Texas Independent Producers & Royalty Owners Ass'n v. Environmental Protection Agency: Redefining the Role of Public Participation in the Clean Water Act

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The Clean Water Act has been one of the most successful keystone environmental statutes of the past three decades. Much of the Act's effectiveness in cleaning up the nation's waterways can be attributed to its public participation and citizen suit provisions, which have filled gaps in the often reluctant enforcement capabilities of the Environmental Protection Agency (EPA) and state agencies. Despite the importance of public participation to the Act, the EPA has gradually cut back on citizen input at the same time it expands its regulatory scheme to important sources of pollution such as storm water runoff. In Texas Independent Producers & Royalty Owners Ass'n v. EPA, the Seventh Circuit created a circuit split on this emerging issue when it departed from the holdings of the Second and Ninth Circuits that required public notice and comment on individual operator's permits despite the existence of an overarching "general permit" system. This Note explores the circuit courts' conflicting analyses, the larger context of the public participation debate surrounding pollution regulation, and also suggests potential middle ground for the Court and policy makers to consider for the resolution of a question critical to the continued success of the Clean Water Act.

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INTRODUCTION

The Clean Water Act has proven over the past thirty years to be one of the most effective environmental laws enacted by Congress, and its regulatory structure has served as a model for numerous environmental statutes. One of the core elements of that structure, public participation, has been called into question by recent circuit court decisions. The opinion issued by the U.S. Court of Appeals for the Seventh Circuit in *Texas Independent* could have a significant impact on the Environmental Protection Agency’s (EPA) regulation of storm water discharges under the Clean Water Act and the National Pollutant Discharge Elimination

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The decision erodes the EPA’s ability to regulate storm water pollutants by limiting public information and citizens’ access to the courts. The court’s holding in the case regarding public notice and comment on permits issued for storm water discharge explicitly departs from the 2003 holding of the Ninth Circuit in *Environmental Defense Center, Inc. v. EPA*, and the Second Circuit in *Waterkeeper Alliance, Inc. v. EPA*.

Although *Texas Independent* addressed the construction industry, the decision could have major implications for mining and agriculture, as well as other industries that currently operate under the EPA’s general permit system for storm water discharge.

This Note explores the analyses utilized by the circuit courts of appeals to address storm water permitting and seeks to place these methods within the larger context of Clean Water Act enforcement mechanisms. Public notice and participation in pollution control regulations serve as a critical starting point for environmental petitioners to bring enforcement actions and obtain substantive judicial review of agency action. Though some courts have tried to distinguish public participation from enforcement and minimize the implications of restricting participation, the interplay between them is critical to understanding the relevance of the current circuit split and options for alternative approaches to public participation.

I. THE CLEAN WATER ACT AND STORM WATER POLLUTION

Congress passed the Clean Water Act in 1972 as the Federal Water Pollution Control Act over the veto of President Nixon, who objected that the Act would not be economically feasible for regulated industries.

The Act created a permit system to regulate both direct and indirect discharges of pollutants, and it allowed for public participation in the permitting process as well as citizen suits to spur enforcement. Since its passage, the Act has dramatically improved water quality in the United States, doubling the number of Americans served by sewage treatment plants and rendering an additional thirty percent of the nation’s waterways safe for swimming and fishing. Though the Act has realized significant benefits in its first thirty years, progress has recently ground to a halt. The EPA’s own *National Water Quality Inventory* for the year 2002 reported no improvement and even an increase in the nation’s water pollution levels.
Pollution from storm water runoff is to blame for much of the lack of progress in the last decade. Distinct from point source pollution, which is discharged directly and purposefully into water bodies, storm water runoff is one type of "non-point source pollution," which is produced from diffuse sources. The EPA defines storm water as "storm water runoff, snow melt runoff, and surface runoff and drainage." Rapid development and urbanization have made storm water a significant environmental concern, as the natural landscape, which is normally able to absorb rainfall and recharge groundwater supplies, gives way to increasing acreage of impervious surfaces. Exacerbating this problem is rainfall on roads, parking lots and other icons of suburbia which picks up sediment, metals, automotive fluids, and other chemicals and carries them into receiving water systems. The tributaries impacted by storm water runoff also experience physical changes due to increased velocity, temperature and degraded oxygen levels.

A. Regulatory Structure of the Clean Water Act

In the 1987 Clean Water Act Amendments, Congress sought to address the growing problem of non-point source water pollution more comprehensively by requiring EPA to establish regulations and a permitting system for these discharges. In contrast with the more definite provisions of the CWA regulating point sources, the non-point source program under section 319 of the 1987 Amendments consists largely of grant incentives and encouragement of state projects rather than strict mandates. The non-point source program urges states to move towards watershed-based community programs without demanding particularity at the local level. The 1987 Amendments require the EPA to regulate storm water in two phases. EPA completed the first phase, involving rules for larger sewer systems serving more than 100,000 people, in 1990, and the second phase, which addressed smaller municipalities and construction sites, in 1999.

8. See discussion infra Section I.A.
11. See id.
12. See LYNN M. GALLAGHER, CLEAN WATER HANDBOOK 2, 81 (Government Institutes, 3d ed. 2003).
15. See GALLAGHER, supra note 12, at 81.
The EPA administers the Clean Water Act's mandates to minimize both point source and non-point source water pollution under a permit scheme, the National Pollutant Discharge Elimination System (NPDES). NPDES forbids discharges of pollutants by a point source unless permitted.\textsuperscript{16} "Point source" pollution describes direct sources of water pollution from any number of "discrete conveyances" which discharge directly into water bodies as a matter of course.\textsuperscript{17} It is this type of industrial dumping Americans most readily associate with the water pollution problem, and has been the type of water pollution most effectively regulated by the Act.\textsuperscript{18} The Act requires point source dischargers to meet definite effluent limitations based on control levels achievable under best available technology (BAT) standards.\textsuperscript{19} In contrast, EPA has chosen to regulate non-point source storm water runoff largely by a general permit system which emphasizes best management practices (BMP) for pollution prevention rather than target numbers or effluent standards.\textsuperscript{20}

Another distinction between regulation of point and non-point source pollution is their relation to total maximum daily load (TMDL) programs. Section 303 of the Clean Water Act requires states to identify nonattainment water bodies and establish TMDLs, which designate the quantitative total amount of specified pollutant a water resource may receive.\textsuperscript{21} Individual point source permits are then adjusted in order to meet TMDL standards, but the same is not true for non-point sources since they do not include quantitative standards.\textsuperscript{22} Indeed, section 319 gives no express authority for the EPA to step in where a state has failed to plan for non-point source pollution, and because there are no effluent limits on such pollution, it is not required to fit within TMDL schemes.\textsuperscript{23} Thus, regulators' motivation to curb non-point source pollution is dependent upon grant incentives and political will rather than tangible standards.

Critics have noted that an effect of weak non-point source regulation on TMDL programs is that many water bodies cannot practically be

\textsuperscript{16} 33 U.S.C. § 1311(a).
\textsuperscript{17} GALLAGHER, supra note 12, at 10-11.
\textsuperscript{18} See ROBERT W. ADLER, JESSICA C. LANDMAN & DIANE M. CAMERON, THE CLEAN WATER ACT 20 YEARS LATER 14-17 (1993).
\textsuperscript{19} 33 U.S.C. § 1311(b)(1)(A). BAT standards are more stringent than others because they require use of the most current and effective methods for controlling pollution regardless of cost.
\textsuperscript{21} 33 U.S.C. § 1313(b) (2006); see also GALLAGHER, supra note 12, at 60.
\textsuperscript{22} See GALLAGHER, supra note 12, at 60-61.
brought into compliance. The failure to impose effluent limitations on non-point source discharges is also unfair to point source permittees whose permits limits must be adjusted downwards, despite their relatively small contribution to pollution in some water bodies.

B. The General Permit System

The NPDES permitting process is administered by both the EPA as well as individual states that have developed regulatory structures and agreements in line with EPA standards. To date, a vast majority of states operate their own NPDES permitting system under the Clean Water Act. EPA directly administers the programs in Massachusetts, New Hampshire, Idaho, New Mexico, Alaska, U.S. territories and holdings, and certain tribal lands. Other states’ guidelines generally follow EPA’s model regulations and must be at least as strict (though some are more stringent), and are subject to final approval by the EPA. Thus, though the resolution of the current circuit split would primarily affect regions directly regulated by the EPA, many states are likely to follow the agency’s lead.

EPA regulations outline the distinctions between individual and general permits. The general permit system covers multiple facilities under a blanket permit wherein industries are categorized according to similarities in size and in the nature of their storm water runoff potential. To operate under a general permit, an operator need only file a Notice of Intent (NOI) indicating its desire to work under the general permit system, and it is automatically authorized so long as its planned discharges fall within permit terms. Within this system, an operator determines whether its activities are eligible for coverage under the general permit, and it also prepares its own storm water pollution prevention plan (SWPPP) in accordance with practices outlined in EPA’s or an authorized state authority’s general permit. The degree of discretion allowed individual operators in creating their own permits is significant when coupled with limited opportunities for public notice and

24. See id. at 10,270.
25. See id. at 10,275.
27. Id.
28. See id.
31. See Tex. Indep. Producers & Royalty Owners Ass’n v. EPA, 410 F.3d 964, 968 (7th Cir. 2005).
32. See Bibler & Brodeur, supra note 20.
comment—operators end up essentially regulating themselves with little supervision. Individual NPDES permits, though rare, are still available for storm water runoff.\textsuperscript{33} The EPA adopted the general permit system as the agency struggled with how to implement a permit system during Phase I of its formulation of regulations addressing storm water discharge by large sewer systems.\textsuperscript{34} The EPA justified the general permit system in 1990 as a method that would “greatly reduce the otherwise overwhelming administrative burden associated with permitting storm water discharges.”\textsuperscript{35} The same document explaining the final rule also acknowledged, however, that the public would have access to monitoring data, and other permittee information, as well as an opportunity to comment on permitting activities.\textsuperscript{36}

The Clean Water Act requires public involvement in the permitting process, stating explicitly that “the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant.”\textsuperscript{37} The Clean Water Act contains little discussion of general permits per se, but EPA regularly conducts public notice and comment during promulgation of its various general permit schemes. Whether the same level of public participation should occur alongside each Notice of Intent to operate under a general permit is the key question at issue in this Note.

\textit{C. Early Iterations of the General Permit System: Efficiency and Public Participation in Balance}

Section 505 of the Clean Water Act allows citizens with standing to enforce provisions of the Act concerning violations of effluent standards, and to force the EPA to take enforcement action where an operator is out of compliance.\textsuperscript{38} Thanks to the thorough reporting requirements of the Act, environmental groups have supplemented EPA and state action by bringing enforcement suits, most often for violations of NPDES

\textsuperscript{33} Such permits are utilized either when a facility does not fit within any general permit category, or on the rare occasion when the EPA rejects a facility's application under a general permit because the agency believes special circumstances merit the creation of an individual permit. Individual permits are tailored to specific facilities and developed by collaboration between the permitting authority (usually either the EPA or a state water board) and the operator of the permitted facility. These permits are subject to public participation through notice and comment on each individual draft. See Office of Wastewater Mgmt., Water Permitting 101, at 7, available at http://www.epa.gov/npdes/pubs/101pape.pdf (last visited Dec. 19, 2005).

\textsuperscript{34} National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 48,002 (Nov. 16, 1990) (codified at 40 C.F.R. § 122).

\textsuperscript{35} See id.

\textsuperscript{36} See id.


\textsuperscript{38} See id. § 309(c)(4); see also GALLAGHER, supra note 12, at 182–83.
permits. Relying primarily upon permittees’ own discharge monitoring reports as evidence, such suits play a key role in monitoring individual operators and improving local water quality. Because the EPA’s targeting of specific industries varies with prevailing policy objectives and presidential politics, this type of grassroots level involvement accounts for much of the pressure on permittees to take permit standards seriously.

Public participation has thus been central to enforcement of the Clean Water Act under the traditional permit system. Organizations such as Waterkeeper Alliance, which counts 157 local affiliates in its network, as well as the state Public Interest Research Groups (PIRGs) and other state and local environmental groups work closely with local NPDES permitting authorities to participate in the permit development process. Although both state- and EPA-administered NPDES programs allow permittees to draft large portions of their own permits, NPDES permits are not only more thorough in their provisions and reporting requirements than NOIs, they are also subject to public comment under EPA regulations. Draft permits are “accompanied by a Fact Sheet or Statement of Basis explaining how the permit terms and conditions were calculated and developed,” making permit language accessible to lay citizens. NPDES permitting authorities are required to give public notice of the pending permit, as well as thirty days for public comment. The permitting authority may hold a public hearing on a permit if there is significant public interest in the particular facility. In light of public participation requirements imposed by the Clean Water Act on the permitting process, the practice of individual operators writing their own NOIs and SWPPPs without public input is quite a departure.

In the early 1990s, as the EPA was developing the first iterations of storm water general permits, the agency justified the imposition of such permits by referring to the D.C. Circuit’s holding in Natural Resources Defense Council (NRDC) v. Costle, in which the court found that the EPA did not have broad discretion to exempt smaller sources of pollutant

39. GALLAGHER, supra note 12, at 183.
40. See Hill, supra note 30, at 259; see also Gwaltney of Smithfield v. Chesapeake Bay Found., 484 U.S. 49, 62 (1987) (“[L]anguage of the citizen suit provisions of the two Acts is not accidental; rather, the two provisions share the common central purpose of permitting citizens to abate pollution when the government cannot or will not command compliance.”).
41. See Hill, supra note 30, at 259–60.
43. See 40 C.F.R. § 124.11 (2006) for EPA’s public participation requirements regarding water programs.
44. GALLAGHER, supra note 12, at 27.
45. See 40 C.F.R. § 124.10.
46. See id. § 124.12.
To support its conclusion, the court emphasized the legislative history of the Clean Water Act, pointing to the comments of Senators who praised the legislation's deadlines, tough standards and definite guidelines. In dicta, the court suggested that the EPA had ample flexibility to create a general permit system that would address the agency's fear of administering an avalanche of individual small permits without being forced to exempt broad categories of facilities. The court's holding was influenced by the NRDC's argument in supporting briefs that a general permit system would be a valid alternative to the EPA's policy of ignoring smaller sources. Thus, the development of the general permitting system seems to have justified itself based upon both enforceability and efficiency concerns. Yet, neither the Costle court nor the NRDC likely imagined that the general permit system would not include some opportunity for public participation, since such participation was an integral aspect of the Act at the time of the decision.

Environmental groups have since critiqued general permits for their tendency to exclude the public from decision-making processes and thus provide disincentives for compliance. For example, the NRDC notes that because of the general permit for dredging of wetlands, "little information is available on the acreage of wetlands and other waters destroyed or altered." Indeed, general permits tend to leave less of a paper trail due to the lack of negotiation between the permitting authority and the individual operator, hampering later attempts at enforcement through administrative and legal channels. Nancy Stoner, Director of the NRDC's Clean Water Project, argues that general permits are so broad in their suggestions for Best Available Technology (BAT) standards and so lacking in particularity that public comment on the permit is nearly irrelevant: citizens have no way of submitting substantive critiques because they cannot adequately evaluate the potential impact on their communities. Thus, the general permit system and its lack of public notice and comment severely limit environmental interests' ability to establish legal standing or even obtain a basic understanding of the pollution sources affecting their local water resources.

47. NRDC v. Costle, 568 F.2d 1369 (D.C. Cir. 1977).
48. Id. at 1375.
49. Id. at 1381.
50. Id.
51. ADLER ET AL., supra note 18, at 14–17.
D. The EPA's General Permit for Construction and Development

A 1992 consent decree emerging from a complaint by the NRDC required EPA to propose guidelines for storm water discharge under eleven source categories. The EPA selected Construction and Development as the subject for the tenth rule, and in 1998 promulgated two general permits for construction activities. These broad, schematic general permits would serve as templates to regulate larger facilities in Phase I of the storm water program. On July 1, 2003, the EPA issued a new Construction General Permit (CGP) under Phase II, which included both large and small facilities. EPA dramatically revised the permit guidelines after review by the White House Office of Management and Budget (OMB), attracting criticism from environmental organizations who complained that the OMB had gutted substantive technology standards already applied by local authorities without sufficient economic justification. The 2003 CGP differs significantly from the 1998 permit in its waiver opportunities for small operators and its allowance for weekly site inspections instead of an inspection following each rainfall event. Although the new permit did tighten up certain inspection requirements, it is generally less strict than its predecessor as it provides larger loopholes for operators and demands less stringent reporting. Both environmental and industry groups challenged the CGP in Texas Independent Producers & Royalty Owners Ass'n v. EPA.

II. THE ROAD TO TEXAS INDEPENDENT

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

The Ninth Circuit Finds that General Permits and Lack of Public Participation Amount to a Failure to Regulate

In Environmental Defense, the Ninth Circuit considered consolidated petitions from environmental, industry and municipal groups for review of EPA's Phase II Storm Water Rules on twenty-two

53. See EPA, DEVELOPMENT DOCUMENT FOR FINAL ACTION FOR EFFLUENT GUIDELINES AND STANDARDS FOR THE CONSTRUCTION AND DEVELOPMENT CATEGORY 2-4 (2004), available at www.epa.gov/waterscience/guide/construction/devdoc/final/section2.pdf. NRDC's suit alleged that EPA had failed to comply with Clean Water Act section 304(m) which requires the agency to publish a plan every two years which updates new categories of pollutants and sets a schedule address new discharges.

54. See Bibler & Broduer, supra note 20. As previously discussed, the Construction General Permit applies where the EPA has not authorized a state or other authority to administer the NPDES permit program. This includes Massachusetts, New Hampshire, Idaho, New Mexico, Alaska and certain tribal lands. However, states that do have permitting authority most often adopt the EPA permit as a template for their own general permits.

55. See STONER & GREENWALD, supra note 10, at 1, 8.

56. See Bibler & Broduer, supra note 20.
different grounds. Though the general permit scheme in *Texas Independent* did not include storm water pollution prevention plans (SWPPPs), the Notices of Intent (NOIs) at issue in both cases function similarly. The portion of the *Environmental Defense* opinion significant for our purposes is the court's treatment of requirements under Phase II for notice and comment upon NOIs issued for municipal sewage systems.

The court reviewed the EPA's decision to not require notice and comment on NOIs under the *Chevron* test that would also be the standard of review in *Texas Independent*. In *Chevron U.S.A., Inc. v. NRDC, Inc.*, the Supreme Court created a two-step test for judicial review of an agency's formulation of a statute it is charged with administering. In the first step, a court must determine whether Congress directly addressed the question at issue. If the answer to the first question is affirmative, the court, "as well as the agency, must give effect to the unambiguously expressed intent of Congress." If the question is not unambiguously addressed in the statute itself, the court must determine whether the agency's interpretation is reasonable by undertaking a fact-intensive look at the agency's policy choices, the balance of various factors weighing on a decision, as well as the logic of the agency's conclusion.

The Ninth Circuit found that under the first prong of the *Chevron* test, congressional intent regarding notice and comment procedures for individual operators under a general permit scheme was clear because "[u]nder the Phase II Rule, NOIs are functionally equivalent to the permit applications Congress envisioned when it created the Clean Water Act's public availability and public hearing requirements." The court's findings that NOIs are functionally equivalent to permit applications depended on the critical distinction between traditional uses of general permits under Phase I regulations within the CWA and Phase II NOIs. Earlier iterations of general permits under Phase I of Clean Water Act regulation explicitly required general permits to include technology-based requirements, while in Phase II NOIs, an operator is allowed to choose its own measures to reduce discharges without review by permitting authorities. The court found that allowing operators to

57. Envtl. Def. Ctr., Inc. v. EPA, 344 F.3d 832 (9th Cir. 2003); see also Susan Bruninga, *EPA Requires Opportunity for Comment on Notices of Intent for Storm Water Permits*, 35 ENV'T REP. (BNA) 17 (Apr. 23, 2004).
58. See Envtl. Def. Ctr., 344 F.3d at 856.
60. See id. at 842-43.
61. Id.
62. See id. at 843.
63. See id. at 862-65.
64. Envtl. Def. Ctr., Inc. v. EPA, 344 F.3d 832, 857 (9th Cir. 2003).
65. See id. at 855.
provide the essential details of permits crossed "the threshold from being an item of procedural correspondence to being a substantive component of the regulatory regime." The Ninth Circuit considered the development of the CWA and its varying modes of public participation over the years to reach its holding that modern NOIs should be deemed the functional equivalent of the permit applications developed before them. This functional analysis addresses both the real world enforcement outcomes of processes affecting public participation and congressional intent regarding the permit application.

In *Environmental Defense*, the EPA argued that NOIs are available to the public through the Freedom of Information Act (FOIA) and public participation minimum measures (as dictated by state and local requirements) and therefore did not have to be expressly provided by the agency. The Ninth Circuit then examined whether these interpretations by the agency matched the clear intent of Congress. Here, the court found that practical problems for the public in obtaining the NOIs, especially from state permitting authorities not covered by FOIA, rendered the EPA's rule "manifestly contrary to the Clean Water Act, which contemplates . . . greater uniformity of public availability than the Phase II rule provides." The court thus vacated portions of the Phase II rule that lacked proper procedure under the CWA for public availability and hearing.

The court in *Environmental Defense* made the additional finding (not addressed in *Texas Independent*) that allowing NPDES permitting authorities to approve NOIs without criteria for EPA review resulted in a "failure to regulate" under the CWA. The EPA had argued that the flexibility encouraged by the general permit system allowed for such a system of non-discretionary approvals, and that even a self-regulatory system would be permissible. The court disagreed, concluding that as a practical matter, nothing would impede an individual operator from innocently misunderstanding storm water prevention methods and selecting inappropriate and wholly ineffective management practices that would not fulfill the CWA's mandate to reduce discharges "to the maximum extent practicable." The court's discourse on the EPA's failure to regulate echoed its earlier emphasis on practical outcomes. Comparatively, as will be discussed below, the Seventh Circuit in *Texas

66. Id. at 853.
67. See id. at 857.
68. Id.
69. See id. at 858.
70. Id. at 854–55.
71. See id.
Independent ignored the larger implications of scaling back public participation in favor of deference to the agency.73

Somewhat ironically, EPA had argued that concerns about enforceability were unfounded because states and citizens would be able to initiate enforcement actions if they found a particular NOI lacking in substantive terms.74 EPA’s reference to citizen suits lends legitimacy to environmental organizations’ larger objections to the general permit system. It is difficult to imagine how citizens could bring enforcement actions without access to NOIs. Indeed, the value of citizen input at all stages of the permitting process as a means to check industry and government activities and hold both to high standards of accountability has been a key method of enforcing the Clean Water Act’s provisions since its inception.75

After the Ninth Circuit’s decision, James Hanlon, director of the EPA’s Office of Wastewater Management, sent a memorandum to permitting authorities providing interim guidance on how to comply with the court’s holding.76 The interim guidance recommended that permitting authorities publish NOIs through traditional listing methods in newspapers and on web sites, and suggested that while the public could comment on activities outlined by an operator in a NOI, hearings need not be granted to every citizen requesting one.77 Ironically, Hanlon pointed out the problems of permitting without attendant public participation and agency response when he summed up the holding in Environmental Defense before a group of state water pollution officials shortly after the decision: “If the permitting authority doesn’t review the notice, you’re effectively having the permittee writing its own permit.”78

B. Waterkeeper Alliance, Inc. v. EPA:

The Second Circuit Stresses the Importance of Public Participation to Enforcement of the Clean Water Act

In Waterkeeper, the Second Circuit evaluated the regulation of water pollutants contained in the runoff from concentrated animal feeding operations (CAFOs) and followed the Ninth Circuit’s “failure to regulate” finding and functional analysis.79 In Waterkeeper, the court did

73. See discussion infra Section III.
74. See Envtl. Def. Ctr., Inc. v. EPA, 344 F.3d 832, 856–57 (9th Cir. 2003).
75. See discussion supra nn. 42–46; see also 33 U.S.C. § 1365.
77. Id.
78. Bruninga, supra note 57, at 889 (quoting James A. Hanlon’s comments to state water pollution control officials in March 2003).
79. Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486 (2d Cir. 2005).
not look at the general permitting scheme, but rather at an exception to the NPDES program that allows large CAFOs to avoid obtaining a NPDES permit entirely if a permitting authority decides the CAFO has no potential to discharge.80 Instead, the CAFO can develop a nutrient management plan, but there is no review by the permitting authority to determine whether the nutrient management plan satisfies the rule's requirements.81 In addition, the rule does not require that the terms of the nutrient management plan be made available to the public.82 The court held that as for regulations of municipal storm sewer discharges, the CAFO provisions of the CWA "require regulation of discharges in fact."83 Further, paralleling the Ninth Circuit's functional analysis of NOIs under the general permit system, the court held that nutrient management plans must be subject to public review due to their substantive regulation of effluent limitations. The Second Circuit found that a lack of public review amounted to a failure to regulate. The Court's reasoning—that large CAFOs might prepare inadequate nutrient management plans merely due to a lack of understanding84—reflected the Ninth Circuit's concern over an operator's innocent failure in Environmental Defense.

Yet, the court in Waterkeeper made an even stronger argument than the Ninth Circuit's opinion in Environmental Defense that the EPA's exclusion of public participation not only violated the clear intent of the Clean Water Act, but also substantively damaged EPA's ability to enforce regulations.85 Citing the legislative history of the CWA, the court emphasized the importance of public participation as an enforcement tool, critiquing the EPA's methods: "Under the CAFO Rule, as written, citizens would be limited to enforcing the mere requirement to develop a nutrient management plan, but would be without means to enforce the terms of the nutrient management plans because they lack access to those terms. This is unacceptable."86 Here, the court's recognition of the essential role of the public directly connects its "failure to regulate" holding with the agency's failure to obtain public participation. Thus, instead of protecting public participation for its own sake or merely to fulfill the mandates of the CWA, the court found that public notice and comment are central to meaningful enforcement. In this sense, the

80. Id. at 495.
81. Id. at 499.
82. Id. at 503.
83. Id. at 500 n.18 ("The demand that permits authorizing municipal storm sewer discharges must 'require controls' is, in sum and substance, identical to the demand that permits authorizing discharges from other point sources must 'assure compliance with' applicable effluent limitations.").
84. See id. at 500 n.19.
85. Id. at 503–04.
86. Id.
Second Circuit's holding took the functional analysis of the Ninth Circuit one step further in recognizing the practical effects of a restrained public voice in storm water regulation and enforcement.87

III. **TEXAS INDEPENDENT:** THE SEVENTH CIRCUIT REJECTS THE NINTH CIRCUIT'S AND SECOND CIRCUIT'S FUNCTIONAL ANALYSIS IN DEFERENCE TO EPA ARGUMENTS FOR EFFICIENCY

*Texas Independent* arose from consolidated petitions for review of the EPA's final 2003 Construction General Permit (CGP).88 NRDC's petition raised three concerns: (1) the CGP's failure to meet the standards of the CWA; (2) lack of opportunity for public notice and comment on NOIs and SWPPPs; and (3) violation of the Endangered Species Act's requirements for consultation.89 The NRDC thus launched a facial challenge to the EPA's general permitting scheme as a whole rather than basing its case on any individual facility's violation under the CGP.90 Oil and gas petitioners argued that the EPA's definitions within the CGP were arbitrary and capricious if they were to be applied to the oil and gas industry as opposed to more traditional commercial construction activities.91 The National Association of Home Builders, the

87. Other courts have made the explicit connection between public participation and effective enforcement. The Minnesota State Court of Appeals observed:

SWPPPs contain the substantive information on how small municipalities will comply with the Clean Water Act, and [the Minnesota Pollution Control Agency] concedes that the SWPPPs are the 'core' of the general permit. The SWPPPs are the state equivalent to the permit applications required by the federal Clean Water Act and are subject to the CWA's public availability and public hearing requirements. Neither the single hearing held before the general permit was issued, nor the public meetings to discuss the annual reports after the implementation of the SWPPPs, are substitutes for a public hearing held before the SWPPPs are implemented. Because there is no opportunity for public hearings on each SWPPP, the general permit procedure violates the public participation requirements of the Clean Water Act. We conclude that the public is entitled to be heard on each SWPPP.


88. See discussion of 2003 Construction General Permit, *supra* Section I.C.

89. See Tex. Indep. Producers & Royalty Owners Ass'n v. EPA, 410 F.3d 964, 969–70 (7th Cir. 2005).

90. Though the NRDC did attempt to establish standing by pointing to specific discharges and resulting degradation of conditions experienced by its members, the organization's standing on its substantive claims was dismissed by the court. See discussion *infra* note 97. In light of the limited opportunities for notice of permits and of violations, environmental organizations may have problems launching as-applied challenges when they lack the requisite documentation.

91. See Tex. Indep., 410 F.3d at 970. Even though the oil and gas petitioners argued that they were specifically exempted from storm water permits, they decided to take part in the case because the EPA was still formulating rules regarding their inclusion. The oil and gas industry's leading participation in the debate over the Construction General Permit signaled its critical importance to the industry. After the decision in *Texas Independent* was issued, oil and gas producers were specifically exempted from the Construction General Permit by the Energy Policy Act of 2005. See *infra* note 93.
Wisconsin Builders Association, and the Associated General Contractors of America intervened in support of the EPA and the CGP.\(^9^2\) The court stayed consideration of the oil and gas petitioners' claims,\(^9^3\) and instead focused its opinion on the public participation debate between the NRDC and the EPA as well as the permit's relation to the Endangered Species Act.

Though its holding on public notice and comment was the most significant aspect of the opinion, the court also departed from the Second and the Ninth Circuits in refusing to grant standing to the NRDC regarding substantive issues, thus refusing to hear NRDC's challenges to tangible aspects of the general permit.\(^9^4\) This divergence points to the

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\(^9^2\) Tex. Indep., 410 F.3d at 969.

\(^9^3\) The court in *Texas Independent* stayed consideration of the oil and gas petitioners' claims that the EPA had failed to take into account differences between the oil and gas industry and the construction industry when formulating the general permit, leaving that question to an action pending before the Fifth Circuit. After the decision in *Texas Independent* was issued, the Fifth Circuit found that a decision from the court would interfere with EPA's ongoing rulemaking regarding the issue. In March 2004, the EPA extended the deadline for oil and gas operators to obtain a NPDES permit until at least June 12, 2006 in order to consider issues raised by stakeholders. See Extension of National Pollutant Discharge Elimination System (NPDES) Permit Deadline for Storm Water Discharges for Oil and Gas Activity, 70 Fed. Reg. 45 (Mar. 9, 2005) (final rule) (codified at 40 C.F.R. § 122 (2006)), available at www.epa.gov/npdes/regulations/sw_oil_gas_final_rule.pdf. The Energy Policy Act of 2005, Pub. L. No. 109-58, § 323, 119 Stat. 594, 694, resolved the issue by exempting most oil and gas activities from construction permits under NPDES, modifying the meaning of 402(l)(2) of the Clean Water Act. See 33 U.S.C. § 1342(l)(2) (2006). The EPA codified the construction storm water permitting exemption in agency rules at 71 Fed. Reg. 33,628 (June 12, 2006). The oil and gas industry funded a large portion of the challenge to EPA's construction general permit regulations, and this seemingly final legislative resolution may reduce industry interest in the issue. Yet, the ultimate resolution of the split between the Second, Seventh and Ninth circuits will undoubtedly influence regulation of discharges from agriculture and mining as well as "traditional" construction activities.

\(^9^4\) Though the court made no explicit connection between its finding of limited standing and the NRDC's public participation claims, the two issues are in fact quite related. Limiting public participation creates the practical problem for environmental plaintiffs of not knowing when agency decisions will create an imminent harm. Thus, when NOIs and SWPPPs are not publicly available and subject to comment, environmental groups are hard-pressed to challenge permits with the individual rigor that the Seventh Circuit demands for standing purposes. This tension highlights the unique problem of storm water regulation: while direct point source discharge governed by numeric effluent limits creates a public health immediacy to allow environmental organizations to obtain review and standing, storm water runoff has been conceptualized by the EPA as a diffuse problem which does not lend itself to such exacting solutions. In reality, the distinction between the two regulated categories is largely artificial and such an understanding prevents genuine enforcement of the Clean Water Act's mandates. See Adler, *supra* note 23, at 10,275; see also John M. Carter II, *Control of Nonpoint Pollution Through Citizen Enforcement of Unpermitted Storm Water Discharges: A Proposal for Bottom-Up Litigation*, 33 Envtl. L. Rep. (Envtl. Law Inst.) 10,876, 10,882 (Nov. 2003) ("EPA, thus, treats industrial operations discharging pollutants through a pipe differently from industrial operations discharging pollutants through storm water discharges . . . even though all discharges may contain similar pollutants.").
significant split in ideology between the Ninth and Seventh Circuits and their perspectives on due process considerations for environmental petitioners. Circuit Judge Manion, who penned the opinion on behalf of a panel including Judges Bauer and Williams, relied heavily on *Lujan v. Defenders of Wildlife (Lujan)* and built upon that decision's demand for a strong causal connection beyond injury in fact.

**A. Public Notice and Public Hearing: Do Notices of Intent and Storm Water Pollution Prevention Plans Function as Permits under the CWA?**

NRDC presented two procedural challenges: the Construction General Permit's failure to provide the public with access to the NOIs and the site-specific storm water pollution prevention plans (SWPPPs) created by permittees, as well as failure to allow the public to engage in a fair hearing on both of these documents. NRDC argued that Clean Water Act sections 1342(a)(1) and 1342(j), which provide for public notice and hearing on permit applications and permits, required the same availability with regards to NOIs and SWPPPs, which NRDC asserted essentially serve as permits under the Clean Water Act.

95. In finding no grounds for substantive standing, the Seventh Circuit acknowledged its disagreement with the Ninth Circuit in *Environmental Defense Center v. EPA*, claiming in a footnote that "the Ninth Circuit failed to consider whether the Phase II Rule at issue in that case caused an actual injury to the environmental petitioners." See *Tex. Indep. Producers & Royalty Owners Ass'n v. EPA*, 410 F.3d 964, 976 n.12 (7th Cir. 2005).


97. The court held that NRDC's affidavits to establish standing lacked sufficient specificity. According to the court, NRDC should have been able to identify particular construction sites authorized under the CGP, as well as specific discharges from the project into the rivers where NRDC members claimed harm to their recreational interests. The court viewed affidavits referring to local bodies of water as too general to meet the "fairly traceable" causation standard. Finally, NRDC failed to establish that discharge was actually occurring, and that such discharge violated the terms of the CGP or other aspects of the Clean Water Act. Here the court distinguished the claims from those in *Laidlaw* and other cases where environmental groups had standing, arguing that petitioners in those cases had established the required nexus between alleged injury and specific violations. See *Tex. Indep.*, 410 F.3d at 972-76 (citing Friends of the Earth, Inc. v. Laidlaw, 528 U.S. 167 (2000)). NRDC had argued that it need not prove violations of the CGP, since its challenge was to the general scheme and not a specific discharge. The court rejected this argument, citing policy concerns that allowing standing based solely on potential injury would undermine the goal of the EPA to compel particular dischargers to take corrective action. *Id.* at 975.

98. See *Tex. Indep.*, 410 F. 3d at 969-70.

99. See 33 U.S.C. § 1342(a) (2006) ("Permits for discharge of pollutants: (1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter."); *id.* § 1342(j) ("Public information: A copy of each permit application and each permit
The court applied a *Chevron* analysis to determine whether the statute had been properly interpreted. In the first step of the *Chevron* test, determining whether congressional intent regarding public participation in permitting is clear from statutory language, the court found that because the Clean Water Act did not specifically mention NOIs and SWPPPs, but rather only “permits” and “permit applications,” the intent of Congress remained unclear as to these documents. By deciding that the terms were “at best” ambiguous, the court essentially collapsed the two-part *Chevron* test into a single analysis by accepting EPA’s linguistic distinction between NOIs and SWPPPs as opposed to traditional permits. The court could have easily found, as the Ninth Circuit did under its “functional analysis,” that Congress was clearly referencing just the type of permitting occurring under the Phase II general permit scheme when it required public participation in permits and permit applications. Instead, the court gave so much deference to the EPA that the agency’s understanding also informed the court’s interpretation of the statute’s language in step one. Thus, the court cut off deeper inquiry into the legislative history of the Clean Water Act and the central role of public participation in CWA enforcement.

Under the second step of the *Chevron* test, the court found that the EPA’s view that SWPPPs do not qualify as permits to be a permissible construction of the statute. Here, the court restated EPA’s somewhat circular argument that NOIs and SWPPPs are not equivalent to permits and permit applications since the general permit scheme does not require any sort of permit application. The EPA also pointed out that the public has the opportunity to comment on the proposed general permits whose guidelines govern the individual SWPPPs. Thus, by the EPA’s reasoning, the public comment and notice requirements of the Clean Water Act had been fulfilled by referral back to the original comment period for a general permit. The court did not consider whether the filing of NOIs or the creation of SWPPPs were unique enough in their own right to again require public comment. Instead the court seemed to agree with the EPA that since a discharger “must comply with the previously established terms... there is no need for additional public comment.”

The EPA also argued that the administrative efficiency encouraged by the general permitting concept would be eliminated by requiring

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100. See Tex. Indep. Producers & Royalty Owners Ass’n v. EPA, 410 F.3d 964, 978 (7th Cir. 2005).
101. See id.
102. See id.
103. See id.
104. Id.
public notice and hearing on individual NOIs and SWPPPs. EPA went a step further to argue that such public participation would be "inconsistent with Congress' intent to allow for the use of general permits." The Seventh Circuit agreed and did not attempt to substantiate or flesh out this aspect of the EPA's claim, despite the fact that general permits are not discussed within the text of the Clean Water Act. Alternatively, the court could have bolstered its ultimate finding by referring to dicta in NRDC v. Costle which praised the flexibility of a general permit system, yet it built no such rationale.

Without much comment, the court proceeded to find the EPA's policy arguments as well as its distinction between permit applications and NOIs, and between permits and SWPPPs, "eminently reasonable." Deferring to the agency under Chevron, the court found that EPA's rule establishing the CGP did not violate the public hearing and notice requirements of the Clean Water Act. Notably, the court again acknowledged its departure from the Ninth Circuit's holding in Environmental Defense. The Seventh Circuit rejected the Ninth Circuit's functional equivalent analysis, holding that the majority in the Ninth Circuit erred because in its view, the "statutory language at issue addresses only 'permit applications' and fails to include any mention of NOIs, SWPPPs, or other so-called 'functional equivalents.'"

B. The Significance of Notice and Comment for Substantive Claims

In its final finding, the court addressed the NRDC's claim that the General Permit system violates section 7 of the Endangered Species Act (ESA) because it does not require the EPA to consult with proper agencies as to the potential impact of permitting upon endangered species. Specifically, the NRDC complained that the EPA was not required under the General Permit scheme to consult with the U.S. Fish & Wildlife Service (or the National Marine Fisheries Service) "upon receipt of an NOI and the completion of a SWPPP." Here, as in the public participation issue, the court found that the petitioner's affidavits were sufficient to fulfill relaxed standards for procedural standing.

105. See id.
106. Id.
110. See id. at 976.
111. Id. at 978 n.13.
112. See id. at 979. Section 7 consultation may take the form of informal or formal consultation when a proposed federal action might affect a threatened or endangered species.
113. See id.
114. See id.
Ruling on the merits, the court in *Texas Independent* found that the filing of the NOI and the creation of a SWPPP were executed by a private actor, without review by the EPA and therefore involved no federal action. Without federal action, the consultation requirement of the ESA would not be triggered.

This holding relies of course, on the court’s primary finding that public notice and participation are not required for NOIs and SWPPPs under the general permit, since any response from the federal government to public comment might well be considered federal action. Instead, the court found that the informal consultation conducted by the EPA with the U.S. Fish & Wildlife Service on the issuance of the general permit was sufficient for compliance.

### IV. ANALYSIS

The Ninth Circuit’s functional analysis in *Environmental Defense* acknowledges the critical role of NOIs and thereby is more closely aligned with congressional intent to encourage public participation within the CWA’s permitting process than is the Seventh Circuit’s decision in *Texas Independent*. The Second Circuit’s analysis in *Waterkeeper* ties the value of public participation directly to the EPA’s ability to enforce CWA mandates. The Second and Ninth Circuits’ views of the CWA are borne out by a pragmatic look at enforcement mechanisms, the Act’s legislative history, and leading decisions regarding administrative procedure. Nonetheless, the Seventh Circuit’s decision reflects the hesitancy of courts with a more restrictive view of environmental due process to risk administrative inefficiency where a compromise position on public participation is not clearly outlined by the statute itself. While providing access to individual permits is not a significant administrative burden, ensuing public comment and alteration of permits may be more problematic and require new approaches to satisfy the requirements of the Act.

#### A. Legislative History and Administrative Law Views in Support of Public Participation

From the first debate on water pollution legislation, and continuing throughout the history of the CWA, Congress has acknowledged that public participation plays a key role in enforcement. In Senate hearings

115. See id.
116. See id.
117. The Clean Water Act explicitly states the importance of public participation under the section titled Congressional Declaration of Goals and Policy:

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any
regarding the Clean Water Act Amendments, legislators recognized that “[t]he public must have a genuine opportunity to speak on the issue of protection of its waters.” Since then, public interest groups have shouldered much of the burden for investigation and enforcement, to an extent even the authors of the CWA might not have envisioned. Organizations such as regional Waterkeeper groups, the Public Interest Research Group’s River Watch project, and numerous others take on the tedious work of looking up permits for storm water discharge, scoping industrial facilities and their pollution prevention methods, and testing runoff during rainfall events. Restricted by limited resources, these groups often help bring operators into compliance by encouraging EPA review and early settlement—undertaking legal actions under section 505’s citizen suit provision only in the most egregious and well-documented instances.

Though legislative intent as to NOIs, SWPPPs and other such sub-permits issued under a general permit system may be somewhat ambiguous notwithstanding the Ninth Circuit’s persuasive functionality interpretation, the court should consider related doctrine on public participation, including notice and comment rulemaking under the Administrative Procedure Act. In American Water Works Ass’n v. EPA, the D.C. Circuit Court of Appeals created a standard for public comment and review when regulations have been altered between the close of comment and issuance of a final rule. In a decision written by current Supreme Court Justice Ginsburg, the court relied on a long line of precedent in crafting its test: “The test we have developed for deciding whether a second round of comment is required in a particular case is whether the final rule promulgated by the agency is a ‘logical outgrowth’ of the proposed rule.” Ultimately, the court held that the petitioning organization could not have reasonably anticipated the final rule from the

State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.


121. See id.

122. 40 F.3d 1266 (D.C. Cir. 1994).

123. Id. at 1274; see also Chem. Waste Mgmt. v. EPA, 976 F.2d 2 (D.C. Cir. 1992).
draft rule. Environmental organizations challenging provisions for public notice and comment might argue that the leap from broad standards under a general permit to site-specific management plans under NOIs and SWPPPs similarly demand a second look, especially in cases where a facility may have an unexpected yet significant contribution to storm water pollution.

The Supreme Court has acknowledged public participation in Clean Water Act rulemaking as a key element of NPDES enforcement as envisioned by Congress. In *Costle v. Pacific Legal Foundation*, the Court tested Pacific Legal Foundation's claim based upon whether the organization had had an opportunity for meaningful review. Even where the court held that the EPA is not required to hold a public hearing on the extension of every permit, Justice Blackmun's opinion also held that at least an opportunity for public hearing must be allowed. The opinion also specifically encouraged public participation in review of the NPDES permit program, citing passages in the CWA's legislative history "indicat[ing] that this general policy of encouraging public participation is applicable to the administration of the NPDES permit program." A parallel argument could be made by environmental petitioners challenging public participation standards under NPDES storm water general permits, namely that the broad suggestions set forth in general permits do not afford the public an opportunity for meaningful review when substantive decisions at the local level are left to the discretion of individual operators.

**B. Administrative Efficiency: Opportunities for Reform**

Although the NRDC's claims were reviewed by a panel preferring deference to agency decisions, the NRDC also faced an uphill battle in *Texas Independent* because of its inability to formulate an alternative that would convince the court that the EPA would not be forced to review every single NOI and SWPPP currently filed under the general permit system. No single alternative currently on the table will likely be attractive to a court, yet a hybrid approach can be cobbled together that at least moves the debate forward.

The NRDC advocates a watershed-based approach to NPDES general permitting, which would bring general permits down from a
Such an approach would avoid both the extremes of eliminating public participation from the storm water permitting system altogether and that of requiring extensive processes for each individual operator which would be too unwieldy for EPA and the states to administer. In the NRDC’s ideal scenario, different qualities of receiving water bodies would be addressed under “watershed general permits.” These permits would be further broken down by industry and include greater detail than the current general permit by including particular effluent limitations on discharges. The NRDC envisions such a system operating under a cumulative impact analysis whereby operators applying for such permits would be evaluated based not only on their proposed technology and management standards, but also on the existing load carried by the water resource including point source and other non-point source discharges. Though the NRDC’s position seems a sensible compromise between the general permit scheme and the need for substantive review of every NOI and SWPPP, industry advocates are likely to argue that such specialized permits would not provide enough flexibility for operators and would be unfair to latecomers barred from operating in a watershed if it already exceeded TMDL limits.

The NRDC’s emphasis on cumulative impacts of non-point sources and watershed management was also advocated by the Clinton administration’s efforts in 1998 to introduce a “Clean Water Action Plan.” The Plan recognized the importance of watershed planning and also attempted to issue rules requiring implementation of TMDL plans that are required by the CWA but have only materialized in a few watersheds nationwide. Clinton’s comprehensive proposal never received full funding in Congress and was finally withdrawn by the Bush administration in 2003. Hope for the EPA to get tougher with TMDL standards seems out of reach considering the EPA’s decision in July 2005 to further relax TMDL regulations by allowing states greater flexibility to list imperiled waters under categories which do not require TMDL definition resulting in further action to limit discharges. However, the

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129. See id.
130. See Hilbrich, supra note 13, at 10,150. Clinton’s Clean Water Action Plan included rulemaking efforts as well as dramatically improved funding for EPA enforcement.
132. See Hilbrich, supra note 13, at 10,150.
inclusion of non-point sources of pollution within a larger TMDL framework is supported by the Ninth Circuit's decision in *Pronsolino v. Nastri*, which held that the EPA is authorized under the CWA to require TMDLs for waters polluted only by non-point sources. Thus, despite the Bush administration's neglect of TMDL standards, reference to the larger context of NPDES regulation when considering storm water general permitting may yet be an important argument for environmental groups to pursue.

An even more radical alternative which directly takes on the problem of non-point sources existing outside of the TMDL framework would attempt to circumvent the general permit system by directly targeting the millions of unpermitted storm water dischargers. John Carter of Defenders of Wildlife theorizes that many of these unpermitted sources could also be categorized as point sources under the statutory definition of a point source, thereby rendering their continued unpermitted discharge a violation under the more readily enforceable section 301(a) of the CWA. Carter argues that environmental advocates would be able to circumvent EPA discretion by putting pressure on "the regulated community to seek coverage under the NPDES program in order to avoid citizen suit liability, and thereby force EPA to more effectively address storm water discharges." While Carter's proposal assumes a great deal about the willingness of the courts to redefine non-point sources in contrast with traditional EPA categorization, his analysis does highlight the inequity between non-point and point source regulation under NPDES. Pointing out such inequity within the regulated community bolsters environmentalists' arguments for stronger non-point source permitting schemes.

While the courts are unlikely to independently legislate either of the alternatives suggested above, a compromise position may be gleaned in part from the EPA's own interim guidance following the decision in *Environmental Defense*. The guidance urged permitting authorities to create a process for limited public comment, not mandatory at the issuance of each NOI, but at the discretion of the local authority.

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137. *See id.*
138. *Id.*
139. EPA recommends that permitting authorities provide for public notice, comment, and review by:
Although the Office of Wastewater Management's system of limited review would require the public to jump over the additional hurdle of obtaining a hearing from a local authority before giving substantive comment, such a system is more likely to meet the standard set forth in *Pacific Legal Foundation* for meaningful review than the current system. The EPA likely envisions that such a system would be administered by traditional permitting authorities, yet a collaborative approach in line with proposals already advocated by the EPA in other arenas of watershed management may be more equitable and palatable to stakeholders. A "watershed council" representing various environmental, agricultural, industrial and community interests might be an appropriate body for vetting the need for public hearing on individual SWPPPs and NOIs.

CONCLUSION

The National Pollutant Discharge Elimination System of the Clean Water Act has been one of the most successful environmental programs ever undertaken in the United States, due in large part to its mobilization of citizen involvement in enforcement and accountability. The clear and particular guidelines set forth in NPDES permits for point source dischargers has facilitated the success of the program. As the Ninth and Second Circuits recognized, general permit schemes ignore the mandate of the Clean Water Act when they effectively quash public notice and comment during the early stages of the permitting process. Lack of public participation sets off a chain reaction that enables looser standards, creates standing problems for citizens bringing suit, and results in a non-point source program that threatens the reliability of TMDL limitations enforced upon point source dischargers.

If the Supreme Court chooses to address the circuit split, it is unlikely to craft a new approach to this problem. However, it cannot

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defer to the agency's discretion when that discretion amounts to a failure to regulate. Instead, the Court should require the EPA to formulate a compromise position that provides for both the efficient administration of the general permit system and the substantive review required for real improvement in storm water management. Watershed-based approaches, collaborative management models, and reference to efficient point source regulation all provide ample opportunities for the agency to create a general permit program acceptable to both environmental and industry concerns. Both the Court and the EPA should view public participation not as an obstacle to efficiency but rather an opportunity to enforce the long neglected mandates of the Clean Water Act.