves the determination of the waste load allocation (WLA). WLAs dictate the maximum discharge of pollutants that will be permitted from each point source discharging into a water quality-limited waterway.\(^7\) This allocation will be accurate only if it accounts for the pollution contributed by nonpoint sources. The WLA attributable to nonpoint source pollution cannot be allocated to any point source. In the case of the WLA for the Columbia River, EPA accounted for the pollution attributable to nonpoint sources and allocated the remaining load, which was less than one half of the river's TMDL for dioxin, to the point sources along the river, in that case paper mills.\(^7\)

In the final step of the TMDL process, the permit writer incorporates effluent limits into a given point source's NPDES permit, based

for the Env't v. Browner, 20 F.3d at 984 ("The EPA in this appeal does not challenge the district court's holding . . . that the EPA is in violation of the mandatory requirements of the CWA.").

\(^72\). Hammond, 741 F.2d 992.

\(^73\). See id. at 996 n.10.

\(^74\). See id. at 997 ("The allegation of the complaint that no TMDL's are in place, coupled with the EPA's admission that the states have not made their submissions, raises the possibility that the states have determined that TMDL's for Lake Michigan are unnecessary.").

\(^75\). See id. at 998 ("The EPA's inaction appears to be tantamount to approval of state decisions that TMDL's are unneeded. State inaction amounting to a refusal to act should not stand in the way of successfully achieving the goals of federal anti-pollution policy. Thus, the dismissal of the TMDL claim was erroneous.").

\(^76\). NPDES TRAINING MANUAL, supra note 16, at 6-9 ("Before calculating a water quality-based effluent limit [in this circumstance], the permit writer must establish the WLA for the point source involved. A WLA is the fraction of a receiving water's TMDL that is allocated to one of its existing or future point sources of pollution.").

\(^77\). See Dioxin/Organochlorine Ctr. v. Rasmussen, 37 Env't Rep. Cas. (BNA) 1845 at *1:

[T]he EPA analyzed the flow volumes at various points in the River to determine the River's loading capacity, which represents the total maximum daily load of dioxin that could be released into the river without causing the concentration of dioxin to exceed 0.013 ppq. The EPA calculated that only 5.97 milligrams per day could be released, and allocated approximately 35% of this total maximum daily load to the American chlorine-bleaching pulp mills on the River.

See also Longview Fibre Co. v. Rasmussen, 980 F.2d at 1309 ("The 2.38 milligrams per day figure was based on allowing the mills, including a Canadian mill not subject to EPA regulation, to discharge 40% of the assumed capacity for dioxins of the Columbia River Basin.").
on the WLA for that point source. In the case of the Columbia River, this meant revising the NPDES permits of several chlorine bleaching pulp mills to include more stringent limitations on dioxin discharges in the permits.

At its conclusion, the TMDL process leads to the incorporation of revised effluent limitations into the NPDES permit for a given point source. The TMDL requirement is redundant since it is another mechanism for accomplishing the same result already directly mandated by section 301. Section 301 calls for the establishment of more stringent effluent limits in NPDES permits so that state WQSs will be met in all waters of the United States. The TMDL requirement is designed to do much the same thing.

3. The 1987 Toxic Hot Spots Control Requirement

In 1987, Congress added section 304(l) to the Clean Water Act and "effectively required the states and EPA to place a high priority on identifying and controlling certain 'toxic hot spots.'" That provision "did not change the basic requirements of the CWA; rather, it simply established a mandatory schedule for the completion of a toxic pollutant subset of the water quality-related activities that the CWA already imposed."

The toxic hot spots requirement employed a regulatory approach quite similar to the one just discussed for establishing TMDLs. First, Congress required states to submit to EPA listings of waters in which quality was impaired by toxic pollutants. EPA regulations require

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78. Dioxin/Organochlorine Ctr. v. Clarke, 57 F.3d at 1520 ("When a TMDL and specific wasteload allocations for point sources have been established, any NPDES permits issued to a point source must be consistent with the terms of the TMDL and WLA. See 40 C.F.R. § 130.2.").

79. Longview Fibre Co. v. Rasmussen, 980 F.2d at 1309 ("The EPA generated a figure of 2.38 milligrams per day of allowable dioxin discharge for all of the chlorine-bleaching pulp mills, to be divided up among them in their permits.").

80. See supra Part I.C.2. The TMDL mechanism is somewhat different from the section 301 program, however, because the TMDL process yields more stringent permit limits only when a series of important actions have been taken and decisions made by state officials about the quality of receiving waters and the point and nonpoint sources whose effluent affects that quality.


82. Westvaco Corp. v. EPA, 899 F.2d 1383, 1385 (4th Cir. 1990).

83. Id. See also Natural Resources Defense Council v. EPA, 915 F.2d 1314, 1319 (9th Cir. 1990) ("The effect of the individual control strategy is simply to expedite the imposition of water quality-based limitations on polluters—limitations which otherwise would have been imposed when the polluters' NPDES permits expired.").

84. See Clean Water Act 33 U.S.C. 1314(l)(1); see generally 40 C.F.R. § 130.10(d). In fact, states must submit three lists to EPA. See Percival, supra note 3, at 952-53. The list required by subsection (A)(i) is to include waters that fail to attain or maintain WQSs "due to toxic pollutants." 33 U.S.C. § 1314(l)(1)(A)(i). The list required by subsection (A)(ii) is to identify waters that fail to attain several defined water quality goals, including "protec-
states to refer to their TMDL lists of impaired waters when preparing the lists required by section 304(l). The section 304(l) lists should, in large part, identify those waters suffering from toxic pollutant degradation among those identified in the TMDL lists. This is so because the Clean Water Act mandates that the TMDL lists identify all of a state's impaired waters, regardless of the pollutant causing the impairment.

As with the TMDL regulatory scheme, the listing of waters does not itself impose any new limitations on point source discharges. The regulatory force of section 304(l) is felt, and permit limitations are imposed, when its other two requirements are implemented. This is where the "toxic hot spots" identified by the state are subjected to individual control strategies (ICSs). Section 304(l)(1)(C) requires the state to determine which point sources are discharging the toxic pollutants believed to be impairing water quality in each waterway listed pursuant to section 304(l)(1)(C). States must also identify the amount of each toxic pollutant discharged by each source. Once these point sources and their discharges are identified, section 304(l)(1)(D) provides that:

States must prepare and submit for Agency approval an [ICS] for each listed water segment that will produce a reduction in the discharge of toxic pollutants from the identified point sources sufficient to meet water quality standards for the toxic pollutants as soon as possible but no later than three years after the establishment of the ICS.

See 40 C.F.R. § 130.10(d)(6)(v). Congress established a two year limit for the submission of these section 304(l) lists. 33 U.S.C. § 1314(l)(1).

In re J&L Specialty Products Corp., 25 Envtl. L. Rep. 40,230, 40,232 (E.P.A. E.A.B. June 20, 1994): A listing decision under section 304(l) serves only as an indication that some type of NPDES permitting action may be necessary to attain and maintain compliance with water quality standards for toxic pollutants. Until that permit action is taken, there is no obligation upon the discharger flowing from the listing decision that could possibly be the subject of review.

These requirements are discussed generally in 40 C.F.R. § 123.46.

33 U.S.C. § 1314 (l)(1)(C). The scope of this listing requirement has been controversial. EPA's Appeals Board, for example, states that this listing of point sources and their discharges is required only for B list waters, which are described supra note 84. In re J&L Specialty Products Corp., 25 Envtl. L. Rep. (Envtl. L. Inst.) 40,230. The Ninth Circuit has held, however, that this listing of point sources and their discharges must be submitted for impaired waters included on any of the three required lists. See Percival, supra note 3, at 953.

In re J&L, 25 Envtl. L. Rep. at 40,231 (citing 304(l)(1)(D); footnote omitted). A source must be listed pursuant to section 304(l)(1)(C) before it is subject to the ICS re-
EPA regulations provide that a point source's ICS is its NPDES permit.90 This means that a source's NPDES permit is required to include the more stringent limitations on toxic pollutant discharges necessary to ensure that the state's WQSs are met. Triggering the ICS requirement, therefore, imposes a three year outer limit for complying with the WQS for any relevant toxic pollutant.91 This statutory deadline trumps any more lenient compliance deadline that would otherwise be available to point sources under the applicable state WQSs.92

Based on our review of the record on appeal, it is clear that the present permit is not, nor could it be, an ICS because the facility does not meet the statutory prerequisites for imposing an ICS. That is, the Fenholloway River, into which Buckeye discharges its effluent, is not a listed water segment under CWA §304(l)(1)(A) or (B), nor has the Foley Mill been identified as a point source pursuant to CWA §304(l)(1)(C). Thus, the facility legally cannot be subject to the requirements of section 304(l).

EPA's regulations require ICS's not only for stream segments whose point source toxic problem, if eliminated, would bring the segment up to standards, but also for segments not meeting that description but whose point source contribution of a particular toxic is so severe that, standing alone, it would cause an excursion above the applicable water quality standard regardless of any nonpoint source contribution of the toxic. 40 C.F.R. § 130.10(d)(5)(ii). The inclusion of this latter type of stream segment in the ICS program has not been challenged. We note that EPA has ample authority, in addition to CWA §304(l), to require expedited action on such stream segments.

90. 40 C.F.R. § 123.46(c). See Westvaco Corp. v. EPA, 899 F.2d 1383, 1386 (“Exercising its agency discretion, EPA has defined an ICS to be a draft or final NPDES permit, with supporting documentation showing that effluent limits are sufficient to meet the applicable water quality standards.”).

91. See In re J&L, 25 Envtl. L. Rep. at 40,234 (§ 304(l) “allows applicable water quality standards to be achieved, via water quality-based effluent limitations imposed under section 301(b)(1)(C), as soon as possible but not later than three years after the establishment of the ICS.” (footnote omitted)). See also Natural Resources Defense Council v. EPA, 915 F.2d at 1319:

The effect of the [ICSs] is simply to expedite the imposition of water-quality-based limitations on polluters—limitations which otherwise would have had to be imposed when the polluters' NPDES permits expired. NPDES permits are issued for periods of no more than five years, although administrative delays can extend de facto the duration of the permits.

92. See In re J&L, 25 Envtl. L. Rep. at 40,233 (“section 304(l) listing decision may affect the period of time allowed for a permittee to come into compliance with the applicable effluent limitations and/or water quality standards for the toxic pollutants identified in the listing decision.”); see also id. at 40,234:

The Ohio regulation does not limit the [compliance] schedule term, and therefore if it applies exclusively, the schedule presumably could be for a full permit term of five years if the permit issuer determined that this period was appropriate. In contrast, section 304(l) limits the time allowed for compliance to three years from the establishment of the ICS. These sources of authority may operate concurrently, and if so, section 304(l) might serve to limit the amount of time for compliance that may otherwise be available under the Ohio regulation, because the State regulation cannot grant more time than that allowed under the federal statute.

(footnote omitted).
As with the TMDL provision, Congress has delegated important oversight responsibilities to EPA. States must submit and EPA must review the lists of toxic hot spots and the list of point sources impairing the waters. EPA was required to implement the provisions of section 304(l) itself before June 4, 1990, if a state failed to submit the required lists or if EPA failed to approve the state’s submissions. In the event that EPA has disapproved a portion of a state’s submission, EPA must implement the section 304(l) requirements for that disapproved portion.

The 1987 enactment of section 304(l) demonstrated Congress’ conviction that toxic pollutants emitted by point sources should not be allowed to degrade water quality to unhealthy levels. As implemented by EPA, the regulatory approach mandated by the Act leads to the inclusion of more stringent limitations in NPDES permits when necessary to ensure WQS compliance. This regulatory approach is essentially the same as that already dictated by sections 301(b)(1)(C) and 303(d). The fact that Congress felt the need to enact a new and duplicative provision in 1987 suggests strongly that it recognized that the regulatory approaches already in place were not adequately protecting water quality.

4. More Stringent Effluent Limitations Under Section 302

The Clean Water Act also requires reductions in point source emissions by delegating limited authority to EPA to impose more stringent permit limitations directly, when necessary to prevent the violation of WQSs. The section 301(b)(1)(C) requirement that NPDES permits contain the more stringent limitations necessary to ensure compliance with state WQSs applies to the permit-issuing agency, usually a state agency, rather than EPA. The section 302 au-

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93. See supra Part I.C.2.
94. EPA’s role under § 304(l) is summarized at 40 C.F.R. §§ 130.10(d)(8-11).
95. 40 C.F.R. § 130.10(d)(9). The submission of lists and EPA’s actions with respect to those submissions are not subject to direct review. See Westvaco Corp. v. EPA, 899 F.2d at 1386-87, holding that court lacks jurisdiction:
[Over] Westvaco’s petitions for review challeng[ing] EPA’s preliminary partial disapprovals of the Maryland and Virginia lists which, it asserts, may affect its Luke and Covington Mills. Specifically, the petitions seek judicial review of EPA’s proposed B and C lists for Maryland and Virginia, and of the associated ICSs that may be promulgated for the Luke Mill and Covington Mill sources.
See also In re J&L, 25 Envtl. L. Rep. at 40,232:
[O]nly NPDES permit conditions, not listing decisions per se, are subject to review by this Board but in the course of such review, the Board can consider a petitioner’s collateral attack upon the Agency’s actions in implementing section 304(l) where the listing decision is material to the permit condition at issue.
97. See 40 C.F.R. § 130.10(d)(10).
thority, by contrast, is granted to EPA alone, and allows the agency to act even when a state administers its own NPDES program.

EPA's supplemental authority under section 302 can, however, only be exercised after a public hearing has been held and is subject to feasibility modifications that increase the amount of the permitted discharges. Scholars have suggested that these limitations have foreclosed EPA's use of its section 302 authority. Professor Rodgers, in fact, characterizes section 302 as a "virtual dead letter."

5. State Certification of WQS Compliance and Imposition of Necessary Conditions Under Section 401

The fifth and final mechanism for ensuring compliance with state WQSs applies in the few states in which EPA administers the NPDES program. Section 401 of the Clean Water Act provides that, before a federal agency may issue a permit authorizing discharges into surface waters, downstream states with waters that will be affected by the permitted discharges must certify that the issuance of the federal permit will not cause a violation of their WQSs. The Act provides, moreover, that these affected states may require that the federal permits include conditions necessary to ensure compliance with their WQSs. When a state dictates that such conditions are needed, the conditions may not be overruled by the federal permitting agency.

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99. S. Rep. No. 99-50, at 24 (1986): Section 302 is not intended to undercut or in any way affect the development of water quality standards under section 303 nor the imposition of section 301 (b)(1)(C) of the Act. Rather, it is a supplemental provision which directs the Administrator, with the concurrence of the State, to impose effluent limitations which assure the attainment or maintenance of water quality . . . .


100. 33 U.S.C. § 1312(b)(1).

101. Id. § 1312(b)(2).

102. See John E. Bonine & Thomas O. McGarity, The Law of Environmental Protection: Cases - Legislation - Policies 346 (2d ed. 1992) [hereinafter Bonine]; Schoenbaum and Rosenberg, supra note 99, at 1191 (stating that section 302's "authorization for water quality related effluent limitations contains several complicating features which have apparently lead to its non-use.").

103. See generally Rodgers, supra note 3, at 26.

104. Section 401 and its related legislative history are discussed in more detail in Healy, supra note 11, at 410-13.

105. Forty states are responsible for administering the NPDES permit program. See LA NPDES Monitoring, supra note 47. Section 401 does not apply to state-issued permits in these states.


107. Id. § 1341(d).

108. See Healy, supra note 11, at 411-12.
The Supreme Court recently interpreted the state certification authority described above quite broadly.\(^{109}\) The effect of section 401 is accordingly to give affected states the power to veto NPDES permits issued by the EPA or to place conditions on those permits if the states determine that the discharges to be permitted would cause WQS violations.\(^{110}\)

The discussion in the preceding sections has demonstrated that Congress has sought to ensure WQS compliance through the NPDES permit system. Indeed, Congress has defined five methods for writing point source NPDES permits to ensure that the permitted discharges will not cause WQS violations. These five methods operate without regard to the level of discharges that the applicable technology-based standards would otherwise permit. Despite this complex scheme for protecting water quality, the Clean Water Act's NPDES permit system has failed to ensure WQS compliance. The following section describes the current state of the nation's waters and offers some possible explanations for WQS noncompliance under the Act.

II

PERMIT LIMITATIONS-BASED ENFORCEMENT OF STATE WQSs HAS FAILED

Although the Clean Water Act is designed to achieve compliance with state WQSs through the incorporation of more stringent effluent limitations into the NPDES permits for point sources, this regulatory scheme has proved to be a failure. Despite a quarter century of regulation under the Clean Water Act, recent national studies reveal a significant level of noncompliance with WQSs. Approximately one quarter to one third of the nation's waters are not in compliance with WQSs, while particular aquatic sites may suffer much higher levels of impairment.\(^{111}\) These national studies are consistent with more fo-

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110. See Healy, supra note 11, at 427-28.
   At the time of its enactment in 1972, the Clean Water Act set a goal of assuring fishable and swimable waters throughout the Nation by 1984 and eliminating the discharge of pollutants by 1985. Today, approximately 30 percent of all assessed river miles fail to attain fully designated water quality standards. Twenty-five percent of lakes are impaired and 29 percent of estuaries similarly do not meet designated water quality standards.

See also S. REP. NO. 103-33, at 14 (1993) ("About 30 percent of the Nation's, rivers and streams did not meet water quality standards. Twenty percent of lakes were impaired and 25 percent identified as threatened. Fully 92 percent of the shoreline miles of the Great Lakes were not meeting water quality standards."); Water Pollution: Water Quality Indicators Report Sets Baseline for Future Efforts, EPA Says, 27 Env't Rep. (BNA) 453 (June 14, 1996) [hereinafter Water Quality Indicators Report] (summarizing a report on the quality of waters nationwide which found that "[m]ore than 60 percent of fresh water mussels and
cused reports of the condition of waters within particular states. For example, recent reports of conditions of waters in Virginia and Minnesota, as well as other states, indicate that WQSs are not being met in those states. Although explanations for these degraded conditions may vary, it is uncontroversed that current water quality is very often below the quality mandated by the Clean Water Act.

This section will attempt to explain this failure of the Clean Water Act to ensure WQS compliance. It will discuss the inadequate implementation of the Act's core requirement that NPDES permits include sufficiently stringent effluent limitations and the likelihood of continued WQS violations, notwithstanding possible improvements in the Act's implementation. The long history of failed implementation and the likelihood of similarly flawed implementation in the future mean that the nation's degraded water quality is unlikely to improve unless the water pollution control regime is changed. Following this section,
the Article will consider whether permitting citizen suit enforcement of WQSs would be an appropriate change.

A. EPA's Implementation of the Clean Water Act Has Failed to Ensure That WQSs Are Met

As discussed above, the theory behind the Clean Water Act's structure is that state WQSs will be achieved by requiring point source NPDES permits to include more stringent effluent limitations when necessary. These more stringent limits are the straightforward mandate of section 301,116 and are also the end result of the TMDL, Toxic Hot Spots ICS, section 302, and section 401 regulatory schemes discussed above.117 EPA's implementation of the more stringent limitations requirement has, however, been inadequate in a number of important respects. As noted above, surveys of water quality illustrate that the system has failed to achieve timely, or even delayed, WQS compliance. The sections that follow describe the administrative and implementation problems that have plagued the Clean Water Act's water quality program. These problems have been largely responsible for the failure of the more stringent limitations requirement.

1. EPA's Long Delay in Promulgating Implementing Regulations

EPA is responsible for defining the minimum requirements for all NPDES programs through the issuance of regulations.118 Seventeen years passed following the enactment of the Clean Water Act, however, before EPA included "the procedures for developing water quality-based effluent limits" in those minimum requirements.119 These procedures describe how permit writers should translate numeric and narrative WQSs into effluent limitations for particular point sources. When EPA finally promulgated the long delayed regulations, it commented that the permit-issuing agencies already had the authority to

117. See supra Part I.C.
118. See 33 U.S.C. § 1342(b). NPDES permits may be issued either by states that have received permit granting authority from EPA or by EPA. Forty states have been granted the authority to issue NPDES permits. LA NPDES Monitoring, supra note 47. EPA reviews and has authority to veto state-issued NPDES permits. See 33 U.S.C. § 1342(d).
119. EPA promulgated the regulations in June of 1989. National Pollution Discharge Elimination System; Surface Water Toxics Control Program, 54 Fed. Reg. 23,868, 23,871 (1989) ("Although sections 402(a)(1) and 301(b)(1)(C) of the CWA provide the authority to require NPDES permits to achieve the effluent limits necessary to attain and maintain water quality standards, the existing NPDES regulations do not describe the procedures for developing water quality-based effluent limits."). Eight years had elapsed before EPA initially promulgated its regulations for the issuance of NPDES permits. See Michael D. Axline & Patrick C. McGinley, Universal Statutes and Planetary Programs: How EPA Has Diluted the Clean Water Act, 8 J. ENVTL. L. & LITIG. 253, 275 (1993) ("In 1980, eight years after Congress instructed EPA to develop the NPDES permit program, EPA adopted final regulations implementing the program.” (footnote omitted)).
impose more stringent limitations, even in the absence of those regulations. The EPA's delay nonetheless proved to be a very serious impediment for permit-issuing agencies, both because binding minimum requirements were lacking until EPA finally promulgated its regulations, and because the absence of regulations suggested a lack of concern at the agency about ensuring compliance with the more stringent limitations requirement.

2. EPA Does Not Require That NPDES Permits Define Effluent Limits for All Pollutants Discharged by a Point Source

Because the Clean Water Act includes a broad prohibition on the discharge of pollutants into waters of the United States without a permit, one might expect that a permitted source would be barred from discharging any pollutant not covered by its permit. EPA has not, however, interpreted the Act as giving the permit requirement this "universal" effect. Rather, EPA has only required that NPDES permits include effluent limits for the pollutants identified in the permit. The discharge of other pollutants in significant amounts must merely be reported to the permit-issuing agency, and pollutants not discharged in significant amounts are not regulated at all.

120. EPA made the following comment in the preamble:
Although EPA's existing NPDES regulations provide adequate authority to require water quality-based effluent limits in permits when an excursion above a water quality criterion is either identified or projected, the existing regulations do not describe the procedures for developing such limits. Today's regulations establish minimum consistent procedures for the states, EPA, and the regulated community, to use in developing water quality-based effluent limitations.

See National Pollution Discharge Elimination System; Surface Water Toxics Control Program, 54 Fed. Reg. at 23,871.

121. 33 U.S.C. §§ 1311, 1342.

122. Axline & McGinley, supra note 119, at 267 stating that:
The history of EPA's current NPDES permit program reveals that EPA has vacillated on the question of how comprehensive permits should be, and has moved incrementally away from the universal program required by the CWA and towards a planetary program that can never achieve the lofty goals of the CWA. But compare Peter S. Menell & Richard B. Stewart, Environmental Law and Policy 453 n.3 (1994), which states that the question whether a permit bars the discharge of pollutants not identified in the permit is an "important issue that has received little judicial attention."

123. See Axline & McGinley, supra note 119, at 278, where the authors state that:
EPA's strategy for addressing unregulated but "significant" pollutants, however, has not evolved beyond the self-reporting system adopted in 1980 and is implemented (if at all) only by admittedly overworked permit writers. EPA has no process for addressing pollutants that, for whatever reason, fail to rise to the level of "significance."

Thus, in EPA's final 1980 rulemaking, the Agency admitted that some toxic pollutants need not even be reported in permit applications, that other "non-significant" pollutants, while reported in applications, are "not limited in permits" nor "specifically controlled in the permit," and that additions of even significant pollutants to the wastestream of permit holders "are regulated only by the requirement that permittees notify the Director" when a threshold level is reached.
interpretation of the scope of the NPDES permitting requirement thus allows point sources with NPDES permits to discharge some pollutants without any effective, enforceable limit.124

The impact of EPA's NPDES permitting policy can be gauged by considering the court's decision in Atlantic States Legal Foundation v. Eastman Kodak.125 In that case, the Eastman Kodak Company (Kodak) was a permitted point source.126 Kodak's permit included effluent limits for at least twenty-five pollutants.127 Atlantic States Legal Foundation brought a citizen suit arguing that Kodak was discharging pollutants that had no limits defined by the company's NPDES permit and that this violated the Clean Water Act.128 The court rejected this claim and held that, when a permit fails to define an effluent limit for a pollutant, the permittee complies with the requirements of the Clean Water Act when it meets any applicable reporting requirements for the discharge of pollutants not covered by an NPDES permit.129

The EPA regulatory policy described above is important because it tends to contribute to the degradation of water quality.130 This deg-

124. See id. at 279, where the authors discuss that EPA has recognized this regulatory gap.
125. 12 F.3d 353 (2d Cir. 1993).
126. See id. at 354.
127. See id. at 355:
DEC issued Kodak a SPDES permit, number 000-1643, effective November 1, 1984, establishing specific effluent limitations for approximately 25 pollutants. The permit also included 'action levels' for five other pollutants as well as for three of the pollutants for which it had established effluent limits. DEC further required Kodak to conduct a semi-annual scan of "EPA Volatile, Acid and Base/Neutral Fractions and PCB's priority pollutants on a 24-hr. composite sample." (footnotes omitted)
128. See id. at 357 ("Atlantic States argues first that the plain language of section 301 of the CWA, 33 U.S.C. § 1311, prohibits the discharge of any pollutants not expressly permitted.").
129. See id. at 357 stating that:
Viewing the regulatory scheme as a whole, however, it is clear that the permit is intended to identify and limit the most harmful pollutants while leaving the control of the vast number of other pollutants to disclosure requirements. Once within the NPDES or SPDES scheme, therefore, polluters may discharge pollutants not specifically listed in their permits so long as they comply with the appropriate reporting requirements and abide by any new limitations when imposed on such pollutants.
(footnote omitted)
130. See Axline & McGinley, supra note 119, at 255-56 ("comparisons of additional . . . disclosure statements and NPDES permits has revealed that the discharge of toxic chemicals not mentioned in a NPDES permit is commonplace among a variety of industries."). Indeed, the Kodak court specifically discussed EPA's recognition of this regulatory gap when rejecting what the court characterized as "Atlantic States' absolutist and wholly impractical view of the legal effect of a permit." The court made the following comments in rejecting the contention that Kodak's discharges had violated the CWA:
The EPA has never acted in any way to suggest that Atlantic States' absolutist and wholly impractical view of the legal effect of a permit is valid. In fact, the EPA's actions and policy statements have frequently contemplated discharges of pollutants not listed under a NPDES or SPDES permit. It has addressed such
radiation may, in turn, result in the violation of WQSs, notwithstanding the fact that the Clean Water Act is theoretically structured to ensure compliance with those standards. Because it tends to degrade water quality and conflict with the Act’s purpose of limiting the introduction of pollutants into surface waters, EPA’s policy of excluding some pollutants from NPDES permit coverage has been criticized strongly.\textsuperscript{131} The policy also conflicts with the Act’s structure because the policy will protect water quality only after it has already been degraded and will not prevent degradation in the first place.

3. \textit{EPA’s Interpretation of the More Stringent Limitations Requirement Often Results in Requiring Only Monitoring as a Permit Condition, Rather Than Actual Effluent Limitations}

Under EPA’s interpretation of section 301, a permitting agency must have evidence that more stringent limitations are actually necessary to prevent a WQS violation before it may impose an effluent limitation that is more stringent than the otherwise applicable technology-based limitation. The agency must have evidence that the absence of a more stringent limitation will or might reasonably be expected to cause or contribute to a WQS violation.\textsuperscript{132} The issue of whether a discharges by amending the permit to list and limit a pollutant when necessary to safeguard the environment without considering pre-amendment discharges to be violations calling for enforcement under the CWA. 33 U.S.C. §§ 1319, 1365. The EPA thus stated in its comments on proposed 40 C.F.R. § 122.68(a), which applied the “application-based” limits approach to implementation of the CWA reporting scheme,

\begin{quote}
There is still some possibility . . . that a [NPDES or SPDES] permittee may discharge a large amount of a pollutant not limited in its permit, and EPA will not be able to take enforcement action against the permittee as long as the permittee complies with the notification requirements [pursuant to the CWA].
\end{quote}

\textit{Kodak}, 12 F.3d at 358 (footnote omitted, quoting 45 Fed. Reg. 33516, 33523 (1980)).

\textsuperscript{131} See Axline & McGinley, \textit{supra} note 119, at 254 (EPA’s “implementation of the NPDES program has turned the CWA on its head by regulating only those pollutants specifically authorized by a NPDES permit and ignoring pollutants that are discharged to waters of the United States but not addressed in a permit.” (emphasis added)); see e.g., \textit{id.} at 262 (“Congress plainly anticipated that its permit program would sweep in all pollutants. It did not say permits are required for the discharge of ‘significant pollutants’ or ‘toxic pollutants.’ It said permits are required for the discharge of ‘any pollutant.’”) (footnote omitted)); cf. \textit{id.} at 263 (“The Act therefore requires EPA to meet the conditions of the Act by regulating on a permit-by-permit basis those pollutants not covered by a national effluent limitation standard.”).

\textsuperscript{132} See \textit{In re Miami-Dade Water & Sewer Auth. Dep’t}, 24 Envtl. L. Rep. (Envtl. L. Inst.) at 40,036, where the EPA’s EAB stated that:

Under section 301(b)(1)(C), the Region is only required to include a permit limitation if that limitation is “necessary” to ensure compliance with the State requirements. Similarly, section 122.44(d), which requires the establishment of permit limitations to ensure compliance with water quality standards and other State requirements, also only applies if the permit limitation is “necessary” to ensure compliance with the State requirement. In the context of water quality
more stringent limitation is necessary under this standard is a factual question that the permitting agency must resolve as part of the permitting process.\footnote{133} The agency granting the permit must develop a factual record to support its finding that a more stringent limitation is necessary.\footnote{134}

As with the EPA policy governing the discharge of pollutants not covered by a point source's NPDES permit, the EPA policy governing the more stringent limitations requirement of section 301(b)(1)(C) focuses on improving already degraded water quality rather than preventing degradation initially.\footnote{135} Although EPA has suggested that its policy provides for the control of pollutants before they have caused water quality degradation,\footnote{136} the agency has counseled permit standards, a permit limitation is deemed "necessary" to ensure compliance with a water quality standard if the subject discharge "will cause, has the reasonable potential to cause, or contribute to an excursion above any State water quality standard **." 40 CFR § 122.44(d)(I)

(footnote omitted). See also In re Boise Cascade Corp., Permittee, 24 Envtl. L. Rep. (Envtl. L. Inst.) 40,116, 40,118 (EPA EAB Jan. 15, 1993) ("[Dissolved oxygen] limits may not be included in the permit unless such limits are 'necessary' to ensure compliance with Louisiana's water quality standard, i.e., unless discharges from the mill have a reasonable potential for causing or contributing to a violation of that standard." (citations omitted)).

\footnote{133} See In re Boise, 24 Envtl. L. Rep. at 40,119, where the EAB reviewed more stringent permit requirements and stated that:

Presumably, the Region has determined that Boise's discharges do present such a potential [to cause a WQS violation], but the factual basis for the Region's determination is not apparent in the administrative record before us. The Fact Sheet merely states that "[t]he proposed permit contains requirements as necessary to comply with the dissolved oxygen (D.O.) standard of 5.0 mg/l for this receiving water." The response to comments similarly states that the permit requirement "is required in accordance with the current State water quality standards and the water quality management plan, pursuant to 40 CFR 122.44(d)." Neither document provides enough factual information to allow us to conclude as a matter of law that the mill's discharges present a reasonable potential for violating Louisiana's standards. We conclude, therefore, that whether Boise's discharges will cause or contribute to, or have a reasonable potential for causing or contributing to, a violation of Louisiana's water quality standard is a material issue of fact.

(citations omitted).

See also id. at 40,120:

On appeal, Boise states that it does not dispute that EPA has authority to impose reasonable biomonitoring requirements and that EPA could impose the biomonitoring at issue if those requirements were in fact necessary to achieve Louisiana's narrative criterion for toxic substances. Boise states that the real issue is whether the biomonitoring requirements in the permit 'are reasonable or necessary to achieve Louisiana's narrative criterion for toxic substances.'

\footnote{citation omitted}

\footnote{134} Id. at 40,119-20.

\footnote{135} EPA policy defines the minimum requirements for the federal and state-administered NPDES programs. See 33 U.S.C. § 1342(b). States may, however, impose more stringent requirements in their programs. Id. at § 1370; see 40 C.F.R. § 123.25(a).

\footnote{136} See NPDES TRAINING MANUAL, supra note 16, at 6-5:

[N]umeric criteria that protect aquatic life from acute and chronic effects . . . are used as the basis to analyze an effluent and decide which chemicals need controls and to derive permit limits to control those chemicals. This approach allows for the control of individual chemicals before a water quality impact has occurred.

But compare id. at 6-7 stating that:
writers that they should impose more stringent effluent limitations only when they have strong factual support for those limitations.\(^{137}\) To develop a sufficient factual record, EPA suggests that agencies impose water quality monitoring requirements as conditions in NPDES permits.\(^{138}\) In light of EPA's view that a significant factual record is necessary to support more stringent effluent limitations,\(^{139}\) permit writers are unlikely to be confident enough to predict that future discharges will cause or contribute to WQS violations. Permit writers are likely to impose a monitoring requirement that will detect degradation rather than effluent limitations that would prevent it. This policy has the effect of tolerating the degradation of water quality.

4. Permit Writers May Decline To Include More Stringent Effluent Limitations, Due to the Difficulty of Defining Those Limits

Translating state WQSs and narrative standards into necessary effluent limits for individual point sources is quite difficult for several reasons. A permit writer must predict whether the pollutant discharges allowed by the applicable technology-based standard will cause WQS violations. That projection is dependent on conditions in

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When conducting an effluent characterization, the permit writer is essentially projecting the concentration of the pollutant(s) contained in the effluent once the effluent reaches the receiving water. The permit writer then compares this projected receiving water concentration to the applicable State water quality criteria. If the projected concentration exceeds the applicable water quality criteria, the permit writer has established that [water-quality-based emissions limitations] are needed.

137. See id. at 6-7:

If the permit authority so chooses, or if the circumstances dictate, the authority may decide to develop and impose a permit limit for [whole effluent toxicity] or individual toxicants without facility-specific effluent monitoring data. ... In justification of a limit, EPA recommends that the more information the authority can acquire to support the limit, the better a position the authority will be in to defend the limit if necessary. In such a case, the regulatory authority may well benefit from the collection of effluent monitoring data prior to establishing the limit.

138. See id. at 6-8, where EPA's guidance to permit writers states that:

If the regulatory authority, after evaluating all available information on the effluent, in the absence of effluent monitoring data, is not able to decide whether the discharge causes, has the reasonable potential to cause, or contributes to an excursion above a numeric or narrative criterion for WET or for individual toxicants, the authority should require WET or chemical-specific testing to gather further evidence. In such a case, the regulatory authority can require the monitoring prior to permit issuance, if sufficient time exists, or it may require the testing as a condition of the issued (reissued) permit.

Under such circumstances, the permit authority may include a permit reopener allowing for the imposition of an effluent limit if the effluent testing establishes that the discharge causes, has the reasonable potential to cause, or contributes to an excursion above a water quality criterion.

139. See id. at 6-9 (stating that determining a waste load allocation of a point source is based on an "exposure assessment," which in turn is based on either of two water quality models—"steady-state and dynamic" and that "[t]he minimum data required for model input include receiving water flow, effluent flow, effluent concentrations, and background concentrations.").
the receiving water, such as flow volume and pollutant levels. Pollutant levels will depend on the discharges from other point and nonpoint sources of pollution. Flow volume is dependent on precipitation levels in the area and the amount of runoff entering surface waters and tributaries. Pollution level and flow volume determinations are complex and add to the difficulty associated with translating narrative WQSs into effluent limitations. As a result of these difficulties, permit writers have historically failed to include water quality-based effluent limitations in NPDES permits.

This failure of permit writers to impose more stringent water quality-based effluent limits in permits was no doubt encouraged by the fact that EPA regulations failed to require the imposition of such limitations until 1989. Even now, under its regulations requiring the translation of WQSs into effluent limitations, EPA has employed a "degrade first, protect later" policy by encouraging permitting agencies to impose monitoring requirements prior to actually requiring reduced discharges to protect water quality.

Some of these problems may be remedied over time as permit writers gain experience with implementing the 1984 regulations. Such experience may give permit writers more confidence to mandate actual effluent limitations to ensure compliance with WQSs. Moreover, as states increasingly employ numerical, rather than narrative, water quality criteria, permit writers should have less difficulty defining ac-

140. The difficulty of identifying defensible effluent limits is also discussed supra at notes 133-137 and accompanying text. See also NPDES TRAINING MANUAL, supra note 16, at 6-7:

The regulatory authority may already have effluent toxicity data available from previous monitoring or it may decide to require the permittee to generate effluent monitoring data prior to permit issuance or as a condition of the issued permit. EPA recommends monitoring data be generated on effluent toxicity prior to permit limit development for the following reasons: (1) the presence or absence of effluent toxicity can be more clearly established or refuted, and (2) where toxicity is shown, effluent variability can be more clearly defined.

See also id. at 6-8 to 6-9 (stating that "[t]he difficulty of setting WQBELs is further complicated where water quality in a water body is affected by more than one discharger and the burden of effluent reduction must be allocated among the various dischargers.").

141. See Natural Resources Defense Council v. EPA, 915 F.2d 1314, 1317 (9th Cir. 1990):

Although ostensibly [permit writers] were supposed to impose these more stringent limitations, in practice they often did not. One explanation for this failure is that the criteria listed by the states, particularly for toxic pollutants, were often vague narrative or descriptive criteria as opposed to specific numerical criteria. These descriptive criteria were difficult to translate into enforceable limits on discharges from individual polluters.

See also id. ("the complexity of [permitting] decisions and judgments led many a permit writer to avoid making them altogether.") (citation omitted).

142. See supra Part II.A.1.

143. The use of monitoring requirements is discussed supra in Part II.A.3.
tual pollution discharge limits. Nevertheless, permit writers may decide not to include more stringent effluent limitations in NPDES permits when they believe that defining defensible limits is too difficult. The likely result of this would be continued failure to meet WQSs.

5. EPA's Failed TMDL Implementation Policy

As discussed above, the structure of the Clean Water Act dictates that NPDES permits should include more stringent effluent limitations to prevent WQS violations. EPA policy has significantly undermined this structure by encouraging permit writers to impose such limitations only after water quality has already suffered degradation. The same sorts of administrative and policy problems have plagued the implementation of the Clean Water Act's TMDL provision.

As discussed above, the TMDL requirement was designed to reinforce the more stringent limitations requirement of section 301 by providing a mandatory mechanism for the identification of necessary effluent limitations. The TMDL requirement has been almost a total failure. Indeed, one court has remarked that “[t]he only ‘consistently held interpretation’ that the EPA has demonstrated with respect to the Clean Water Act’s TMDL requirements has been to ignore them.”

The TMDL regulatory process has failed in several important respects. Some states have completely failed to submit the required list of quality-impaired waters. Even when states have listed their impaired waters, they have often failed to identify TMDLs for all such waters. Recall, for example, that in *Scott v. Hammond*, the plaintiffs' claim and the court's holding were based on the failure of Indiana and Illinois to list portions of Lake Michigan as water quality impaired and to identify TMDLs for the lake.

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144. *See Natural Resources Defense Council, 915 F.2d at 1318* (“The requirement of numerical criteria for toxics makes it easier for permit writers to incorporate the water quality standards into NPDES permits. Permit writers thus no longer have an excuse for failing to impose water-quality-based limitations on permit holders.”).


146. *See supra* Part I.C.2. for a discussion of TMDLs.

147. *Alaska Ctr. for the Env't v. Reilly, 796 F. Supp. at 1379.*

148. Because of these failures and the 21 or so lawsuits that these administrative failures have prompted, EPA has recently sought to define a new policy for fully implementing the TMDL program. *See Water Pollution: Draft Plan for Improving TMDL Program Issued at Meeting of New Advisory Panel, 27 Env't Rep. (BNA) 1560 (Nov. 22, 1996)* [hereinafter *TMDL Draft Plan*].

149. *741 F.2d 992* (7th Cir. 1984).

150. *See id.* at 996 n.10.

151. *See id.* at 997 stating that:
In *Sierra Club v. Browner*, the plaintiff sought to compel the EPA to prepare TMDLs for Minnesota's impaired waters. Minnesota had identified and listed 447 impaired waters pursuant to section 303(d), but had established only 43 acceptable TMDLs. Similarly, in *Alaska Center for the Environment v. Reilly*, the court chided EPA for "allow[ing] over a decade to pass before taking even these first steps towards implementing the Alaskan TMDLs program." The court concluded that "[t]his delay has rendered TMDLs completely useless to date as a tool to control water pollution in Alaska" and that "[t]he failure of the EPA to perform its mandatory duties has frustrated congressional intent underlying the TMDL provisions of..."
the CWA."\textsuperscript{156} The court indicated that it believed that EPA's failure reflected the agency's broader regulatory priorities.\textsuperscript{157}

Viewed together, \textit{Scott v. Hammond}, \textit{Sierra Club v. Browner}, and \textit{Alaska Center for the Environment v. Reilly} provide examples of the TMDL implementation problems, including state failure to identify water quality-limited segments and failure to establish TMDLs for those waterways. The cases illustrate why the TMDL provision has failed to ensure that WQSs are met. EPA statistics indicate, moreover, that the problem of states failing to identify impaired waters and establish TMDLs extends well beyond Illinois, Indiana, Minnesota, and Alaska.\textsuperscript{158} When these shortfalls within the TMDL program are viewed together with other problems associated with the implementation of the more stringent effluent standards discussed above, it is reasonable to conclude that EPA and the states have implemented the Act's requirements and the NPDES permitting regime in a manner that makes compliance with WQSs very difficult.

\textsuperscript{156} \textit{Id.} The court's remedy for this regulatory neglect was rather limited. Although the Clean Water Act had mandated the initial identification of TMDLs for all impaired waters by the middle of 1974 (\textit{see supra} note 57 and accompanying text), the court directed the EPA "to work with the State of Alaska to establish a reasonable schedule for the development of TMDLs for all waterbodies designated as water quality limited segments." \textit{Id.} at 1380. That schedule "may provide more specific deadlines for the establishment of a few TMDLs," but was also permitted to include "only general planning goals for long-term development of TMDLs for water quality limited segments about which little is known." \textit{Id.} (emphasis added).

\textsuperscript{157} \textit{Id.} at 1378-79 finding that:

Robert Burd, Director of the EPA Region X's Water Division, justifies in detail why the EPA has not made the implementation of a TMDLs program a priority, despite the statutory requirement to do so. Mr. Burd points to the EPA's other worthwhile water quality programs, and explains that the EPA "must retain the ability, notwithstanding statutory deadlines, to respond to future environmental crises by shifting available resources away from other tasks."

(citations and footnote omitted).

\textsuperscript{158} \textit{See Alaska Ctr. for the Env't v. Reilly,} 762 F. Supp. at 1425 ("In comparison to Alaska's lack of progress in developing TMDLs, other areas of the country have a mixed record of success. In 1989, EPA Region IV approved 163 TMDLs, Region V approved 74, Region I approved 50, Region VIII approved 16, Region X approved 11. Regions II, III, and VII, however, approved no TMDLs." (footnote and citation omitted)). Recent district court decisions suggest however that there may be a limit to the willingness of courts to accept long delays and unspecified deadlines for defining TMDLs. The fact remains that TMDL delays continue to contribute to WQS compliance problems. \textit{See Water Pollution: Federal Judge Tells EPA that Schedule for Idaho's TMDL Program is Too Long,} 27 Env't Rep. (BNA) 1329 (Oct. 11, 1996) [hereinafter \textit{Idaho TMDL Program}] (reporting that a district court in Idaho rejected the EPA-approved 25-year schedule for setting TMDLs for impaired waters and ordered that a "reasonable" schedule, possibly a five year schedule, be substituted); \textit{see Georgia TMDLs, supra} note 114 (reporting that a district court in Georgia ordered that EPA establish TMDL's for the state's impaired waters within five years); \textit{but cf. Impaired Water Listing Process, supra} note 114 (reporting that EPA's guidance for the Pacific northwest provides for priorities in setting TMDLs and that "[w]aters identified as medium or low priority for TMDLs may not have additional controls recommended in the near future . . . .").
B. Even Improved Implementation of the Clean Water Act by EPA Would Not Ensure WQS Compliance

The sections that follow illustrate why WQS violations would still occur, even if the Act were implemented in a more perfect manner. Even if one assumes that EPA would improve its implementation of the Clean Water Act over the next twenty-five years with respect to the issuance of NPDES permits containing limitations calculated to ensure WQS compliance, concerns about degraded water quality should nevertheless remain. The affected public is therefore likely to continue to have a strong interest in seeking an alternative mechanism to control those violations.

I. Permit Writers Are Likely To Make Mistakes

Permit writers are likely to make mistakes in their jobs because of the difficulty associated with translating WQSs, and particularly narrative standards, into effluent limitations. As we have seen, EPA regulations now include standards that apply to defining more stringent effluent limitations based on the applicable WQSs. In its training manual, EPA warns permit writers that this translation process is more difficult than determining the technology-based limitations for a point source. The difficulty associated with translating WQSs into NPDES limitations was also made strikingly clear in Northwest Environmental Advocate where the court stated that circumstances may make it “impossible to determine the level at which to set a numeric concentration-based permit limit in order to ensure that the gross amount of pollution discharged will not violate water quality standards.” Indeed, honest mistakes in the definition of effluent standards appear to be inescapable, given that the WQSs to be translated into effluent limits are often quite complex. For example, when defining specific effluent limits, permit writers must consider and select among a range of variables. They may have to rely upon sophisti-

159. See supra Part II.B.1.
160. See supra Part II.A.1.
161. See NPDES TRAINING MANUAL, supra note 16, at 3-4 (“Water quality-based limits are generally more difficult to develop than effluent guidelines because they involve a site-specific evaluation of the discharge and its effect on a receiving stream.”).
162. Northwest Env'tl. Advocate v. Portland, 56 F.3d 979, 989 (9th Cir. 1995), stating that:
Because the number and volume of overflow events from CSO systems are caused primarily by uncontrollable events—i.e., the amount of stormwater entering the system—regulators have no ready way of determining what portion of the flow in a given discharge event is sewage and what portion is rainwater. Without this information, it is impossible to determine the level at which to set a numeric concentration-based permit limit in order to ensure that the gross amount of pollution discharged will not violate water quality standards.
163. See NPDES TRAINING MANUAL, supra note 16, at 6-1 (“States may, at their discretion, adopt policies affecting the application and implementation of the standard, such
cated surveys, and default values when such studies are incomplete.

Similar problems arise in defining TMDLs. Even when states list their water quality impaired waterways and establish TMDLs, the program may fail if the TMDLs themselves are flawed. Flaws in TMDLs may arise because the available supporting evidence of toxicity is "inconclusive and diverse," or because allocating specific pollutant loads to nonpoint sources is uncertain. In sum, even when permit writers make a conscientious effort to define more stringent effluent limitations to be included in NPDES permits, those limitations are likely to be flawed and result in violations of state WQSs.

2. Revised WQSs Complicate the Establishment of and Compliance with Effluent Limitations

The Clean Water Act requires triennial review and approval of state WQSs. This review process may produce revised WQSs that are more protective for a variety of reasons. A state may, for example, decide that it wishes to provide citizens with cleaner water for their use and enjoyment. A state may also decide to substitute nu-
rical criteria for its existing narrative criteria. Finally, newly available scientific evidence may change a state’s understanding of what ambient concentration of a given pollutant must be met to protect the waterway’s uses, such as swimming, defined by the state.

Regardless of the reasons for adopting more protective WQSs, the result will be that effluent limitations that might once have been sufficient to ensure compliance with existing WQSs may not protect against violations of the revised WQSs. Because NPDES permits are normally issued for a five-year period, while WQSs are revised every three years, NPDES permits cannot be relied on to ensure compliance with revised WQSs. The problem of ensuring compliance with revised WQSs is unavoidable because although NPDES permits may include reopener clauses that allow more stringent limitations to be imposed based on changed circumstances, these clauses are of limited value because modifying a permit is no easy task. As a result, revised WQSs are unlikely to be met through the relatively static NPDES permitting process.

3. Changed Conditions in Receiving Waters May Render the Established Effluent Limitations Ineffective

It is important to note that conditions in receiving water may change during the five-year term of a point source’s NPDES permit. New conditions may result from unexpected changes in climate or in the loading of pollutants into the waters. Changes in pollutant loads may, in turn, be the result of new point or nonpoint contributions to pollution either within or outside the state.

170. The Act dictates, for example, that states adopt numerical criteria rather than narrative standards, for priority toxic pollutants. See 33 U.S.C. § 1313(c)(2)(B).

171. See NPDES TRAINING MANUAL, supra note 16, at 3-3 (a “common error” in drafting the permit cover page is the “[f]ailure to limit the duration of the permit to 5 years”).

172. See e.g., Axline & McGinley, supra note 119, at 279 (EPA has conceded that “[NPDES] permit modification can be a lengthy process.” (footnote omitted)).

173. For example, water quality may depend greatly, as it did in the Portland litigation, on the volume and quality of storm water discharges into the receiving water body. EPA policy for permitting storm water discharges, however, does not subject the permits to water quality based effluent limitations. See Water Pollution: Numeric, Water Quality Based Effluent Limits Do Not Apply to Storm Water Permits, EPA Says, 27 Env’t Rep. (BNA) 840 (Aug. 9, 1996) [hereinafter Storm Water Exemption]. EPA stated that this policy is “[d]ue to the nature of storm water discharges, and the typical lack of information on which to base numeric water quality-based effluent limitations (expressed as concentration and mass),” Id.; see also report of same title, 27 Env’t Rep. (BNA) 1480 (Nov. 15, 1996). Moreover, EPA recently announced a policy that would facilitate effluent trading among sources within watersheds. See 61 Fed. Reg. 4994 (1996). Such trading may further complicate the judgment permit writers must make about what effluent limitations necessary for particular sources to ensure that WQSs will be met within the affected watershed over the course of the permit’s five-year duration.
If these changed circumstances result in degraded water quality, existing permit effluent limitations may be rendered insufficient to protect against WQS violations. An effluent limitation that was sufficient when the permit was issued may later prove to be inadequate if conditions change during the term of the permit. As noted above, the existence of a reopener clause in the point source’s NPDES permit is unlikely to be of much practical value as permit modification may be quite challenging.\(^{174}\)

### III

**NORTHWEST ENVIRONMENTAL ADVOCATE V. PORTLAND**

The preceding discussion has illustrated that the Clean Water Act’s goal of WQS compliance is not presently being met. This is true despite the fact that point source polluters are theoretically subject to effluent controls that are more stringent than the otherwise applicable technology-based limitations. The Article now turns to a consideration of whether and under what circumstances the Clean Water Act permits citizens to press WQS enforcement claims. The Article will then investigate whether and when permitting such suits reflects good public policy. A detailed description of the recent Ninth Circuit Court of Appeals decision in *Northwest Environmental Advocate v. Portland* provides the context for conducting a legal and policy analysis of citizen suits. This case is an appropriate point of departure because it was the first court of appeals decision to hold that a citizen suit may be brought against a point source when its emissions cause a violation of state WQSs.

#### A. The Facts

As required by the Clean Water Act,\(^{175}\) the Portland, Oregon publicly-owned treatment works (POTW) was issued an NPDES permit that allowed it to discharge pollutants into the Columbia Slough and the Willamette River. The permit contained a variety of specific, numerical limits on the pollutants that could be discharged by the POTW. The permit also anticipated that during some periods of precipitation, the flow into the POTW would exceed the facility’s treatment capacity on between fifty and eighty occasions. The permit provided that on such occasions, the POTW would discharge untreated effluent “through a system of combined sewer overflow (CSO) outfalls in what is termed a CSO event.”\(^{176}\)

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174. *See supra* notes 118 and accompanying text.
175. *See supra* note 20.
The state agency responsible for issuing the NPDES permit for the POTW did not establish any pollution limits for the discharges that were allowed at the CSO outfalls during the anticipated CSO events. Portland's NPDES permit did, however, include a relevant condition that applied expressly to the CSOs. The condition stated that "notwithstanding the effluent limitations established by this permit, no wastes shall be discharged and no activities shall be conducted which will violate [Oregon's] Water Quality Standards."  

Northwest Environmental Advocate (NWEA) decided to file its citizen suit during the time that the state was drafting a new NPDES permit for Portland. In its action, NWEA claimed that Portland had violated the conditions of its existing NPDES permit because the POTW's discharges during the CSO events were causing violations of the state WQSs. Specifically, NWEA presented evidence that the state standard for fecal coliform was violated routinely during CSO events. The district court dismissed the NWEA action, concluding that the Clean Water Act does not permit citizen suits based on claims of WQS violations. 

B. The Majority Opinion

A panel of the Ninth Circuit Court of Appeals reversed the district court, holding that NWEA could pursue its citizen suit. The court had initially agreed with the district court's interpretation of the Act, but thereafter changed its decision, citing the intervening

177. See id. at 985. The court commented that, "[a]lthough technically the permit should have established effluent limitations for the CSOs, it appears that the parties intended to omit such requirements. The district court was presented with sufficient evidence from which it could determine that DEQ, as well as Portland, intended this allegedly unlawful interpretation." Id.

178. Id. The Northwest Envtl. Advocate court distinguished Oregon Natural Resources Council v. U.S. Forest Service, 834 F.2d 842 (9th Cir. 1987), because WQS compliance was included as a condition of Portland's NPDES permit. 56 F.3d at 989 n.11. In Oregon Natural Resources Council v. U.S. Forest Service, the Ninth Circuit held that a citizens group could not bring a citizen suit based on allegations of violations of WQSs that were not included as permit conditions.

179. See Northwest, 56 F.3d at 981-82.

180. See id. at 981.

181. See id. at 986.

182. See id. at 982.

183. Id. at 979. The court's conclusion is consistent with the much earlier district court decision in Montgomery Envtl. Coalition v. Fri, 366 F. Supp. 261 (D.D.C. 1973). In that case, however, the district court suggested that a citizens suit based on a WQS violation might not be available once the technology-based limitations became effective. See id. at 265 ("it is this Court's firm conviction that water quality standards promulgated pursuant to the 1965 Act are to constitute a floor level of quality until the stiffer effluent limitations of the 1972 Act can be implemented.").

184. See Northwest Envtl. Advocate v. Portland, 11 F.3d 900 (9th Cir. 1993) (vacated and withdrawn). During the period between the Ninth Circuit's earlier panel opinion and its resolution to vacate that decision, two district courts relied on the earlier opinion to
Supreme Court decision in *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology.* In *PUD No. 1,* the Supreme Court held that the certification authority granted to states by section 401 of the Clean Water Act gives states substantial power to ensure that federal permits would not cause violations of their WQSs. While the *PUD No. 1* decision construed section 401 in unexpectedly broad terms, that case did not concern the scope of the Clean Water Act's citizen suit provision. In reality, the court of appeals' reliance on *PUD No. 1* was no more than a convenient explanation for its decision to alter its earlier holding in *Northwest Environmental Advocate.*

The court of appeals held that the text of the Clean Water Act expressly permits a citizen to bring an action based on the violation of a “condition” of an NPDES permit. The court also concluded that this reading of the statute was consistent with the Clean Water Act's legislative history, which indicated that Congress hoped to “improve enforcement” of the statute by supplementing the water quality-based system of regulation with technology-based limitations on pollution.

The court then explained how its decision was consistent with recent Supreme Court precedent holding that narrative WQSs establish enforceable standards, and with lower court decisions holding that “citizens [sic] groups may seek to enforce many kinds of permit conditions besides effluent limitations. In fact, permit conditions that courts commonly enforce under § 505(a) are not effluent limitations, but rather, requirements for retaining records of discharge sampling and for filing reports.” Finally, the court concluded that the decision to allow citizen suits for violations of WQSs furthered the purpose of dismissal citizen suits alleging violations of state WQSs. See e.g., Citizens for a Better Env't v. Union Oil Co. of Cal., 861 F. Supp. 889, 913 (N.D. Cal. 1994), aff'd on other grounds, 83 F.3d 1111 (9th Cir. 1996); Save Our Bays and Beaches v. Honolulu, 904 F. Supp. 1098 (D. Haw. 1994).

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186. See supra Part II.C.5. (discussing section 401 authority). The Supreme Court's decision in *PUD No. 1* is analyzed in Healy, supra note 11.
187. See Healy, supra note 11, at 426-27.
188. See 56 F.3d at 986 (footnote omitted), where the court stated that:

The plain language of CWA § 505 authorizes citizens to enforce all permit conditions. That section provides: “[A]ny citizen may commence a civil action... (1) against any person... who is alleged to be in violation of (A) an effluent standard or limitation under [the Clean Water Act]....” 33 U.S.C. § 1365(a)(1)(A). An effluent standard or limitation includes “(2) an effluent limitation or other limitation under section 1311... or (6) a permit or condition thereof...” 33 U.S.C. § 1365(f)(2), (f)(6) (emphasis added). This language clearly contemplates citizen suits to enforce “a permit or condition thereof.”

Portland holds a National Pollutant Discharge Elimination System (NPDES) permit, and the water quality standards are conditions of its permit.
189. See id. at 986; see also id. at 987.
190. See id. at 981, 987-88 (discussing PUD No. 1 of Jefferson County).
191. Id. at 988 (citations omitted).
pose of the Clean Water Act because it would result in the control of discharges that would otherwise be unregulated because the applicable effluent limitations are not defined, or because the WQSs cannot be translated into effluent limitations.\textsuperscript{192}

C. The Dissenters' Opinions

Judge Kleinfeld dissented from this decision, believing that the panel’s initial, albeit withdrawn decision was correct and that the intervening Supreme Court decision had not dictated a different result.\textsuperscript{193} He also argued that allowing citizen suit enforcement of WQSs constituted misguided public policy.\textsuperscript{194}

Portland petitioned the Ninth Circuit for an en banc rehearing of the case. The court rejected that petition.\textsuperscript{195} Four judges of the Ninth Circuit would have considered the case en banc and dissented from the order denying rehearing.\textsuperscript{196} These judges argued that the panel decision had erred by “significantly reshap[ing] federal environmental law.”\textsuperscript{197} They contended that the result of the panel decision “promises to invite excessive, costly, and counterproductive citizen suits, funded by the taxpayers for the enforcement of standards that are imprecise and astronomically costly to the municipalities affected.”\textsuperscript{198} They contended that the panel had seriously misread the role that WQSs play in the Clean Water Act’s regulatory scheme:

While state water quality standards may serve as an important source of authority for a state to impose additional pollution control requirements, they should not be used as a vehicle for flooding the federal courts with citizen suits against permittees who are meeting the specific requirements (i.e., effluent limitations) outlined in their permits.\textsuperscript{199}

The remainder of this Article addresses the legal and public policy issues raised by the Ninth Circuit’s decision to permit the NWEA citizen suit. It will first address the legal question of whether the Clean Water Act allows a private party to bring a citizen suit against a point source based on a claim that the source’s discharges are causing WQS violations. The Article will then address whether allowing such

\begin{itemize}
\item \textsuperscript{192} See id. at 989.
\item \textsuperscript{193} See id. at 991 (Kleinfeld, J., dissenting).
\item \textsuperscript{194} See id. at 992-93.
\item \textsuperscript{195} See Northwest Envtl. Advocate v. Portland, 74 F.3d 945 (9th Cir. 1996) (denial of petition for panel rehearing and rehearing en banc).
\item \textsuperscript{196} Id. (opinion of O'Scannlain, Circuit Judge, joined by Hall, T.G. Nelson, and Kleinfeld, Circuit Judges, dissenting from order rejecting suggestion for rehearing en banc).
\item \textsuperscript{197} Id. at 946.
\item \textsuperscript{198} Id.
\item \textsuperscript{199} Id.
\end{itemize}
citizen suits constitutes flawed public policy because of the high costs to the court system and to point sources.

IV
DOES THE CLEAN WATER ACT PERMIT DIRECT CITIZEN SUIT ENFORCEMENT OF WQSs?

In analyzing the legal question of whether and under what circumstances citizen suits are authorized by the Clean Water Act, the Article considers (1) the statute's text, (2) the legislative intent with respect to citizen suits, and (3) the overall legislative purpose be-

200. E.g., Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992) ("In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished." (citation omitted)); United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989) (consideration of a statute's meaning "must begin . . . with the language of the statute itself"). This "beginning point" for statutory construction reflects a basic principle that the governed should have fair notice of the laws that apply to them. See William N. Eskridge & Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 STAN. L. REV. 321, 339 (1990) ("Citizens ought to be able to open up the statute books and have a good idea of their rights and obligations. When the statute seems plainly to say one thing, courts should be reluctant to alter that directive."). Interpreting a provision by principal reference to its text is strongly supported as well by the federal constitutional structure, which assigns Congress the power to legislate. See Cass R. Sunstein, After the Rights Revolution: Reconcieving the Regulatory State 113 (1990) ("In a democratic system, one with an electorally accountable legislature and separated powers, it is usually thought impermissible for courts to invoke considerations that cannot be traced to an authoritative textual instrument."); Daniel A. Farber, Statutory Interpretation and Legislative Supremacy, 78 GEO. L.J. 281, 283 (1989) ("Legislative supremacy, as a doctrine of statutory interpretation, is grounded in the notion that, except when exercising the power of judicial review, courts are subordinate to legislatures." (footnote omitted)).

201. A well-accepted next step in the search to understand the meaning of statutory terms or to strengthen the construction that a court has given to the text is to consider extrinsic evidence of a statute's meaning. That extrinsic evidence is most often legislative history. Professors Eskridge and Frickey, e.g., have written that:

Original legislative expectations are important in a democracy where the legislature is the primary source of lawmaking. Evidence of the statute's background, together with the text, at least suggests the original meaning of the statute. To the extent that the Court can recover that original meaning, it subserves democratic values by enforcing the law as the legislature understood it, thus limiting judicial discretion and power.

Eskridge & Frickey, supra note 200, at 356; see Sunstein, supra note 200, at 128 ("one cannot get a sense of the context and purpose of a statutory enactment without a reading of the legislative history . . . . [M]ost fundamentally, it is not clear where judges are to look if they fail to look at the legislative history. Without reference to the history, interpretation can become less bounded."); James Willard Hurst, Dealing with Statutes 46 (1982) ("The statutory text is basic and central. But if a law is to be a vital force in society, the text usually must be seen as part of a flow of policy-making activity that originates before the text is voted and continues after it is on the books."); Eskridge & Frickey, supra note 200, at 353 (identifies "Specific & General Legislative History" as the second "Most Concrete Inquiry" into a statute's meaning).
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hind the Clean Water Act.\textsuperscript{202} Although each is a well accepted source for understanding the meaning of a statute, the text is undoubtedly the most important source.\textsuperscript{203} The Clean Water Act clearly provides that suits may be brought alleging that a point source's emissions have caused violations of the state WQSs, but only when WQS compliance is a condition of the point source's NPDES permit. The legislative history and statutory purposes are much more ambiguous, but in any event do not clearly indicate that the text's literal meaning was not intended.

\section*{A. The Text of the Citizen Suit Provision}

The majority in \textit{Northwest Environmental Advocates} relied principally on the text of the Clean Water Act to support its holding that a citizen suit could be based on the alleged WQS violations if WQS compliance was an NPDES permit condition. The Clean Water Act's citizen suit provision states in relevant part that:

\begin{quote}
[A]ny citizen may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation . . . . \textsuperscript{204}
\end{quote}

A close analysis of this text strongly supports the conclusion that citizen suits are authorized to enforce WQSs when WQS compliance is a

\begin{footnotesize}
\textsuperscript{202} See Bob Jones University v. United States, 461 U.S. 574, 586 (1983) ("It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute." (citations omitted)). See generally, \textsc{Henry M. Hart, Jr. \& Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law} 1374-80 (William Eskridge, Jr. \& Philip Frickey eds., 1994) (defining purposivist approach to statutory interpretation). Professor Llewellyn has made the claim that it is necessary for courts to look to the underlying policy of the statute when construing its terms. He writes that:

If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense. If a statute is to be merged into a going system of law, moreover, the court must do the merging, and must in so doing take account of the policy of the statute — or else substitute its own version of such policy.

Karl N. Llewellyn, \textit{Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed}, 3 Vand. L. Rev. 395, 400 (1950); see also Patricia M. Wald, \textit{Some Observations on the Use of Legislative History in the 1981 Supreme Court Term}, 68 Iowa L. Rev. 195, 199 (1983) (suggesting that a court "ignores reality" if, in interpreting a statute, it stops at the words of the statute and fails to consider context including "the problems giving rise to the statute").

\textsuperscript{203} See Estate of Cowart, 505 U.S. at 475. Indeed, even for scholars who are not textualists, an important and potentially decisive starting point is the text of the statute. See e.g., Eskridge \& Frickey, \textit{supra} note 200, at 353 (stating that the "Practical Reasoning Model of Statutory Interpretation" begins with the "Most Concrete Inquiry," which is the "Statutory Text."). For a discussion of the flaws of the textualist approach to interpretation, even when it yields a result that is favorable to the environment, \textit{see generally} Healy, \textit{supra} note 11.

\end{footnotesize}
specific condition of a point source's NPDES permit. The textual case for citizen suit enforcement disappears, however, when no such condition exists in the NPDES permit.

1. The Case Where WQS Compliance Is an NPDES Permit Condition

Although the citizen suit provision quoted above makes no explicit reference to WQS violations, the Act's definition of "effluent standard or limitation" applicable to the citizen suit provision indicates that citizens can sue for certain WQS violations.205 One type of "effluent standard or limitation" specified by the text is "a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter."206 This means that the Clean Water Act expressly provides that a citizen suit may be brought, if the plaintiff alleges that the defendant point source has violated a condition of its NPDES permit.207 The text of the statute thus establishes that the availability of citizen suits to enforce WQSs is dependent on WQS compliance being an NPDES permit condition.

In light of the text of the Clean Water Act, *Northwest Environmental Advocate* was correctly decided. This is the case because the defendant point source in *Northwest Environmental Advocate* was required to comply with state WQSs as a condition of its NPDES permit.208 In fact, the *Northwest Environmental Advocate* court distinguished an earlier Ninth Circuit decision, which had prohibited a citizen suit for a WQS violation, on the grounds that the relevant NPDES permit in that case did not make WQS compliance a permit condition.209

205. Id. § 1365(f).
206. Id. § 1365(f)(6).
207. The reference to 33 U.S.C. § 1342 in § 1365(f)(6) is to section 402 of the Act, which establishes the NPDES permitting system for point sources. Because of this statutory definition, interpretations of the Act that focus on requiring a citizen suit claimant to show a violation of an "effluent standard or limitation" have little persuasive value on the question of whether a suit can be based on an alleged violation of a WQS when WQS compliance is a condition of the source's NPDES permit. See *Save Our Community v. EPA*, 971 F.2d 1155, 1162 (5th Cir. 1992) ("Without the violation of either (1) an effluent standard or limitation under the CWA, or (2) an order issued with respect to these standards and limitations, the district court lacks jurisdiction to act.").
208. 56 F.3d at 985. In support of its adoption of this definition of "effluent standard or limitation," the court stated that other courts had allowed citizen suits to be brought based on claims of violations of other permit conditions. See id. at 988 ("By applying § 505(f)(6), several courts have held that citizens groups may seek to enforce many kinds of permit conditions besides effluent limitations. In fact, permit conditions that courts commonly enforce under § 505(a) are not effluent limitations, but rather, requirements for retaining records of discharge sampling and for filing reports." (citations omitted)).
209. See id. at 989 n.11 ("When this Court and other courts have held that citizens may not enforce water quality standards under § 505(a)(1), they addressed standards that were not included in a NPDES permit." (citation omitted)).
Because the text of the Clean Water Act makes the availability of citizen suits dependent on whether or not the defendant point source's NPDES permit makes WQS compliance an explicit condition, the question of how permit conditions are defined becomes extremely important. Whether WQSs are defined as conditions in an NPDES permit typically will depend on the discretion of permit writers. Federal guidance, as well as state regulations, appear to grant permit writers the authority, but not the obligation, to impose WQS compliance as a permit condition. One notable exception to this discretion arises when the WQS compliance condition is mandated by a state certification required by section 401.

210. It is unclear how many NPDES permits include WQS compliance as a permit condition. Recent reported cases, however, provide several examples of that condition. See Citizens for a Better Env't v. Union Oil Co. of Cal., 861 F. Supp. at 913 (court dismisses on authority of the vacated panel opinion in Northwest Environmental Advocates citizen suit claim based on violation of state water quality standards); Save Our Bays and Beaches v. Honolulu, 904 F. Supp. 1098 (City's NPDES permits for its POTWs, "[i]n addition to effluent limitations . . . contain express prohibitions against causing violations of state water quality standards in the receiving waters." Id. at 1106. The court bars citizen suit claims based on violations of the WQSs because of the initial panel decision in Northwest Environmental Advocates.); Culbertson v. Coats American, Inc., 913 F. Supp. 1572 (N.D. Ga. 1995) (permit requires compliance with Georgia Rules on water quality, including a narrative standard for color. Court relies on later Northwest Environmental Advocates decision and holds that citizen suit action may be based on WQS violations.). Cf Miami-Dade, at 2 (a WQS is included in a draft permit in the form of an effluent limit).

211. EPA's guidance to NPDES permit writers does not include compliance with state WQSs as one of the many standard conditions that should be included in the permit to "help ensure uniformity and consistency of all permits issued by NPDES States or EPA Regional offices." NPDES TRAINING MANUAL, supra note 16, at 3-12. The guidance also gives permit writers the discretion to include "special conditions." Id. at 3-14. The manual states that:

Ultimately, special conditions are designed to provide an additional measure of control for the reduction of discharges to waters of the United States. As such, the permit writers should not feel constrained to the special conditions discussed above. In many cases, the special conditions section can be used to promote Agency initiatives and to foster compliance with policies.

Id. Certainly, ensuring compliance with state WQSs "foster[s] compliance with policies" of the Clean Water Act, and agencies accordingly have authority to include WQS compliance as a special condition. State regulations may be similarly ambiguous. For example, regulations for Kentucky provide that:

(4) Water quality standards and state requirements shall be included [as conditions] as applicable. Any requirements in addition to or more stringent than EPA's effluent limitations guidelines or standards shall be included, when necessary to: (a) Achieve water quality standards established under KRS Chapter 224 and administrative regulations promulgated pursuant thereto, including any narrative criteria . . . .


The permit also requires that: "Combined Sewer Overflows [CSO] must not cause violations of State Water Quality Standards." Id. The CSO-related provisions described above were contained in the draft permit. In its letter certifying the draft permit, the State wrote that: "None of the conditions of the permit may be
In addition to making permit conditions enforceable through citizen suits, the Clean Water Act's definition of “effluent standard or limitation” is significant because it indicates that actionable statutory violations may occur even when the permit-issuing agency is itself responsible for the fact that the applicable NPDES permit does not contain effluent limitations necessary to meet WQSs. Specifically, section 365(f)(1) provides that “effective July 1, 1973,” a citizen suit may be brought based on “an unlawful act under subsection (a) of section 1311 of this title . . . .” Section 1311 provides that “[e]xcept as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.” Section 1342, in turn, provides for the NPDES system for permitting point sources. The effect of these provisions is that “the discharge of any pollutant without NPDES permit is an unlawful act under § 1311(a).”

The Fifth Circuit recently interpreted these provisions to impose liability after the effective date of July 1, 1973, even though the permitting agency may be responsible for the fact that a point source is without an NPDES permit. This interpretation supports the conclusion that a point source’s failure to comply with WQS permit conditions will not be excused on the ground that the permit writer should have explicitly included the actual effluent limits needed to ensure WQS compliance.

made less stringent without violating the requirements of the State Act and the Massachusetts Water Quality Standards.” (footnote omitted).

See also In re Boise Cascade Corp., 24 Envtl. L. Rep. (Envtl. L. Inst.) 40,116, at 40,119 n.7 as to when limits are required by certification. For a general discussion of § 401 certification, see supra Part II.C.5. The Section 401 certification is, of course, required by the Clean Water Act only when a federal permit is being issued. 33 U.S.C. § 1341. Federal permitting activities that trigger the certification requirement include permits that result in nonpoint source pollution as well as point source pollution. See Idaho TMDL Program, supra note 158. In the context of NPDES permitting, federal permits are now issued by EPA in only ten states. See supra note 118 (40 states now have authority to administer their own NPDES programs).

214. Id. § 1311(a).
215. Id. § 1342.
216. Sierra Club v. Cedar Point Oil Co., 73 F.3d 546, 559 (5th Cir. 1996). See also Axline & McGinley, supra note 119, at 257 (“Together, sections 301(a) and 402 establish the essential structure for regulating point sources of pollution—no discharge of a pollutant is allowed without a permit.”).

217. See Sierra Club, 73 F.3d at 562 (quoting with approval United States v. Frezzo Bros., Inc., 602 F.2d 1123, 1128 (3rd Cir.1979), cert. denied, 444 U.S. 1074 (1980)). The Fifth Circuit stated that this result was consistent with EPA’s interpretation of the CWA and with the decisions of other courts. See 73 F.3d at 562 (“numerous courts have allowed suits by citizens against persons allegedly discharging pollutants without a permit, despite the fact that the discharger was complying with applicable effluent limitations or that no applicable effluent limitation was in place.” (citations omitted)).
In sum, the Clean Water Act's text provides strong evidence that a citizen suit may be brought against a point source when WQS compliance is a condition of the source's NPDES permit and when its discharges cause a WQS violation.

2. The Case Where WQS Compliance Is Not an NPDES Permit Condition

The Clean Water Act provisions discussed above also provide strong evidence that although citizens are authorized to sue when WQS compliance is a condition of the relevant NPDES permit, they have no authority to sue when no such condition is included in the permit. Congress included a permit shield provision in section 402(k) of the Clean Water Act. That provision states that "[c]ompliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of section[ ] . . . 1365 of this title, with section[ ] 1311 . . . of this title . . . ."218 This means that the Act "defines compliance with a NPDES . . . permit as compliance with Section 301 for the purposes of the CWA's enforcement provisions."219 The Supreme Court has stated that "[t]he purpose of [the shield provision] seems to be . . . to relieve [permit holders] of having to litigate in an enforcement action the question of whether their permits are sufficiently strict."220 The permit shield provision supports a reading of the Act's text as barring citizen suits to enforce WQSs in cases where the relevant NPDES permit includes neither sufficiently stringent effluent limits nor WQS compliance as a permit condition.221

EPA itself, whose expertise in enforcing the CWA is entitled to some deference, has recognized that citizens have the right to sue 'Coastal Subcategory' operators who are discharging produced water without a permit. At the time EPA made this statement, it had never issued such permits and had only issued effluent limitations on the oil and grease content of produced water." (footnote and citation omitted)

Id. But cf. Hughey v. JMS Dev't Corp., 78 F.3d 1523 (11th Cir. 1996) (court seems to hold that citizen suit may not be brought where violation results from administrative glitch in failing to issue required permit).

218. 33 U.S.C. § 1342(k). 33 U.S.C § 1365 is the citizen suit provision, while section 1311 makes it illegal to discharge a pollutant without a permit.


221. A recent law review Article has argued, however, that the permit shield provision does not apply when the permit has not been issued in accordance with the Clean Water Act's requirements. See Axline & McGinley, supra note 119, at 287:

Under the reasoning of DuPont a permit that is issued in violation of a requirement in the CWA for permit issuance, such as the requirement in section 402(a)(1) that the issuing agency apply either national effluent limitations or use BPJ to set BAT or BCT standards for all pollutants, would not be protected by the section 402(k) shield.

Under this reasoning, the shield might not apply when a permit-issuing agency has failed to incorporate effluent limits that are sufficiently stringent to prevent WQS violations.
Other provisions of the Act reinforce this NPDES permit condition dependent approach to the question of whether citizens may sue for WQS violations. Recall that both the TMDL\textsuperscript{222} and the Toxic Hot Spot ICS\textsuperscript{223} provisions include methods for incorporating into NPDES permits specific effluent limits that are sufficiently stringent to ensure compliance with WQS. Section 401 also allows states to demand that permits issued by EPA contain conditions necessary to ensure that state WQSs will not be violated.\textsuperscript{224} All of these provisions allow the permittee and affected states to rely on the terms and conditions of the NPDES permit to determine whether point source discharges comply with Clean Water Act requirements. Because the statute provides that point sources may rely on the terms and conditions of NPDES permits as being the extent of the controls that will be imposed under the Clean Water Act, it would be improper to permit citizen suits to enforce WQSs when WQS compliance is not an explicit permit condition.

In sum, the Clean Water Act's text presents a strong case that citizen suits may be brought in response to alleged point source violations of state WQSs if that point source's NPDES permit includes WQS compliance as a condition.\textsuperscript{225} As noted above, the statutory text is the most reliable evidence of a statute's meaning.\textsuperscript{226} Given this strong textual support for the NPDES permit condition dependence of citizen suit availability, only very strong evidence to the contrary, drawn from the legislative intent or the Act's underlying purpose, could overcome the textual interpretation and dictate that such a citizen suit is not available.\textsuperscript{227}

B. The Legislative Intent Regarding the Availability of Citizen Suits

Key portions of the legislative history provide evidence that Congress intended to limit the availability of citizen WQS enforcement


\textsuperscript{224} 33 U.S.C. § 1341(d).

\textsuperscript{225} See Northwest Envtl. Advocate v. Portland, 56 F.3d 979, 991 (9th Cir. 1995) (Kleinfeld, J., dissenting) (“This reasoning [based on the statutory text] has force, and I am troubled by the difficulty of applying Oregon Natural Resources Council in the face of this logical, literal construction.”).

\textsuperscript{226} See supra note 203 and accompanying text.

\textsuperscript{227} The court in Atlantic States Legal Found. v. Eastman Kodak, 12 F.3d 353, 359-60 (2d Cir. 1993), had held that requirements established only by state law are not enforceable under the citizen suit provision. See id. (“even if Atlantic States is right about New York law, the action would fail because New York would be implementing a regulatory scheme broader than the CWA. . . . and such broader state schemes are unenforceable through section 505 citizen suits.”) (citation omitted). This reasoning does not apply to bar citizen suits based on WQS violations when the permit requires WQS compliance as a condition. This is because section 1365(f)(6) defines “effluent standard or limitation” to include permit conditions and thus makes the permit conditions requirements of federal law.
suits. Legislative intent therefore undercuts somewhat the strong textual case discussed above for permitting citizens to sue for some WQS violations. Note, however, that the strong textual case relied upon the availability of a citizen suit to enforce permit conditions. Nothing in the Clean Water Act’s legislative history indicates that Congress intended that certain permit conditions, for example those mandating WQS compliance, should not be subject to full enforcement.

The Senate Report on the predecessor bill to the Clean Water Act strongly suggests, however, that WQSs were not intended to be enforceable by themselves, and particularly not in the context of private enforcement actions. The Senate Report stated broadly that “[w]ater quality will be a measure of program effectiveness and performance, not a means of elimination and enforcement.”228 In discussing the citizen suit provision, the Report emphasized that citizen suit enforcement actions would not rely on a “court-developed definition of water quality,”229 but would instead involve courts considering “manageable and precise benchmarks for enforcement.”230 A core concern about permitting citizen suit enforcement of WQSs is that these suits will not provide courts with clear standards for adjudication.231 Indeed, the Report indicated that WQSs did not provide this kind of precision.232 The Report stated, finally, that the administra-


Section 505 would not substitute a “common law” or court-developed definition of water quality. An alleged violation of an effluent control limitation or standard, would not require reanalysis of technological in [sic] other considerations at the enforcement stage. These matters will have been settled in the administrative procedure leading to the establishment of such effluent control provision. Therefore, an objective evidentiary standard will have to be met by any citizen who brings an action under this section.

230. Id. The Senate Committee stated that:

Enforcement of pollution regulations is not a technical matter beyond the competence of the courts. The citizen suit provision is consistent with principles underlying the Federal Water Pollution Control Act, that is the development of clear and identifiable requirements. Such requirements should provide manageable and precise benchmarks for enforcement.

231. See supra note 198 and accompanying text.
232. S. Rep. No. 92-414 (1971), reprinted in 1972 U.S.C.C.A.N. 3675 (“Water quality standards, in addition to their deficiencies in relying on the assimilative capacity of receiving waters, often cannot be translated into effluent limitations—defendable in court tests, because of the imprecision of models for water quality and the effects of effluents in most waters.”). In his dissent, Judge Kleifeld made a similar point about the enforceability of WQSs:

[W]e previously concluded on the basis of analysis of several additional provisions of the statute that it is not the permittee who must comply with the water quality standards, but rather the issuing authority, which has a “duty . . . to include in the permit end-of-pipe effluent limitations that will ensure that water quality standards are met.” Northwest Environmental, 11 F.3d at 908. That makes sense in light of what the Supreme Court said in Jefferson County. Congress meant for the issuing authority to decide upon end-of-pipe effluent stan-
tive permitting process should generate clear standards, which would be the only standards enforceable by citizen suits or by government enforcement. In other words, the legislative history indicates that Congress did not intend to authorize citizen suit enforcement of WQSs under all circumstances.

Notwithstanding the concerns raised above about the role that WQSs should play in the Act's enforcement scheme, language in the Senate Report supports the statutory interpretations presented in the previous section. The Senate Report stated, for example, that citizens were granted the authority to bring suit to enforce the terms of "any condition of any permit issued under Section 402." Thus, the Report provides inferential support for the type of citizen suit permitted in *Northwest Environmental Advocate*.

C. The Purpose of the Clean Water Act

Nothing in the Clean Water Act's broad purposes contradicts or otherwise undercuts the strong textual case for permitting citizen suits for the enforcement of WQSs when WQS compliance is a condition of the point source’s permit. The express purposes of the Clean Water Act call for reliance on the two regulatory approaches discussed in this Article: uniform technology-based limitations on point sources and supplementary limitations for the protection of water quality.

The first stated goal is that "the discharge of pollutants into the navigable waters shall not violate any standard established by the Administrator..." when Congress allowed citizens' suits to enforce permit limitations. It did not mean for citizens’ suits to proceed on the basis of permit violations, where the permittee complied with end-of-pipe discharge limitations but the water still wound up being too polluted. A water quality standard should be deemed to be not among those authorized by the statute for purposes of citizen suit enforcement.

The City of Portland persuasively argues that, if the water quality standard were used as a basis for punishing sewage overflows during rainy weather, then the detailed end-of-pipe discharge limitations in the permit designed for this precise problem would have no practical effect.

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The standards for which enforcement would be sought either under administrative enforcement or through citizen enforcement procedures are the same. Therefore the participation of citizens in the courts seeking enforcement of water pollution control requirements should not result in inconsistent policy. Whether abatement is sought by an agency or by a citizen, there should be a considerable record available to the courts in any enforcement proceeding resulting from the Federal and State administrative standard-setting procedures. Consequently, the factual basis for enforcement of requirements would be available at the time enforcement is sought, and the issue before the courts would be a factual one of whether there had been compliance.

234.  *Id.* ("citizens are granted authority to bring enforcement actions for violations of... any condition of any permit issued under section 402.").

235.  *See supra* Part I.A.
gable waters be eliminated by 1985.” 236 This purpose reflects the Act’s concern that sources of pollution limit their pollution discharges and that this limitation be accomplished through the application of uniform, technology-based standards to various categories of sources.

The Act also states that its “objective . . . is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 237 and that “wherever attainable, an interim goal of water quality which provides for the protections and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983.” 238 These goals reflect the Act’s concern with ensuring healthful water quality and articulate an environmental protection purpose supplementary to the technology-based effluent controls mandated by the Act. This purpose is entirely consistent with permitting direct citizen suit enforcement of state WQSs, and especially WQSs adopted to protect water dependent species and recreational activities.

Because the Act’s two purposes parallel its dual regulatory regimes for the control of discharges, it would be difficult to articulate any convincing argument for ignoring the statutory text that establishes this basic regulatory structure. In other words, nothing about the purpose of the Clean Water Act calls into doubt the conclusion that the text of the Act authorizes citizen suits for WQS violations when WQS compliance is an NPDES permit condition.

In sum, the text of the Clean Water Act provides strong support for the result reached by the Ninth Circuit Court of Appeals. When WQS compliance is a condition of a source’s NPDES permit, citizens should be able to bring an enforcement action against that point source if its discharges cause violations of state WQSs. Neither the legislative history of the Act nor its purposes present a compelling case for rejecting the strong textual argument for allowing citizen suits under these limited circumstances. Moreover, the text and intent of the Clean Water Act also dictate that citizen suits are not authorized when WQS compliance is not an express condition of an NPDES permit.

V

DOES CITIZEN SUIT ENFORCEMENT OF WQSs CONSTITUTE GOOD PUBLIC POLICY?

This Article will now consider whether allowing citizen suits to enforce WQSs is good public policy. The previous section addressed

237. Id. § 1251(a).
238. Id. § 1251(a)(2).
the legal questions surrounding citizen suit enforcement. These questions are, as a matter of statutory construction, almost always resolved by reference to the desires of the enacting legislature. This section is not similarly constrained by a concern with legislative supremacy. Rather than focusing on congressional expectations and drafting, this section will address the public policy question and will consider, when appropriate, any practical lessons to be learned from the statute's actual implementation over the past twenty-five years. When relevant, practical experience is important because the issue of citizen suit enforcement is not being resolved in a vacuum, but rather implicates the overall implementation and effectiveness of the Clean Water Act.

As in the preceding section, this public policy analysis will consider citizen suit enforcement both when WQS compliance is made a specific condition of an NPDES permit and when WQS compliance is not a condition. This section begins with an analysis of the arguments that have been made against citizen suit enforcement of WQSs. Each of these arguments counsels some degree of restraint with respect to allowing citizen suits. The section then presents several policy arguments in favor of citizens suits. In my view, based on a weighing of the conflicting arguments, the basic distinction drawn by the statute and recognized by the Northwest Environmental Advocate court reflects the best public policy result. Citizen suits to enforce WQSs should be permitted only when WQS compliance is a specific condition of a point source's NPDES permit.

A. Public Policy Arguments Against Permitting Citizen Suit Enforcement of WQSs

Articulated objections to citizen suit enforcement of WQSs fall into three basic categories: arguments that courts will be forced to exceed their institutional and technical competence to resolve such cases; arguments that permit holders will be treated unfairly if such claims are allowed; and arguments that allowing such claims will lead to an inefficiently high level of enforcement. The Article will discuss each of these objections in turn below. It will focus particularly on how the strength of the objections may depend on whether WQS compliance is included as an NPDES permit condition.

1. Institutional Problems Faced by Courts

Courts may confront serious institutional problems in adjudicating citizen suits alleging WQS violations. Courts generally play an un-

239. Cf. Eskridge & Frickey, supra note 200, at 353 (in describing the "hierarchy of sources" to be considered by a court in interpreting a statute, the authors identify the relevance of the "Evolution of the Statute" as well as "Current Policy," which is also the "Most Abstract Inquiry").
controversial role in adjudicating Clean Water Act enforcement claims when they apply bright line rules to determine whether discharges violate the Act. For example, in the paradigmatic enforcement case, a point source will be held liable for violating its NPDES permit if the source’s mandatory report of discharges shows that it discharged pollutants at levels exceeding what was allowed under its NPDES permit.\textsuperscript{240}

Adjudication under these circumstances is straightforward and uncontroversial because the court is required merely to compare reported point source discharges with the levels mandated by the source’s NPDES permit.\textsuperscript{241} Whether courts should have jurisdiction to entertain citizen suits in a nontraditional context may depend on whether the court will be called upon to make the same type of uncontroversial determinations in the new context. In a recent case, the Fifth Circuit Court of Appeals considered whether citizens should be permitted to press claims of statutory violations in one nontraditional situation.\textsuperscript{242} The citizens in \textit{Sierra Club v. Cedar Point Oil Co.} claimed that a point source had violated the zero discharge limit for the discharge of pollutants in the absence of a permit. The court concluded that the citizen’s claim could be heard because a bright line rule applied and the court would not be forced to balance factors to reach a complex judgment.\textsuperscript{243} As in the traditional case of an NPDES violation documented by mandatory reporting, the court did not have to be concerned about intruding on the role of the EPA or a state agency regarding the administration of the Act and the definition of enforcement or substantive policy. The Clean Water Act plainly mandates

\begin{itemize}
  \item \textsuperscript{240} \textit{E.g.}, \textit{Connecticut Fund for the Env’t, Inc. v. Upjohn Co.}, 660 F. Supp 1397 (D. Conn. 1987); \textit{see generally}, \textit{PERCIVAL, supra} note 3, at 1078.
  \item \textsuperscript{241} For the purposes of this Article, it is assumed that citizen suits reflect good public policy in the context of these well accepted claims of illegality that do not necessitate the exercise of difficult judgments. This Article does not address, moreover, the question of whether citizen suits are a constitutional form of enforcement of federal statutes. For a discussion of this question, \textit{see} Cass R. Sunstein, \textit{Article II Revisionism}, 92 MICH. L. REV. 131 (1993).
  \item \textsuperscript{242} \textit{Sierra Club v. Cedar Point Oil Co.}, 73 F.3d 546 (5th Cir. 1996).
  \item \textsuperscript{243} \textit{See id.} at 567, where the court stated that:

\begin{quote}
[T]hese rare cases where courts are called upon to determine whether a substance is a pollutant do not require a “complex balancing” of biological, technological and economic factors, such as EPA must undertake when promulgating effluent standards. That is, the court will not be asked to analyze the level of discharge, the character of the receiving waterway, and the cost of achieving various permit limitations. Rather, Congress has already set the permit limitation in such cases—zero discharge. A court need only apply the statutory definition to determine if the substance in question is a pollutant. If it determines that the substance is a pollutant, and the defendant is discharging it at all without a permit, then there has been a violation of § 1311(a). We do not think that this task is beyond the competence of a court.
\end{quote}
\end{itemize}
that point sources may not discharge pollutants into waters of the United States without a permit.\textsuperscript{244}

If courts have jurisdiction to hear citizen claims based on WQS violations, their determinations regarding the existence of violations are likely to be more difficult and controversial than in the situation described above.\textsuperscript{245} Courts may have to resolve questions of both enforcement and substantive policy raised by these new claims. Imposing Clean Water Act liability for violations of WQSs in suits brought by private citizens will force courts to consider several issues including: the existence of multiple pollution sources affecting the quality of receiving waters; the use of compliance schedules in defining WQSs; and the applicability of mixing zones to the determination of whether WQSs have been violated.\textsuperscript{246} To be sure, the discussion that follows shows that these are problematic enforcement issues. These issues do not, however, warrant reaching the conclusion that citizen suits to enforce WQSs should be barred in all contexts.\textsuperscript{247} Instead, these issues militate in favor of courts exercising restraint in their consideration of WQS-based claims. For example, courts might require citizen suit plaintiffs to show that the defendant point source's discharges clearly caused the alleged WQS violation.\textsuperscript{248}

\textsuperscript{244} See id. at 569 n.37, where the court suggests that courts should be more suspicious about allowing citizen suit claims, when the underlying issue of compliance involves a difficult judgment or question of policy:

Where EPA has not promulgated a permit or limitation for a particular discharge, it may be because EPA lacks the resources to do so or because the discharge is not a priority. Occasionally, however, it may be because EPA questions whether the discharged substance is a pollutant at all. In such a case, it is likely that the substance may not clearly fit within the statutory definition and that there will be little regulatory guidance from EPA. In a citizen suit brought under these circumstances, courts should exercise restraint to avoid stretching the term "pollutant" too far.

\textsuperscript{245} The legislative history shows that Congress understood this problem and accordingly indicated that WQSs would not be enforceable in either public or private actions. See supra Part IV.B.

\textsuperscript{246} In addition to these troublesome judgments, courts may simply be required to determine whether violations of unclear WQSs have occurred. See, e.g., In re Florida Power Co., Op. No. 61, 1977 WL 28248, at *2 (E.P.A.G.C.) (Florida standard related to thermal discharges depends on whether "monitoring produces evidence of substantial damage [to aquatic life and vegetation].") (emphasis added).

\textsuperscript{247} Concerns about the difficulty of enforcing uncertain requirements in the context of citizen suits animated in part the Second Circuit's decision that a citizen could not seek enforcement of air quality standards defined under the Clean Air Act, even though a state implementation plan appeared to require state compliance with that standard. See Wilder v. Thomas, 854 F.2d 605, 615-16 (2d Cir. 1988). The court states that its decision "effectuat[es] both the congressional purpose of fostering [citizen] enforcement and the equally important purpose of providing specific, objective standards for citizen suits." Id. at 616.


The courts may refuse to enforce foolish or perverse applications of a statute. There are precedents for judicial refusal to enforce the law . . . . [I]f giving courts a discretionary power to decline to enforce the law is tolerable, then the major
a. Multiple Pollution Sources

In his dissent in *Northwest Environmental Advocates v. Portland*, Judge Kleinfeld argued that allowing citizen suits based on WQS violations is misguided because courts will have great difficulty in identifying a particular point source as responsible for the violation. He argued that courts should not decide the issue of a specific source's liability for degraded water quality because a WQS violation is the result of the discharges of upstream sources as well. Judge Kleinfeld's comments have even greater force in light of the fact that WQS compliance is often dependent on flow conditions, particularly flow volume, and may be influenced by upstream NPDES permit violations. Neither flow conditions nor upstream violations are within the control of a downstream point source. Judge Kleinfeld's dissent suggested that public enforcement efforts may offer a better response to WQS violations than citizen suit enforcement, presumably because public officials are better placed to decide how readily the WQS violations could have been avoided and to assign blame for WQS violations to particular point sources.

b. Compliance Schedules

Courts considering whether point sources have caused violations of WQSs may also have to consider the applicability and effect of

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cost of discretionary nonenforcement by public enforcement agencies can be eliminated without abrogating the public monopoly of enforcement.

249. 56 F.3d at 992 ("[WQSs] are too uncertain and amorphous . . . for use against specific polluters.").

250. Id. stating that:

Suppose, hypothetically, that a water quality standard allows for 100 units of a pollutant, upstream and non-point source polluters discharge 50 units, and the downstream discharger is permitted to discharge 50 units. If the upstream and non-point source polluters increase their discharge to 80 units, it does not automatically follow that the downstream discharger should be limited to 20.

251. See *Sierra Club v. Browner*, 843 F. Supp. 1304, 1313 (D. Minn. 1993) ("According to the EPA, TMDLs are based on conditions where the water quality standards are not being met. Nonpoint sources normally have a greater effect on water quality during high flow conditions, but point sources have a greater effect on water quality during low flow conditions.").

252. See id. at 1308 finding that:

The EPA responds that at least some of the 1116 waters are those not meeting water quality standards because a point source is not meeting its permit requirements and that these waters are not WQLSs because the effluent limitations required by other sections of the Act might be stringent enough to implement water quality standards." (citation omitted).

253. See *Northeast Env'tl. Advocate*, 56 F.3d at 992 (Kleinfeld, J., dissenting). Mentioning that "government enforcement authorities . . . decided not to prosecute this case against the City of Portland" and questioning the propriety of limiting the discharges of downstream sources, based on the aggregate discharges of various upstream sources, Judge Kleinfeld stated that "[t]he burdens of so severe a limitation may exceed the burdens of the extra pollution, or enforcement efforts might more appropriately be directed at the other polluters." Id.
compliance schedules. Compliance schedules define the date or dates by which a particular standard or requirement must be met. Many states incorporate compliance schedules into their WQSs. Thus, whether a WQS has been violated at a particular point in time may depend on whether the particular WQS is currently applicable or is subject to delayed applicability pursuant to the state's compliance schedule. The applicability of a compliance schedule dictates whether a source is required to comply with a state WQS immediately or at a later date and is governed by state agency discretion. This discretion should be exercised by the permit granting agency when it drafts and issues the NPDES permit for a point source.

When a citizen suit is based on a WQS violation, and WQS compliance is a condition of an NPDES permit, the court adjudicating the claim will not be forced to make an independent judgment about the applicability of that state's compliance schedule. By including WQS compliance as a permit condition, the state will have already exercised its administrative authority over the compliance schedule issue. Even if the compliance condition is ambiguous and a court has to decide whether a compliance schedule is applicable to the permit condition, the state agency will at least have had an initial opportunity to resolve the issue of the compliance schedule's applicability. Allowing citizen suits in such instances might strengthen the permit issuance process by encouraging the permit granting agency to focus on WQS issues thoroughly when drafting the terms and conditions of the permit. In sum, the applicability of compliance schedules does not weigh

254. See In re Star-Kist Caribe, Inc., 24 Envtl. L. Rep. (Envtl. L. Inst.) 40,009, 40,011 n.9 (E.P.A. E.A.B. May 26, 1992) ("According to petitioner's Status Report, 29 jurisdictions have provisions in their laws (water quality standards or related regulations, including permit regulations) that explicitly authorize schedules of compliance in NPDES permits. Six (6) others have begun, but not completed, the steps necessary to provide for such schedules." (citations omitted)).


It is well established that "[t]he Clean Water Act does not authorize EPA to establish schedules of compliance in the permit that would sanction pollutant discharges that do not meet applicable state water quality standards." The only recognized exception to this rule is "when the water quality standard itself (or the State's implementing regulations) can be fairly construed as authorizing a schedule of compliance." (internal quotations omitted).

256. See In re J&L Specialty Products, 25 Envtl. L. Rep. (Envtl. L. Inst.) 40,230, 40,234 (E.P.A. E.A.B. June 20, 1994) ("under this [state] regulation [implementing the WQSs], the permit issuer may, in its discretion, grant a permittee a compliance schedule, provided that certain preconditions exist, such as the discharger's inability to meet the applicable effluent limitation."; id. ("The authority to grant a compliance schedule under the Ohio regulation is purely discretionary.").

257. This type of process-based benefit associated with allowing citizen suits based on WQS violations is discussed infra Part V.B.
strongly against citizen suit enforcement of WQSs when WQS compliance is a permit condition.

c. Mixing Zones

The applicability of mixing zones presents one final difficulty that courts are likely to face if they have jurisdiction over citizen suits based on claims of WQS violations.258 A mixing zone is an area in which effluent mixes with the receiving waters. When a mixing zone is applicable, compliance with state WQSs is monitored outside of the mixing zone.259 This means that a point source’s discharges will not be treated as violating the state’s WQS, even if water quality within the mixing zone is significantly lower than what is dictated by the state’s WQS, so long as water quality complies with state standards outside the mixing zone.

One court recently considered the significance of mixing zones to Puerto Rico’s certification, pursuant to section 401, that an NPDES permit issued by EPA would comply with Puerto Rico’s WQSs.260 In that case, Puerto Rico was in the process of reviewing its mixing zone policy when EPA issued a new NPDES permit to a point source. This new permit, unlike the prior permit, failed to provide expressly for the applicability of a mixing zone to the determination of WQS compliance, and the point source contended that the permit conditions should have provided for such a mixing zone.261 The court noted that states have reached varied conclusions because each state has discretion to decide whether a mixing zone will apply when defining their WQSs.262

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258. See Water Pollution: Board Says Region IV Properly Determined Need for Total Residual Chlorine Limit in Period, 27 Env’t Rep. (BNA) 1160 (Sept. 20, 1996) [hereinafter Region IV Chlorine Limit] (reporting an EPA decision which held that the question of whether discharges would violate WQSs depends on whether a mixing zone was to be used at the point of the discharge).

259. See Puerto Rico Sun Oil Co. v. EPA, 8 F.3d 73, 75 (1st Cir. 1993). The court described the significance of a mixing zone by stating that the concentration of a pollutant:

[C]ould be measured in the effluent itself—such as storm runoff or waste water—just as it drains into the stream, river or bay which is protected by the Clean Water Act; alternatively, it could be measured at the edge of a defined area of the receiving body of water after the pollutant has been diluted by that water. Such a defined area is called a mixing zone, and it appears that measuring pollutants at the edge of the mixing zone is widespread in the application of the Clean Water Act.

260. Id.

261. See id.

262. See id. The court stated that:

According to an EPA publication, “[w]hether to establish such a mixing zone policy is a matter of State discretion.” Practically every state and Puerto Rico have adopted mixing zone criteria, although the criteria appear to differ widely. The mixing zone concept is described in Marathon Oil Co. v. EPA, which concludes with the observation that “the ‘mixing zone’ determination is basically a cost-
Adjudicating citizen suit claims of WQS violations will be made substantially more complex if courts must make policy judgments regarding the applicability and effect of mixing zones. As with the issue of compliance schedule applicability, courts will be relieved from having to resolve this difficult policy-bound question if permitting agencies have already made decisions about the use of mixing zones when WQS compliance is made a permit condition. Permitting agencies will not have made any such decision if WQS compliance is not included as a permit condition.

In sum, significant institutional problems will confront courts if they adjudicate citizen claims of WQS violations when WQS compliance is not an NPDES permit condition. Even when WQS compliance is a permit condition, however, deciding claims of WQS violations may require courts to make difficult decisions that implicate enforcement and implementation policy.

2. Fairness Problems

In addition to presenting courts with difficult judgments about liability, citizen suits based on WQS violations are also likely to be perceived as unfair by point sources that are subjected to such lawsuits. This is in large part because, as Judge Kleinfeld discussed in his Northwest Environmental Advocate dissent, WQS violations may occur as the result of upstream discharges from point and nonpoint sources.

Indeed, WQS violations may be caused by stream flow conditions or upstream permit violations. In each such circumstance, the downstream point source is likely to argue vigorously that enforcement of WQSs against it would be unfair.

EPA has occasionally established that WQS violations may occur without regard to the level of pollutants discharged from a given point source. For example, EPA allows states to define water quality criteria that are more stringent than background pollutant levels in the

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See supra note 257 and accompanying text. See supra note 250 and accompanying text. See supra note 251 and accompanying text. See supra note 252 and accompanying text. See supra note 253 and accompanying text.

263. See NPDES Training Manual, supra note 16, at 6-12 (“It is not possible to guarantee, using permit limits, that a WLA will never be exceeded.”); Alaska Ctr. for the Envt v. Browner, 20 F.3d at 984 (“the EPA argues that even if it is required to establish TMDLs [to limit point-source discharges], the actual quality of Alaskan waters will depend in part upon discretionary acts of the State of Alaska with respect to non-point source pollution.”); see also S. REP. No. 103-33, (1993) (“The scientific community identified significant impairments to the ecological integrity of waterbodies, mostly as a result of nonpoint sources of pollution.”).
waterway. This policy can lead to an extreme case where degraded water quality is the result of conditions beyond a permitted source’s control, and where even if the point source were discharging pure water, conditions in the receiving waters would violate state WQSs.

This fairness problem is more acute when the point source in question is complying with all limits and conditions included in its NPDES permit than when the point source is violating an NPDES permit condition directing it to comply with state WQSs. If a point source’s NPDES permit does not mandate WQS compliance, the source may be able to rely on recent decisions that require that a regulated party be given “fair warning” before it can be held liable for a violation of an environmental statute. Point sources with NPDES permits that do not mandate WQS compliance could rely on these decisions to argue that they should not be subject to citizen suits to enforce state WQSs. A point source operating under an NPDES permit that conditions discharges on WQS compliance would be unable to make the same sort of fairness and “fair warning” arguments against citizen suit enforcement. As a policy matter, therefore, fairness concerns favor the NPDES condition dependent approach adopted by the Ninth Circuit in *Northwest Environmental Advocate*.

3. Inefficient Level of Enforcement

The final public policy objection made to allowing citizen suits that are based on WQS violations is that too many enforcement ac-

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268. *See* Albuquerque v. Browner, 865 F.Supp. 733, 741 (D. N.M. 1993) (“The EPA does not believe it is authorized to reject proposed standards because they are more stringent than background levels. 56 Fed. Reg. 64,886 (1991).”).

269. *Cf.* id. at 742, where the court discussed EPA’s issuance of an NPDES permit to Albuquerque’s treatment works:

EPA is prepared to include limits in the City’s NPDES permit to ensure that discharged water at the facility outfall meets the water quality standards of the downstream state without first concluding that the quality of the river water five miles further downstream will be measurably improved. For example, the Pueblo’s arsenic standard for the Rio Grande is three orders of magnitude (1000 times) more stringent than the federal Safe Drinking Water Standard, and is below the concentration that can be accurately measured by current laboratory equipment. EPA will impose this stringent limit on the City despite the fact that arsenic occurs naturally in Albuquerque’s ground water at relatively high levels and is not discharged to the water by industrial polluters. If pure water is discharged at the City’s outfall, it is possible that the arsenic levels in water flowing through the Pueblo will remain relatively high.

270. But reconcile this view with that of the Supreme Court; Axline & McGinley, *supra* note 119, at 285, where the authors quote from the Court’s decision in *EPA v. California ex rel. State Water Resources Control Bd.* that states, “[a]n NPDES permit serves to transform generally applicable effluent limitations and other standards—including those based on water quality—into the obligations (including a timetable for compliance) of the individual discharger. . . .”

tions will result. Judge Kleinfeld raised this objection in his dissent in *Northwest Environmental Advocate.*272 The objection was reiterated by the dissenters to the denial of en banc review, who believed that allowing citizen suits would burden the courts with too much new litigation and result in overenforcement of state WQSs.273

Landes and Posner considered the problem of overenforcement in their study of private enforcement of law. They explained that an important characteristic of maintaining a public monopoly on enforcement is that it "enables the public enforcer in effect to nullify particular laws, or particular applications of law, simply by declining to prosecute violators."274 They argued that this "discretionary nonenforcement" has the important positive social value of limiting the effect of laws, that read literally would almost always be overinclusive. Selective nonenforcement may also avoid punishment of "conduct that the legislature or court that formulated the rule did not in fact want to forbid."275

Landes and Posner argued that if the public enforcer lacked discretion not to enforce the law, harm would likely result: "[i]f enforced to the letter, an overinclusive rule could impose very heavy social costs."276 In the case of the Clean Water Act, the overenforcement feared by the *Northwest Environmental Advocate* dissenters might lead to point sources unfairly being held liable for WQS violations and being forced to expend vast sums of money for new controls on pollution discharges. Landes and Posner also noted that the public enforcer's exercise of its discretionary nonenforcement authority can be monitored and controlled by legislative oversight, while private enforcement of the law is not subject to the same check.277

The fact that poor administration by the states and EPA have caused WQSs to fail to provide any kind of effective limit on the dis-

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272. See *Northwest Envtl. Advocate*, 56 F.3d at 993 (Kleinfeld, J., dissenting), where the judge made the following analogy:

A "public interest advocacy group," however, would have an incentive to ticket all the automobiles going a few miles per hour over the limit, because the private group, unlike the police officer and the judge, would have a financial incentive to enforce against the large number of minor violators, even though the burdens of enforcement would be very high relative to the improvement in public safety. A zealous concern for safety on the highways would doubtless contribute to doing well by doing good, but there would be too much good done.

273. See *Northwest Envtl. Advocate v. Portland*, 74 F.3d 945, 946 (9th Cir. 1996) (denial of petition for panel rehearing and rehearing en banc) (O'Scannlain, J., dissenting) ("The result [in the case] promises to invite excessive, costly, and counterproductive citizen suits, funded by the taxpayers, for the enforcement of standards that are imprecise and astronomically costly to the municipalities affected.").


275. Id.

276. Id.

277. Id. at 39-40.
charge of pollutants for so long strongly suggests, under the Landes and Posner analysis, that citizen enforcement of WQSs would be inefficient. This implication arises because the failure of WQSs as effective supplementary controls on discharges is well documented and long standing. Congress’ failure to penalize EPA or the states for this lack of WQS enforcement may indicate that Congress does not view WQSs as an effective basis for controlling the discharge of pollutants and tolerates discretionary nonenforcement by public officials. In this event, allowing uncontrolled citizen enforcement would likely be inefficient.278

Landes and Posner, however, also discussed what might be seen as the flip side of discretionary nonenforcement: “selective or discriminatory enforcement” by a public agency.279 This enforcement approach is an “oppressive and inefficient feature of public law enforcement”280 and results when the public enforcer turns a blind eye to violations of the core mandates of a law. When the public enforcer has a monopoly on enforcement authority, selective enforcement is difficult to remedy.

In the context of the Clean Water Act, the Landes and Posner analysis of private law enforcement leads to the question of whether the public enforcers’ twenty-five year failure to enforce WQSs by failing to incorporate more stringent effluent limitations into NPDES permits has been a form of selective enforcement. It is difficult to determine whether past public enforcement of WQSs is better characterized as selective enforcement or discretionary nonenforcement. This question is important, because, if the twenty-five year history is determined to have been an example of selective enforcement, permitting citizen suits to enforce WQSs might be an effective remedy for the public enforcers’ abuse of discretion.

To be sure, Congress initially expressed doubts over whether WQSs would be helpful in limiting discharges into surface waters.281 It has since failed to strengthen the Act’s mandate that NPDES permits include emissions limitations that are sufficiently stringent to ensure WQS compliance. Nevertheless, when Congress amended the Clean Water Act in 1987 it did not retreat from, and indeed it increased, the regulatory effect of WQSs.282 Moreover, in its recent interpretations of the Clean Water Act, the Supreme Court has given

278. Citizen enforcement of WQSs might be controlled to some degree by courts, which might require clear proof that otherwise permitted discharges from the defendant point source actually caused the WQS violation. But see id. at 40.
279. Id. at 41.
280. Id.
281. See supra notes 228-233 and accompanying text.
282. See supra Part I.C.
broad effect to state WQSs. Finally, both discretionary nonenforcement and selective enforcement may flourish only when the public enforcer holds a monopoly on enforcement authority. Prior discussion illustrates that Congress did not provide for a public monopoly over the enforcement of NPDES permit conditions. Those conditions are the subject of private as well as public enforcement. It accordingly follows that when WQS compliance is a permit condition, the permittee must conform to the condition, and noncompliance ought to be subject to private enforcement.

In sum, the cogency of the excessive enforcement critique presented by the *Northwest Environmental Advocate* dissenters depends to a significant degree on two considerations. First, the power of the argument depends on whether Congress has established a public monopoly over the enforcement of WQSs. This Article has already shown that no monopoly exists in a case where WQS compliance is an NPDES permit condition. In light of Congress' intent that private parties have the right to enforce permit conditions, any contention that such citizen suits amount to overenforcement ignores the core requirements of the Act. Second, the cogency of the excessive enforcement critique is dependent on whether EPA administration of the Clean Water Act during the preceding twenty-five years constitutes discretionary nonenforcement or selective enforcement in cases where there is a public monopoly on enforcement. This is a close question. In cases where WQS compliance is not expressly required for point source discharges, in the form of a permit condition or more stringent effluent limitations, the balance weighs strongly in favor of foreclosing citizen enforcement. In the latter cases, Congress has seemingly decided that it will tolerate discretionary nonenforcement by public agencies.

**B. Public Policy Reasons for Citizen Suits Based on WQS Violations**

This Article now turns to an elaboration of the two primary reasons supporting the availability of citizen suits to enforce WQSs: (1) encouraging improved permit writing, and (2) maintaining the integrity of the Clean Water Act. As with the arguments against citizen suit enforcement, the relevance and strength of these public policy concerns depend, to differing degrees, on whether WQS compliance is a condition included in the source's NPDES permit. These arguments support, as a matter of public policy, the *Northwest Environmental Advocate*.
Advoicate court’s statute-driven decision that citizen suit enforcement should be available only when WQS compliance is a permit condition.

1. Deterring Flawed Permit Writing

Professors Axline and McGinley have argued that citizen enforcement mitigates many problems and shortcomings associated with EPA enforcement of laws. Axline and McGinley further believe that enforcement may improve administration and enforcement of the Clean Water Act. The availability of citizen suits may serve the important role of inducing permit granting agencies to issue permits with sufficiently stringent limitations on discharges. If permit writers are confident that permit conditions may be enforced through citizen suits, they may decide that requiring WQS compliance as a permit condition is the most appropriate means to ensure that state water quality will not be degraded. This may commonly be the case when the permit is being drafted by EPA rather than by the state itself. Requiring WQS compliance as a condition is also likely to be less burdensome for a permit writer than seeking to define and defend specific effluent limitations. The WQS compliance condition may come to be viewed by permit writers as a second best strategy for preventing water quality degradation.

The Fifth Circuit Court of Appeals recently had to decide whether a citizen could bring an enforcement action based on a discharge of pollution for which the source in question had not received an NPDES permit. The source tried to defend its failure to obtain a permit by claiming that EPA had not defined any applicable emissions limitations for point source discharges of the pollutant. The court decided, however, that the citizen suit claim was meritorious, based in part on its view that Congress intended that point sources should not

285. See, e.g., Axline & McGinley, supra note 119, at 287 (“Citizen enforcement compensates, to some extent, for EPA’s inadequate resources. Citizen enforcement is also necessary, however, because EPA is an agency, and like any agency it is subject to capture, self-interested decisionmaking, and institutional agendas that differ from those of Congress.” (footnote omitted)).

286. Id. at 288. (“In the case of EPA’s inadequate NPDES program, citizen suits provide an opportunity to achieve the enforcement that EPA has been unwilling or unable to achieve, and at the same time strengthen EPA’s regulatory hand.”).

287. Sierra Club v. Cedar Point Oil Co., 73 F.3d 546 (5th Cir. 1996). The source was discharging produced water containing oil and grease without a permit. Produced water is a by-product of mineral extraction. See id. at 550 n.1; see Washington Wilderness Coalition v. Hecla Mining Co., 870 F. Supp. 983, 986 (E.D. Wash. 1994) (“a citizens suit to enforce an ‘effluent limitation’ can be based on allegations that the defendant is discharging without an NPDES permit.”); see also, Sierra Club, 73 F.3d at 562 (“numerous courts have allowed suits by citizens against persons allegedly discharging pollutants without a permit, despite the fact that the discharger was complying with applicable effluent limitations or that no applicable effluent limitation was in place.” (citations omitted)).

288. See 73 F.3d at 559.
be able to evade the Clean Water Act’s requirements simply because an administrative agency has not met its obligation to implement the statute effectively. This case illustrates that citizen suits can effectively supplement the administration of the Clean Water Act by enforcing the Clean Water Act’s requirements in the absence of proper agency administration. The availability of citizen suits may encourage regulated point sources to demand that agencies issue permits with comprehensive effluent limits in a timely manner. Point sources will be eager to obtain such permits to ensure that they are able to rely confidently on the Clean Water Act’s permit shield provision.

289. The court stated that:

[While Congress’s original intent may have been to limit citizen suits based on unpermitted discharges to those instances where an applicable permit was available from the state or EPA, Congress’s subsequent inaction evinces an intent to allow such citizen suits even where the discharger’s failure to obtain a permit can be explained by administrative default.

Id. at 561. The court drew support for this result from a previous court of appeals decision permitting the United States to enforce a CWA requirement, even though EPA had not defined any national emissions limitations:

We see nothing impermissible with allowing the Government to enforce the Act by invoking § 1311(a), even if no effluent limitations have been promulgated for the particular business charged with polluting. Without this flexibility, numerous industries not yet considered as serious threats to the environment may escape administrative, civil, or criminal sanctions merely because the EPA has not established effluent limitations. Thus, dangerous pollutants could be continually injected into the water solely because the administrative process has not yet had the opportunity to fix specific effluent limitations. Such a result would be inconsistent with the policy of the Act.

Id. at 562 (quoting United States v. Frezzo Bros., Inc., 602 F.2d 1123, 1128 (3rd Cir. 1979), cert. denied, 444 U.S. 1074 (1980)).

290. Even in a case where a court held that it would be unfair to allow a point source to be held liable for failure to obtain an NPDES permit, because the lack of a permit was the sole fault of the permitting agency, the court recognized that the action would likely be proper if the unpermitted discharges were causing a degradation in water quality. See Hughey v. JMS Dev’t Corp., 78 F.3d 1523, 1530 (11th Cir. 1996) (discussed infra Part V.B.2.).

291. See Axline & McGinley, supra note 119, at 289, where the authors offer the following argument in support of the availability of citizen suits claiming that a source has discharged a pollutant that is not identified in the NPDES permit:

Regulated industries are likely to prefer the devil they know to the devil they don’t know. If the discharge of pollutants not specifically authorized in an NPDES permit exposes permit holders to citizen suits for violating section 301’s “no discharge without permission” requirement, those permit holders are likely to be the first to ask EPA to broaden the scope of its NPDES program. Had EPA comprehended this fact when it established its permit program, it might have more aggressively pursued a universal program, and informed polluters who complained about such a program that they faced even more undesirable consequences from a limited program.

These authors believe that the permit shield, discussed supra notes IV.A.2, should be inapplicable when a permit granting agency fails to comply with the CWA in drafting the permit. See Axline & McGinley, supra note 119, at 285 (“When permit writers fail to ‘transform’ general standards into specific standards tailored to individual pollutants, that failure should not shield permit holders from lawsuits for discharging pollutants not addressed in their permit.”).
Note that the beneficial effects of citizen suit availability described above appeared in the context of unpermitted discharges of particular pollutants. Those benefits may not be quite as apparent in the context of WQS enforcement. Unlike the situation where specific pollutants are emitted in the absence of a permit authorizing their discharge, claims of WQS violations can arise notwithstanding a point source’s compliance with its NPDES permit’s effluent limits for the pollutant causing the WQS violation. In the WQS context, therefore, the central issue of permit administration is not whether an NPDES permit has been issued authorizing a discharge, but whether the permit contains sufficiently stringent emissions limitations or requires WQS compliance as a permit condition.

Although allowing citizen suit enforcement of WQSs may induce permit-issuing agencies to improve their permit administration by ensuring that proper permit limitations are included, this inducement arguably may not be necessary because alternate review mechanisms are available to achieve that same result. The Clean Water Act provides three alternative mechanisms for ensuring that the emissions limitations included in an NPDES permit are stringent enough to ensure that water quality is not degraded.

First, EPA now requires that all states allow affected persons to challenge the effluent limitations included in a point source’s NPDES permit. Such review should help deter inadequate permitting because it involves an investigation of whether the permit is sufficiently stringent to protect water quality. Deterrence is even more likely to occur now that EPA regulations define how permitting agencies should translate WQSs into effluent limitations. These regulations will define an applicable review standard for determining whether the permitting agency has acted reasonably in defining or declining to define more stringent limitations.

Second, a citizen may bring an action to compel EPA compliance with the TMDL provision. That provision is intended to ensure that permits for individual point sources include the discharge limitations needed to meet state WQSs. Third, a citizen may bring an action to compel compliance with the Toxic Hot Spots ICS provision added in 1987. That provision is intended to prevent toxic hot spots by ensuring that NPDES permits contain sufficiently stringent effluent limitations for toxic pollutants.
The availability of these alternative mechanisms for ensuring the rigor of effluent limitations included in NPDES permits, helping ensure WQS compliance, weighs against the need for citizen suits to serve as another such mechanism. On the other hand, allowing citizen suit enforcement to ensure that point sources do not cause WQS violations when compliance is a condition of their NPDES permits does provides an important and needed incentive for agencies to define permit conditions with care.\(^{297}\) In this context, citizen enforcement may play the kind of role that Professors Axline and McGinley have advocated.\(^{298}\) Allowing WQS compliance to be enforced by citizens when it is a permit condition may also provide interested citizens and sympathetic state agencies with an important bargaining chip when negotiating the details of NPDES permit requirements.

2. Preserving the Integrity of the Clean Water Act

In order to preserve the integrity of the Clean Water Act it is extremely important that its mandates, such as NPDES permit requirements, are enforced. Allowing citizen suits to enforce WQSs when WQS compliance is a permit condition would help ensure that all permit requirements are met and would, in this way, help preserve the integrity of the Act.

The regulatory structure of the Clean Water Act depends on the issuance of permits that impose effluent limitations and other conditions on permitted point sources. EPA's guidance to permit writers establishes two important principles regarding these permit conditions. First, permit writers are required to include specific "standard conditions" in all NPDES permits.\(^{299}\) One of these mandatory conditions is that: "The permittee must comply with all conditions of the permit. Noncompliance is a violation of the [Clean Water Act] and is grounds for injunctive relief, substantial monetary penalties, incarceration, changes or termination to the permit, or denial of permit renewal."\(^{300}\) This condition gives clear warning to point sources operating under NPDES permits that make WQS compliance an express condition that they are required to comply with "all" permit conditions and undermines any argument they might make that they were not aware of the obligation to comply with WQSs.

\(^{297}\) Agencies have discretion over whether to include WQS compliance as a permit condition, except when WQS compliance is dictated by a state as part of section 401 certification. See supra notes 210-212 and accompanying text.

\(^{298}\) This strong incentive is consistent with the notion that a permit and its conditions establish legal obligations and should be drafted with care.

\(^{299}\) See NPDES TRAINING MANUAL, supra note 16, at 3-12.

\(^{300}\) Id. (restating 40 C.F.R. § 122.41(a)).
EPA has also described the importance of other "special conditions" included in NPDES permits. Special conditions "provide an additional measure of control" and "foster compliance with policies." When a special permit condition requires compliance with WQSs, the statutory significance of the condition cannot be overstated. This is because the Clean Water Act expressly defines permit "limitations or requirements" to include permit conditions and because a core intent of the Act is to ensure that water quality, as defined by WQSs, is not degraded. This is particularly true when a state, exercising its independent authority over federal NPDES permitting pursuant to the section 401 certification process, has mandated that EPA include WQS compliance as a condition of a federal NPDES permit.

A recent case will be useful in evaluating the importance of complying with permit conditions barring degradation of receiving waters. In *Hughey v. JMS Development Corp.*, the Eleventh Circuit Court of Appeals reviewed the district court's decision that JMS Development Corp. (JMS) had violated the Clean Water Act by discharging storm water from its construction site without an NPDES permit. Both sides agreed, however, that JMS had been unable to obtain the required permit, through no fault of its own, because the state permitting agency would not issue such a permit.

The court held that, even though the discharges appeared to violate the zero-discharge limit for unpermitted sources, that limit "presupposes the availability of an NPDES permit, allowing for the discharge of pollutants under the conditions set forth in the permit." Because JMS had no opportunity to obtain a permit to allow its discharges, the court held that it would be unfair and improper to hold JMS liable for violating the Clean Water Act. The court limited its holding, however, to situations where the discharge giving rise

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301. See NPDES TRAINING MANUAL, *supra* note 16, at 3-14 stating that: Ultimately, special conditions are designed to provide an additional measure of control for the reduction of discharges to waters of the United States. As such, the permit writers should not feel constrained to the special conditions discussed above. In many cases, the special conditions section can be used to promote Agency initiatives and to foster compliance with policies.

302. 33 U.S.C. § 1365(f)(6). This provision is discussed supra at notes 206-209 and accompanying text.

303. *See supra* Part IV.C.

304. 78 F.3d 1523 (11th Cir. 1996).

305. *See id.* at 1524.

306. *Id.* at 1525 (citation omitted). Because the case involved neither a permit nor applicable permit conditions, the case does not raise the same issues as a case in which WQS compliance is a condition of a source's NPDES permit.

307. *Id.* at 1530. The case is therefore at odds with the Fifth Circuit's decision in *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996), which is discussed *supra* notes 287-89, 242-44, and accompanying text.
to the claimed violation had *not* degraded water quality.\textsuperscript{308} The court's dictum therefore confirms the importance of the antidegradation principle of the Clean Water Act. That dictum recognized that a citizen suit may be proper when discharges from a point source degrade water quality, despite the fact that the source has been unable to obtain an NPDES permit through no fault of its own. In the court's view, therefore, the existence of actual harm to water quality trumps the fact that the discharger is not responsible for the absence of a permit. This reasoning would likely support allowing citizen suits for WQS violations, regardless of whether a source's NPDES permit makes WQS compliance a condition.

The problem with the broad construction of the citizen suit provision described above, however, is that it fails to recognize that it is unfair to subject a point source to liability in a citizen action when the source has complied with its NPDES permit and all of its conditions. When, however, a point source has an NPDES permit that includes a condition requiring WQS compliance, both the Clean Water Act's core policies of nondegradation and permit compliance support allowing citizen suit claims to be brought. In sum, in a situation in which a permit condition proscribes the violation of WQSs and a source's discharges are in fact improperly degrading water quality, the integrity of the Act demands that citizen suit enforcement be available to ensure permit compliance. If the permitting agency decides that it does not wish to ensure WQS compliance by allowing supplemental citizen suit enforcement, the agency need only refrain from including WQS compliance as a condition of the permit.\textsuperscript{309} If it chooses this course, the agency should, of course, ensure that the actual limits on pollutant discharges are sufficiently stringent to ensure WQS compliance.

\textsuperscript{308} See *JMS Dev't Corp.*, 78 F.3d at 1530, where the court stated that:

The facts of this case necessarily limit our holding to situations in which the stormwater discharge is minimal, as it was here. The district court found that JMS's "discharges pose no threat to human health, and that much of the damage [caused by such discharges] will be reversed with the passage of a relatively short amount of time."

See also id. finding that:

[W]e hold that Congress did not intend (surely could not have intended) for the zero discharge standard to apply when: (1) compliance with such a standard is factually impossible; (2) no NPDES permit covering such discharge exists; (3) the discharger was in good-faith compliance with local pollution control requirements that substantially mirrored the proposed NPDES discharge standards; and (4) the discharges were minimal.

\textsuperscript{309} The only exception to this would be when EPA, in issuing a federal NPDES permit, is required by the source state's section 401 certification to include WQS compliance as a permit condition. In that situation, the state has made the judgment that the condition is, in fact, necessary to ensure that its surface water quality is not degraded.
CONCLUSION

Twenty-five years of administration and enforcement of the Clean Water Act have failed to protect water quality in the nation's waters to the degree prescribed by states in their WQSs. Degraded water quality persists, despite the Act's basic purpose and structure, both of which theoretically mandate compliance with WQSs. One mechanism for achieving greater WQS compliance, which has not yet played a particularly important role, is the filing of citizen suits against point sources to enforce WQSs.

The Ninth Circuit's recent decision in Northwest Environmental Advocate to allow such an action when WQS compliance is a condition of a source's NPDES permit may encourage interested parties to take a second look at the citizen suit enforcement mechanism. The decision should also encourage state agencies to consider imposing WQS compliance as a special condition in point source NPDES permits. That condition may be the second best solution, after specific more stringent effluent limitations, to the problem of degraded surface waters. This Article concludes that the Ninth Circuit Court of Appeals' decision employed an accurate interpretation of the Clean Water Act and reflects good public policy. The authority to bring a citizen suit should not, however, be extended to a case in which a point source's NPDES permit does not include WQS compliance as a condition. Allowing a citizen suit in that context is consistent with neither the Clean Water Act nor good public policy.

Allowing citizen suits to ensure WQS compliance with when such compliance is an NPDES permit condition may not, standing alone, improve water quality significantly. After twenty-five years of failure, optimism regarding WQS compliance would be wholly unwarranted. This enforcement option may, however, be a useful negotiating point for environmental groups and interested citizens. They may strongly urge permit-issuing agencies to include WQS compliance as a required permit condition when the agencies prove unwilling to include specific more stringent limitations in NPDES permits. Failure to include either the more stringent limitations or the WQS compliance condition, meanwhile, could be challenged directly. Once point sources realize the significance of the WQS compliance condition, they may cooperate with permitting agencies to define and implement appropriate, more stringent limitations to replace the general WQS compliance conditions in their NPDES permits. Point sources will be motivated to cooperate with agencies because compliance with the more stringent limitations included in their NPDES permits will shield them from citizen suits based on any WQS violations that may occur.