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COMMENTS

THE INCONSISTENCY OF VIRGINIA'S EXECUTION OF THE NPDES PERMIT PROGRAM: THE FORECLOSURE OF CITIZEN ATTORNEYS GENERAL FROM STATE AND FEDERAL COURTS*

"The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."¹

"It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources. . . ."²

"Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States."³

* This paper was selected as a winner of the first University of Richmond Water Law Writing Competition.

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1. 33 U.S.C. § 1251(a) (1988).
2. 33 U.S.C. § 1251(b).
3. 33 U.S.C. § 1251(e).

I. INTRODUCTION

The above mentioned goals and policies of the Clean Water Act⁴ suggest that Congress intended to create a partnership between the federal government, state governments, and the public to help abate pollution of the nation's waters. This intent is illustrated by the fact that permits issued to dischargers of pollutants into navigable waters⁵ can be issued by either the Environmental Protection Agency (EPA)⁶ or a state agency.⁷ Unfortunately, the goal of public involvement is lost in "the confusion caused by this poorly drafted and astonishingly imprecise statute."⁸ The resulting inconsistent system forecloses some members of the public from participating in segments of the pollution abatement process. Virginia's implementation of the Clean Water Act serves as a prime example of this hidden inconsistency.

The EPA delegated authority under the CWA to Virginia to grant NPDES permits in 1975.⁹ This permit scheme is commonly referred to as the Virginia Pollutant Discharge Elimina-

4. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, *as amended by* Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended at 33 U.S.C. §§ 1251-1387 (1988)) [hereinafter CWA].

5. "The term 'navigable waters' means the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (1988).

6. 33 U.S.C. § 1342(a)(1) (1988).

7. 33 U.S.C. § 1342(b). This section states that "the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. . . ." *Id.* The Act specifies certain requirements which the state application must include before the Administrator can delegate federal administration of the CWA to the state. 33 U.S.C. § 1342 (b)(1)-(9). The specific requirements will be discussed *infra* parts II-IV.

8. *E.I. duPont deNemours & Co. v. Train*, 541 F.2d 1018, 1026 (4th Cir. 1976), *aff'd in part, rev'd in part*, 430 U.S. 112 (1977).

9. See Chesapeake Bay Foundation and Environmental Defense Fund, *Petition for Corrective Action, An Order Commencing Withdrawal Proceedings, and Other Interim Relief With Respect to Virginia's Water Pollution Control Program*, 1 n.1 (Nov. 5, 1993) (submitted to the U.S. Environmental Protection Agency, Region III, Philadelphia, Pa.) (copy on file with the *University of Richmond Law Review*) [hereinafter *CBF Petition*]; see also Memorandum of Understanding Regarding Permit and Enforcement Programs Between the State Water Control Board and the Regional Administrator, Region III, Environmental Protection Agency (Mar. 31, 1975) (copy on file with the *University of Richmond Law Review*) [hereinafter Memorandum of Understanding].

tion System (VPDES).¹⁰ In the past few years, several environmental organizations and municipalities have been critical of Virginia's permitting program. In 1993, two coalitions of citizen groups and municipalities submitted separate petitions to the EPA asking the agency to withdraw Virginia's permitting authority under the Clean Water Act.¹¹ The petition submitted by the Chesapeake Bay Foundation and the Environmental Defense Fund (*CBF Petition*) maintained that the poor quality of Virginia's navigable waters was caused by barriers to citizen standing to challenge water discharge permits issued by Virginia.¹² Much of this concern stems from the arguably poor condition of Virginia's water resources.¹³

Environmental organizations argue that the Virginia State Water Control Board (SWCB) has failed to adequately execute its duties.¹⁴ Furthermore, these organizations have faced difficult challenges in surmounting the statutory scheme under which the SWCB operates. Because of this statutory scheme, Virginians who have sought judicial review of SWCB issuance of VPDES permits have been shut out of Virginia's courts. Vir-

10. See VA. CODE ANN. § 62.1-44.19:3(A) (Michie Cum. Supp. 1994). Historically, the Virginia State Water Control Board (SWCB) has administered the VPDES. The SWCB has recently been absorbed into the Department of Environmental Quality. For the sake of consistency, this paper will continue to refer to the SWCB as the permitting agency.

11. See *CBF Petition*, *supra* note 9; Southern Environmental Law Center, et. al., *Petition for Relief on Virginia's VPDES Program*, (Aug. 10, 1993) (submitted to the U.S. Environmental Protection Agency, Region III, Philadelphia, Pa.) (copy on file with the *University of Richmond Law Review*) [hereinafter *Southern Environmental Law Center Petition*].

12. See generally *CBF Petition*, *supra* note 9. The *CBF Petition* describes Virginia's restrictive standing requirements as "antithetical" to citizen input in violation of the Clean Water Act. The *Southern Environmental Law Center Petition*, *supra* note 11 at 2, using stronger language, describes Virginia's limits to citizen standing as "illegal" under the Clean Water Act.

13. See *Virginia Water Quality Assessment for 1992: § 305(b) Report to EPA and Congress*, Virginia Water Control Board Information Bulletin #588 (Apr. 1992). The report states that 55% of Virginia's biological monitoring stations registered from "impaired" to "severely impaired" water. *Id.* at app. A. Also, Virginia bans fishing or advises against the consumption of fish from 458 miles of river within the state. *Id.* at 3.2-3 to 3.2-4.

14. See, e.g., *CBF Petition*, *supra* note 9, at 4 ("The Virginia Water Control Board assessed only \$304,590 in administrative penalties during mid-89 to mid-91. By contrast, in one Clean Water Act case alone, the Chesapeake Bay Foundation succeeded in obtaining a penalty of almost \$300,000.") (citing *CBF v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690 (4th Cir. 1989)).

ginia is the only state that grants standing only to dischargers to challenge the issuance or denial of a discharge permit issued by the state.¹⁵ This lack of access to the courts remains one of the more difficult challenges to Virginians seeking to act as citizen attorneys general. The *CBF Petition* has yet to receive a final determination by the EPA, but it has experienced some success in initiating increased federal review of Virginia's water pollution discharge permitting system.¹⁶

This paper explores the difference between federal implementation and Virginia's implementation of the Clean Water Act's permitting requirements, and how Virginia can "legitimately" place severe limitations on citizen standing to challenge water discharge permits. Part II of this paper explains the permitting process under the Clean Water Act. This section also discusses the relevant portions of Virginia's water control laws which pertain to the permitting process. Part III discusses federal judicial review of EPA actions on NPDES permits and Virginia's restrictive standing requirements to challenge water discharge permits issued by the State Water Control Board. Part IV discusses original and federal question jurisdiction in federal courts to review NPDES permits issued by state agencies. This includes an explanation of why non-applicants in Virginia cannot challenge permits issued by Virginia in federal court. Part V discusses why this scheme may not be desirable, and how the situation can be remedied on three different levels. Part VI serves as the conclusion of this paper.

II. FEDERAL ADMINISTRATION OF THE PERMITTING PROCESS AND VIRGINIA'S PERMITTING PROGRAM

A. *Effluent Limitations and Water Quality Standards*

In the 1972 Amendments to the Clean Water Act,¹⁷ Con-

15. See *CBF Petition*, *supra* note 9, at 14-17. Besides Virginia, only New Mexico restricts standing to "owners." *Id.* at 17 n.47 (citing N.M. STAT. ANN. § 75-6-5(N) (Michie 1993)). However, New Mexico is a non-delegated state and the EPA administers New Mexico's NPDES program. Therefore, "any interested person" in New Mexico could challenge a permit in federal court. *Id.*; see also *infra* part III.A.

16. See *infra* part V.C.

17. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500,

gress compromised between the absolutist effluent standards approach to regulation with the relativist water quality approach.¹⁸ This regulatory approach combines a limitation on end of pipe discharges with water quality standards for the waters receiving the discharge, and serves as the basis for the National Pollutant Discharge Elimination System found in Section 402 of the Act.¹⁹

The Clean Water Act establishes that it is unlawful for any person²⁰ to discharge²¹ any pollutant²² into the navigable waters of the United States except as in compliance with the Act.²³ The CWA allows discharges of pollutants by a person from a point source²⁴ under certain circumstances. Section 301

86 Stat. 816 (1972).

18. WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 260 (2d ed. 1994). Rodgers contends that this compromise evolved from the absolutist effluent limitation approach of the Rivers and Harbors Act of 1899, ch. 425 sec. 10, 30 Stat. 1151 (current version at 33 U.S.C. §§ 403, 407, 411 (1988)) and the relativist water quality approach of the Federal Water Pollution Control Act, Pub. L. No. 80-845, ch. 750, 62 Stat. 1155 (1948). *Id.* at 252-54. For a discussion of the philosophical conflict between these two concepts, see *id.* at 259-62.

19. 33 U.S.C. § 1342 (1988).

20. "The term 'person' means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. § 1362(5)(1988).

21. The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

33 U.S.C. § 1362(12).

22. "The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). This provision has been interpreted broadly to include all manner of waste material. See, e.g., *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982) (holding that ordnance dropped during naval exercises was a pollutant despite the district court's determination that the ordnance caused no harm to the receiving waters).

23. 33 U.S.C. § 1311(a) (1988). This basic premise of the Clean Water Act was borrowed from the Rivers and Harbors Act of 1899. RODGERS, *supra* note 18, at 361-62. For a historical background of the Clean Water Act and its precursors, the Federal Water Pollution Act and the Rivers and Harbors Appropriations Act of 1899, see *id.* at 252-54; J. GORDON ARBUCKLE ET AL., ENVIRONMENTAL LAW HANDBOOK 177-80 (10th ed. 1989).

24. "The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or ves-

of the Act requires the EPA Administrator to set federal effluent limitations²⁵ which require the "application of the best available technology economically achievable."²⁶ Section 304 places special emphasis on toxic pollutants.²⁷ The Act requires the Administrator to "take into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms and the nature and extent to which effective control is being or may be achieved under other regulatory authority" when determining whether to prohibit discharge of the toxic pollutant or when setting the effluent limitation.²⁸

In addition to the effluent limitation approach of section 301, the CWA incorporates a water quality approach²⁹ and water quality related effluent limitations.³⁰ Water quality standards are established either upon submission of a standard by a state³¹ or promulgation by the Administrator.³² If the effluent standard established by section 301 would "interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters," the Administrator must set new effluent limitations "for such point source or sources . . . which can reasonably be expected to contribute to the attainment or maintenance of such water quality."³³ The water qual-

sel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (1988).

25. "The term 'effluent limitation' means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 U.S.C. § 1362(11).

26. 33 U.S.C. § 1311(b)(2)(A) (1988).

27. 33 U.S.C. § 1317(a)(1) (1988). Congress has specifically listed 65 toxic pollutants. 1 FRANK P. GRAD, TREATISE ON ENVTL. L. § 3.03(4)(g) (Release No. 36, Nov. 1994). This list was later subdivided into 129 pollutants for 21 basic industries. *Id.*

28. 33 U.S.C. § 1317(a)(2). In this vein, Congress established two goals: (1) to eliminate the discharge of pollutants in the navigable waters by 1985; and (2) to promote, "wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983." 33 U.S.C. § 1251(a)(1)-(2) (1988).

29. 33 U.S.C. § 1313 (1988).

30. 33 U.S.C. § 1312 (1988).

31. 33 U.S.C. § 1313(a)(3)(A).

32. 33 U.S.C. § 1313(a)(3)(C).

33. 33 U.S.C. § 1312(a). The effluent standard established by the Administrator

ity approach integrates the state's designation of the planned use of the water body, and requires the Administrator to approve the state's use designation if it comports with the applicable requirements of the CWA.³⁴ The designated uses typically include waters suitable for recreation, propagation of fish, other aquatic and semi-aquatic life, and transportation of sewage and industrial wastes without nuisance.³⁵ Section 304(l) requires states to identify both water quality uses that cannot be achieved from existing effluent standards for toxic pollutants³⁶ and specific control strategies which will sufficiently reduce concentrations of toxic pollutants to achieve the water quality standard for the receiving waters.³⁷

B. *The Permitting Scheme*

1. The Federal Permitting System

Before a person may discharge pollutants from a point source into any navigable waters in the United States, that person must apply for and obtain a discharge permit.³⁸ This permitting system, the National Pollution Discharge Elimination System (NPDES), authorizes the Administrator to issue permits to any person for the discharge of pollutants upon the condition that the discharger meet the "best technology" effluent requirements set out in Section 301.³⁹ Before issuing the NPDES per-

must "assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water. . . ." *Id.*

34. 33 U.S.C. § 1313(a)(3)(B). If a state fails to submit proposed water quality standards within the time allotted by the Act, the Administrator must promulgate water quality standards for that state. 33 U.S.C. § 1313(b)(1).

35. RODGERS, *supra* note 18, at 344. The EPA published an illustrative set of guidelines for water quality criteria in 1973. *Id.* at 344, n.7 (citing *General Water Quality Criteria*, in U.S. EPA GUIDELINES FOR DEVELOPING OR REVISING WATER QUALITY STANDARDS UNDER THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 23 (Apr. 1973)).

36. 33 U.S.C. § 1314(l)(1)(A)-(C) (1988).

37. 33 U.S.C. § 1314(l)(1)(D).

38. 33 U.S.C. § 1342(a)(1)(1988). Congress borrowed this permitting system from the Army Corps of Engineers regulatory scheme under the Rivers and Harbors Act of 1899, ch. 425, sec. 13, 30 Stat. 1152 (codified at 33 U.S.C. § 407 (1970)). 1 GRAD, *supra* note 27, § 3.03(6)(a).

39. 33 U.S.C. § 1342(a)(1).

mit, the Administrator must conduct a public hearing⁴⁰ and determine that the discharge will comply with the applicable requirements of the CWA.⁴¹ The discharger must satisfy the effluent limitations, water quality related effluent limitations, water quality standards, the national standards of performance for new sources,⁴² toxic and pretreatment effluent standards, and ocean discharge criteria.⁴³ The permit prescribes the conditions which the permittee must meet in order to comply with the permit.⁴⁴

2. Virginia's Permitting Scheme

Virginia's water control law resembles the federal act. Virginia prohibits waste discharges into the ambient waters within its jurisdiction unless the discharger obtains a permit.⁴⁵ The Code grants the State Water Control Board (SWCB) the authority to establish "standards of quality and policies for any state waters."⁴⁶ The SWCB may also impose standards more stringent than federal standards after submission of the more stringent standards to the standing committees in each house of the General Assembly with jurisdiction over such matters.⁴⁷ The

40. *Id.* "Any person may submit oral or written statements and data concerning a draft permit. Reasonable limits may be set upon the time allowed for oral statements, and the submission of statements in writing may be required." 40 C.F.R. § 124.12(c) (1994). A hearing officer presides over this public hearing, and the public comments received during the public comment period required by 40 C.F.R. § 124.10 are included as part of the public hearing record. 40 C.F.R. 124.12(a)(4). At the close of the public hearing period, the Regional Administrator decides whether to issue or deny a permit application. 40 C.F.R. § 124.15 (1994). Any interested person may request a formal hearing within 30 days of the Administrator's determination. 40 C.F.R. § 124.74(a) (1994).

41. 33 U.S.C. § 1342(a)(1) (1988).

42. 33 U.S.C. § 1316 (1988). The national standards of performance apply to "new sources," and require new sources to apply the "best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants." 33 U.S.C. § 1316(a)(1)-(2). These standards apply to a minimum of 26 industries. 33 U.S.C. § 1316(b)(1)(A).

43. 33 U.S.C. § 1342(a)-(c).

44. 33 U.S.C. § 1342(a)(2). These conditions include a requirement that the permittee collect and report data and information on the discharge. *Id.* The Administrator can also set "other requirements as he deems appropriate." *Id.*

45. VA. CODE ANN. § 62.1-44.5 (Michie 1992).

46. VA. CODE ANN. § 62.1-44.15(3a) (Michie Cum. Supp. 1994).

47. *Id.*

SWCB can grant a permit to dischargers, and the permit must be of a fixed term of no more than five years.⁴⁸ An "owner aggrieved" by any action of the Board may demand a formal hearing if no formal hearing preceded the Board's action.⁴⁹ The SWCB conducts hearings on permits either by a regular or special meeting of the whole Board or by "at least one member of the Board designated by the chairman to conduct such hearing on behalf of the Board. . . ."⁵⁰

C. *Delegation of NPDES Permitting Authority to States and Virginia's Delegated Authority*

1. The Requirements for Delegation

To promote its policy of preserving and protecting "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution,"⁵¹ Congress gave states the option of administering their own permit program.⁵² The Governor of a state which desires to administer its own permit program must submit to the EPA "a full and complete description of the program it proposes to establish and administer under State law or under interstate compact."⁵³ The Act also requires the state attorney general, or the attorney for the state agency responsible for water pollution control, to submit a statement verifying that the laws of the state or the interstate compact "provide adequate authority to carry out the described program."⁵⁴

Once the Administrator receives the submissions by the Governor and the attorney general, she must approve the petition

48. VA. CODE ANN. § 62.1-44.15(5)-(5a) (Michie Cum. Supp. 1994). The statute refers to permits as "certificates," but for purposes of consistency, "certificates" will be referred to as "permits" in this paper.

49. VA. CODE ANN. § 62.1-44.25 (Michie 1992). For a discussion of the definition of the words "owner aggrieved," see *infra* part III.B.

50. VA. CODE ANN. § 62.1-44.26(A) (Michie Cum. Supp. 1994). "A verbatim record of the proceedings of such hearings shall be taken and filed with the Board." *Id.* § 62.1-44.26(B). Also, the Board has the power to issue subpoenas and subpoenas duces tecum. *Id.* § 62.1-44.26(C). The Board is required to issue such subpoenas at the request of any party. *Id.*

51. 33 U.S.C. § 1251(b) (1988).

52. 33 U.S.C. § 1342(b) (1988).

53. *Id.*

54. *Id.*

of the state unless certain requirements are not met.⁵⁵ These requirements list affirmative duties that the state must have the apparent authority to fulfill under the program. For the Administrator to approve the state proposal, the state must have the authority to issue permits that comply with the following requirements: the state must be able to issue a permit that (a) can apply and insure compliance with sections 301, 302, 306, 307, and 403 of the Act;⁵⁶ (b) is for a fixed term of no more than five years;⁵⁷ (c) "can be terminated or modified for cause" for a violation of a permit condition, misrepresentation or failure to disclose in obtaining the permit, or "change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;"⁵⁸ and (d) can "control the disposal of pollutants into wells."⁵⁹

The CWA further requires that states fulfill specific requirements in administration of its permit program before the Administrator can delegate the permitting authority to the state. The Act requires the Administrator to determine whether the state can fulfill the inspection, monitoring, and record-keeping requirements of section 308.⁶⁰ The state must provide public notice and provide opportunity for a public hearing before making a final decision on a permit application,⁶¹ as well as notify any other state "whose waters may be affected by the issuance of a permit."⁶² Notice and copies of each permit application must be forwarded to the Administrator.⁶³ The state must insure that no permit will be issued if the Secretary of the Army (acting through the Army Corps of Engineers) determines that "anchorage and navigation of any of the navigable waters would

55. 33 U.S.C. § 1342(b)(1)-(9).

56. 33 U.S.C. § 1342(b)(1)(A). The applicable sections include § 301's effluent limitations, § 302's water quality standards, § 306's national standards of performance for new sources, § 307's toxic and pretreatment effluent standards, and § 403's ocean discharge criteria. *See supra* part II.A.

57. 33 U.S.C. § 1342(b)(1)(B) (1988).

58. 33 U.S.C. § 1342(b)(1)(C)(i)-(iii).

59. 33 U.S.C. § 1342(b)(1)(D).

60. 33 U.S.C. § 1342(b)(2)(A)-(B).

61. 33 U.S.C. § 1342(b)(3).

62. 33 U.S.C. § 1342(b)(5). The affected state must be allowed to "submit written recommendations to the permitting State (and the Administrator) with respect to any permit application. . . ." *Id.*

63. 33 U.S.C. § 1342(b)(4).

be substantially impaired thereby."⁶⁴ The state must also insure that: (1) permits issued to publicly owned treatment works satisfy pretreatment standards for toxic pollutants;⁶⁵ (2) industrial users of the publicly owned treatment works comply with the proportional payment requirements of section 204(b) and the toxic effluent and pretreatment standards;⁶⁶ and (3) violations of the permit conditions or the permit program are enforced through civil and criminal penalties.⁶⁷

In keeping with its objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"⁶⁸ Congress gave states the option to set more stringent standards than federal standards.⁶⁹ Also, the Act prohibits state and federal permitting programs from "anti-backsliding," which means that "a permit may not be renewed, reissued, or modified . . . to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit,"⁷⁰ unless the permit falls under certain exceptions.⁷¹

64. 33 U.S.C. § 1342(b)(6).

65. 33 U.S.C. § 1342(b)(8).

66. 33 U.S.C. § 1342(b)(9). The proportional payment requirements of section 204(b) state, in pertinent part, that:

[T]he Administrator shall not approve any grant for any treatment works under section 1281(g)(1) of this title . . . unless he shall first have determined that the applicant (A) has adopted or will adopt a system of charges to assure that each recipient of waste treatment services within the applicant's jurisdiction . . . will pay its proportionate share . . . of the costs of operation and maintenance . . . of any waste treatment services provided by the applicant. . . .

33 U.S.C. § 1284(b)(1) (1988).

67. 33 U.S.C. § 1342(b)(7).

68. 33 U.S.C. § 1251(a) (1988).

69. 33 U.S.C. § 1370 (1988). Section 510 of the Act states that state actions to "enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution . . . " are not precluded unless the effluent standard, or control or abatement requirement, are less stringent than the federal requirements. Thus, by negative implication, a state may set standards more stringent than the federal standards.

70. 33 U.S.C. § 1342(o)(1).

71. 33 U.S.C. § 1342(o)(2). These exceptions allow for increased discharges in a renewed, reissued or modified permit if the facility undergoes "material and substantial alterations or additions" that occurred after the permit issuance. *Id.* § 1342(o)(2)(A). Also, the discharger may seek a modified, renewed or reissued permit for higher discharge levels if either: (1) information not available at the time of issuance would have allowed for less stringent effluent limitations, or (2) the permittee

2. Memorandum of Agreement and Waiver

The regulations that implement the delegation requirements state that there must be a "Memorandum of Agreement" between the state and the Regional Administrator of the EPA.⁷² The agreement must include, *inter alia*, "provisions specifying classes and categories of permit applications, draft permits, and proposed permits that the State will send to the Regional Administrator for review, comment and, where applicable, objection."⁷³ The agreement must also include agreement on compliance monitoring,⁷⁴ and must "specify the extent to which EPA will waive its right to review, object to, or comment upon State-issued permits under section 402(d)(3), (e) or (f) of CWA."⁷⁵ Section 402 allows the Administrator to waive her right to object to the issuance of a permit⁷⁶ and to waive her right to be notified of a permit application or the issuance of that permit by the delegated state.⁷⁷ According to Professor Rodgers, "[t]he waiver provisions . . . obviously are of no small moment since they represent gaps in the knowledge of the EPA regional offices that are irreparable despite regrets or second thoughts."⁷⁸

3. Virginia's Memorandum of Agreement with the EPA

Virginia entered into an agreement with the EPA on March 31, 1975 to perform the permitting and enforcement programs under the CWA.⁷⁹ This agreement grants Virginia the responsibility of issuing all waste discharge requirements under the

acted in accordance with the previous permit, but was unable to meet the conditions of the previous permit. *Id.* § 1342(o)(2)(B)-(E).

72. 40 C.F.R. § 123.24 (1994).

73. *Id.* § 123.24(b)(2).

74. *Id.* § 123.24(b)(4).

75. *Id.* § 123.24(d).

76. 33 U.S.C. § 1342(d)(3) (1988). The Administrator may object to the issuance of a permit issued by a state within ninety days of being notified of the proposed permit. *Id.* § 1342(d)(2). If the Administrator objects, the permit will not issue. *Id.*

77. *Id.* § 1342(e) (incorporating by reference § 1342(d)).

78. RODGERS, *supra* note 18, at 366-67.

79. Memorandum of Understanding, *supra* note 9. The Code of Regulations generically refers to the agreement as a "Memorandum of Agreement." See 40 C.F.R. § 123.24 (1994).

NPDES⁸⁰ and enforcing the terms of the permits under the discharge permits.⁸¹ The agreement requires Virginia to transmit copies of all draft NPDES permits to the EPA Regional Administrator within thirty days of receipt by the SWCB.⁸²

The Regional Administrator may comment on or object in writing to the sufficiency of the draft permit within thirty days after receipt of the draft permit.⁸³ To object to the draft permit, the Regional Administrator must transmit the nature of his objections to SWCB with an explanation and support for the objections.⁸⁴ If the Regional Administrator does not submit objections within the thirty-day (or fourteen-day) time limit, the Regional Administrator waives the right to comment.⁸⁵ When the Administrator objects to the issuance of a permit and transmits her objections to the SWCB, the Board must notify the "Administrator, in writing, prior to the issuance of any proposed NPDES permit of the disposition of any recommendations and or objections of the Regional Administrator which have not been incorporated in the proposed permit."⁸⁶ The agreement, however, does not require the SWCB to adopt any recommendations submitted by the Regional Administrator in objection to a draft permit.

In accordance with the waiver provisions of the CWA,⁸⁷ Virginia and the EPA agreed that the EPA would waive its right to comment and object to the waste discharge requirements contained in certain NPDES permits. These permits involve discharges from publicly owned treatment works, other waste discharges, and discharges that only pass cooling water.⁸⁸ In

80. Memorandum of Understanding, *supra* note 9, at III.1.

81. *Id.* at III.2.

82. *Id.* at III.6.a.

83. *Id.* at III.6.b. These requirements do not apply to the review of draft permits that the Regional Administrator has waived his right to review. *Id.* at VI.1.a. If, however, the permit concerns new sewage discharges, the Regional Administrator must object to or make recommendations within 14 days. *Id.* at III.6.b.

84. *Id.* at III.6.c. These objections must state "the reason that the requirements [in the draft permit] conflict with the Act or regulations and guidelines adopted thereunder. . . ." *Id.*

85. *Id.* at III.6.b.

86. *Id.* at III.6.c.

87. See 33 U.S.C. § 1342(e) (1988).

88. Memorandum of Understanding, *supra* note 9, at VI.1.a. The EPA also agreed to waive its right to receive monitoring reports, to object to proposed changes in

order for the waiver provision to be applicable, the discharges must not exceed certain maximum daily discharge flow rates.⁸⁹ These waiver provisions do not apply to discharges that: “[1] affect the waters of an adjacent state, and/or [2] . . . contain toxic substances in excess of standards promulgated by the Administrator of EPA pursuant to Section 307(a) of the Act, and/or [3] . . . [flow from] ‘Interim Treatment Facilities’” constructed after the commencement of the agreement.⁹⁰ The agreement allows the Regional Administrator to unilaterally terminate the waiver in whole or in part.⁹¹

D. *Withdrawal of Permitting Authority From a State*

The delegation of NPDES permitting authority to a state is not, in theory, permanent. Upon the application of an interested person, the Administrator may commence withdrawal proceedings to remove the state’s permitting authority.⁹² If the Administrator determines after a public hearing that a State is not administering a program” as required by section 402, she may withdraw the state’s permitting authority.⁹³ The Administrator may conduct an informal investigation into the petition’s allegations, and if she determines that “cause exists to commence proceedings,” she may order a hearing.⁹⁴ She must submit the allegations to the state against whom the allegations

monitoring reports, and to “receive notices regarding compliance or non-compliance with permit conditions, schedules and/or limitations” for these specific waste discharges. *Id.*

89. These maximum discharge flow rates include:

[F]or: (1) publicly owned treatment works involving discharges or proposed discharges with an average flow equal to or less than 0.5 MGD [million gallons a day]; (2) all other discharges or proposed discharges with an average flow equal to or less than 0.1 MGD; (3) all discharges equal to or less than 1.0 MGD which involve discharges or proposed discharges consisting only of pass cooling water. . . .

Id.

90. *Id.*

91. *Id.* at VI.2. The Administrator must submit the notice of termination in writing to the SWCB. *Id.*

92. 40 C.F.R. § 123.64(b)(1) (1994). The Administrator must respond to the petition in writing. *Id.*

93. 33 U.S.C. § 1342(c)(3) (1988).

94. 40 C.F.R. § 123.64(b)(1).

are alleged, and the state must respond in writing within thirty days.⁹⁵

Once the state answers the allegations, the party seeking withdrawal has the "burden of coming forward with the evidence in a hearing."⁹⁶ If, after the public hearings, the Administrator determines that the state has failed to administer the program as required, she must notify the state of any appropriate corrective actions the state must take in order to maintain its permitting authority.⁹⁷ If the state does not act within a reasonable time not to exceed ninety days, the Administrator may withdraw the program after notifying the state and making public her reasons for such withdrawal in writing.⁹⁸

III. JUDICIAL REVIEW OF EPA AND SWCB ACTIONS ON NPDES PERMITS

The CWA provides for judicial review of EPA decisions to issue, modify, or deny a NPDES permit.⁹⁹ The Virginia Code also provides for judicial review of SWCB decisions to issue, modify, or deny a VPDES permit.¹⁰⁰ However, the right to challenge EPA actions on NPDES permits stands in stark contrast to the right to challenge VPDES permits in Virginia's courts. As the following discussion illustrates, the CWA grants citizen attorneys general a more expansive right to challenge EPA actions on NPDES permits than the Virginia Code allows to challenge VPDES permits in Virginia's courts.

A. *The Right of Review of EPA Actions on NPDES Permits*

Clean Water Act section 509(b)(1) states, that "any interested person" may seek review of final EPA action as it relates to the issuance or denial of a NPDES permit in a Federal Circuit Court of Appeals.¹⁰¹ The term "interested person" has been

95. *Id.*

96. *Id.*

97. 33 U.S.C. § 1342(c)(3).

98. *Id.*

99. 33 U.S.C. § 1369(b)(1) (1988).

100. VA. CODE ANN. § 62.1-44.29 (Michie 1992).

101. 33 U.S.C. § 1369(b)(1). The section states, in pertinent part:

broadly construed to mean any person.¹⁰² The interested person must seek review where the interested person lives or transacts business, and where the agency action would directly affect that person.¹⁰³

B. *The Right of Review of SWCB Action on VPDES Permits*

The Virginia Code permits any "owner aggrieved" by a final decision of the SWCB to seek judicial review of that action under the provisions of the Virginia Administrative Process Act (VAPA).¹⁰⁴ VAPA entitles "[a]ny person affected by and claiming the unlawfulness of any regulation, or party aggrieved by and claiming unlawfulness of a case decision" to judicial review of that agency action in "any court of competent jurisdiction."¹⁰⁵ However, a contradiction exists between the term "owner aggrieved" found in the state water control law and the term "party aggrieved" found in VAPA. This contradiction has

Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314(l) of this title, may be had by interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which the person resides or transacts business which is directly affected by such action upon application by such person.

Id.

102. See, e.g., *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 14 n.23 (1981) ("The review provisions of § 509 are open to '[a]ny person,' and thus provide an additional procedure to 'private attorneys general' seeking to enforce the Act. . . .") (quoting S. REP. NO. 414, 92d Cong., 2d Sess., 85 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3746).

103. 33 U.S.C. § 1369(b)(1).

104. VA. CODE ANN. § 62.1-44.29 (Michie 1992) (incorporating by reference the Virginia Administrative Procedure Act, VA. CODE ANN. § 9-6.14:1 to .14:25 (Michie 1993)).

105. VA. CODE ANN. § 9-6.14:16(A) (Michie 1993). The venue for such proceedings is governed by VA. CODE ANN. § 8.01-261. That section states, *inter alia*, that the court of competent jurisdiction to review agency action is located in the city or county where the petitioner resides or conducts substantial business or the city or county where the agency is located. VA. CODE ANN. § 8.01-261(1)(a)(1)-(3) (Michie Cum. Supp. 1994).

made it impossible for non-permit holders or applicants to challenge SWCB actions that issue or deny VPDES permits.

Two Virginia Court of Appeals cases illustrate this point. In *Environmental Defense Fund v. Virginia State Water Control Board*,¹⁰⁶ the plaintiff sought review of SWCB reissuance of a VPDES permit to Rocco Farms, Inc., a poultry processing plant located in Shenandoah County, Virginia.¹⁰⁷ The Environmental Defense Fund (EDF) attended a public hearing and submitted oral and written comments stating concerns about the draft permit.¹⁰⁸ Once the Board reissued the permit, EDF requested a formal hearing before the Board to challenge the Board's amendment of the permit.¹⁰⁹ The Board denied the petition, stating that EDF did not have standing to request a formal hearing.¹¹⁰ EDF brought an action for review of the SWCB issuance of the permit in the Richmond Circuit Court, but that court also held that EDF did not have standing to challenge the permit.¹¹¹

The court of appeals also ruled that EDF did not have standing under VAPA or the State Water Control Law. The court reasoned that the applicable section of VAPA¹¹² did not supplement the standing requirements of the basic law (the water control law).¹¹³ "The purpose of Code § 9-6.14:16 is to 'standardize court review . . . save as laws hereafter enacted may otherwise expressly provide.'"¹¹⁴ The court found it dispositive that Code § 9-6.14:3 provides that VAPA "does not supersede or repeal additional procedural requirements in [the water control law]."¹¹⁵ Thus, since the water control law provided a specific

106. 404 S.E.2d 728 (Va. Ct. App. 1991).

107. *Id.* at 729.

108. *Id.*

109. *Id.* at 729-30. The plant already possessed a permit, but sought a flow-tiered permit that would allow it to increase discharges when water levels increased. *Id.* at 729. EDF felt that the permit violated the "anti-backsliding" provisions of SWCB regulations and the CWA. *Id.* at 730. For a discussion of the federal "anti-backsliding" requirements, see *supra* notes 70-71 and accompanying text.

110. 404 S.E.2d at 730.

111. *Id.*

112. VA. CODE ANN. § 9-6.14:16 (Michie 1993).

113. 404 S.E.2d at 731.

114. *Id.* (citing VA. CODE ANN. § 9-6.14:3).

115. *Id.*

standing requirement, the VAPA standing requirement was inapplicable.¹¹⁶

The court then applied the more restrictive "owner aggrieved" standing requirement of Code § 62.1-44:16 to EDF, rather than the less restrictive "party aggrieved" requirement found in Code § 9-6.14:16.¹¹⁷ The state water control law specifically defined the word "owner" to include a person

that owns, operates, charters, rents, or otherwise exercises control over or is responsible for any actual or potential discharge of sewage, industrial wastes, or other wastes to state waters, or any facility or operation that has the capability to alter the physical, chemical, or biological properties of state waters in contravention of § 62.1-44.5.¹¹⁸

In effect, this gives only permit holders or applicants the right to seek judicial review of a Board's decision to issue or deny a permit application. Thus, EDF, acting in its representative capacity for non-permit holders and non-applicants, had no standing to seek review of the Rocco Farms permit in a Virginia state court.¹¹⁹ The court also held that EDF did not have a right to a formal hearing since Code § 62.1-44.25 provides that only "owners" possess the right to request a formal hearing.¹²⁰

In *Town of Fries v. State Water Control Board*,¹²¹ the court faced a similar situation to that of *Environmental Defense Fund*. In *Town of Fries*, the town, a civic organization, individual landowners, and a local business challenged the issuance of a VPDES permit by the SWCB to the City of Galax.¹²² The City of Galax requested an amended permit to build a sewage treatment plant which would discharge pollutants into the New River directly upstream from the Town of Fries.¹²³ The Town

116. *Id.* at 732.

117. *Id.*

118. VA. CODE ANN. § 62.1-44.3(5) (Michie 1992).

119. 404 S.E.2d at 732.

120. *Id.* at 732-33.

121. 409 S.E.2d 634 (Va. Ct. App. 1991).

122. *Id.* at 635-36.

123. *Id.*

of Fries intended to use the water from the New River as a source of drinking water.¹²⁴

The court, following *Environmental Defense Fund* held that the Town of Fries and the other parties were not "owners aggrieved" and thus, had no standing to seek review of the agency's issuance of the VPDES permit.¹²⁵ Expanding on its decision in *Environmental Defense Fund*, the court cited *Virginia Beach Beautification Commission v. Board of Zoning Appeals*,¹²⁶ to state that the term "aggrieved" means the "appellant must show that he has an immediate pecuniary and substantial interest in the litigation, and not a remote or indirect interest."¹²⁷ The court also stated that the Town of Fries was acting to challenge an "anticipated public injury, which the court in *Virginia Beach Beautification* held was an insufficient ground to establish standing."¹²⁸

The decisions in *Town of Fries* and *Environmental Defense Fund* illustrate the seemingly impossible standing requirements that citizen attorneys general must meet to challenge VPDES permits in Virginia state courts. These decisions require that two tests be satisfied before a person can challenge SWCB action on a VPDES permit: (1) the person must be an "owner" as defined in the state water control law; and (2) the person must have been "aggrieved," meaning they must show an immediate pecuniary and substantial interest in the litigation, as opposed to a remote or indirect interest. These standards make challenging SWCB action on a VPDES permit exceedingly difficult.

IV. ORIGINAL AND FEDERAL QUESTION JURISDICTION AND REVIEW OF STATE-ISSUED NPDES PERMITS

As the foregoing discussion illustrates, the CWA grants standing to citizens to seek judicial review of EPA's grant or

124. *Id.* at 637.

125. *Id.* at 636-37.

126. 344 S.E.2d 899, 902 (Va. 1986).

127. 409 S.E.2d at 637 (quotations omitted).

128. *Id.*

denial of an NPDES permit,¹²⁹ while Virginia grants standing to review SWCB decisions to issue or deny a permit only to permit holders or applicants.¹³⁰ As a state delegated to issue NPDES permits, Virginia is the only delegated state to limit standing to challenge the issuance or denial of a discharge permit only to dischargers.¹³¹ In light of Congress' goal to include "[p]ublic participation in the development, revision and enforcement of any regulation, standard, effluent limitation, plan or program established by the Administrator or any State,"¹³² this difference creates at least pause for consideration. The question is obvious. If the CWA grants "any interested person" standing to review EPA action to issue or deny a permit under the NPDES, how can a state prohibit a person from obtaining standing to challenge a substantively similar decision by the SWCB?

A. *Federal Circuit Courts and Original Jurisdiction*

In *Crown Simpson Pulp Co. v. Costle*,¹³³ the United States Supreme Court hinted at an answer to this question. In a footnote, the Court stated that "EPA's failure to object, as opposed to its affirmative veto of a state-issued permit, would not necessarily amount to 'Administrator's action' within the meaning of [CWA] § 509(b)(1)."¹³⁴ Although this statement was not germane to the case, the court was citing with approval *Mianus River Preservation Committee v. EPA*.¹³⁵ In *Mianus River*, the petitioners sought review in the Second Circuit Court of Appeals of a NPDES permit modification issued by the Connecticut Department of Environmental Protection.¹³⁶ The Second Circuit held that the court had jurisdiction to review NPDES permits under section 509(b)(1) only if the EPA Administrator

129. *See supra* part III.A.

130. *See supra* part III.B.

131. *See supra* note 15.

132. 33 U.S.C. § 1251(e) (1988).

133. 445 U.S. 193 (1980) (per curiam).

134. *Id.* at 197 n.9.

135. 541 F.2d 899 (2d Cir. 1976).

136. *Id.* at 900. The petitioners sought review of DEP's grant of a modification of Greenwich Water Company's permit to discharge chemically treated flocculants into the Mianus River. *Id.*

had exercised action on the permit.¹³⁷ Thus, since the Connecticut DEP issued this permit under its delegated authority, and since no "Administrator action" was involved, the court did not have jurisdiction.¹³⁸

The Second Circuit rejected two arguments advanced by the petitioners. The petitioners argued that (1) in issuing NPDES permits, the DEP acted as the Administrator's agent, thus rendering DEP action "an action of the Administrator through a delegation of authority," and (2) the Administrator's failure to reject or "veto" the permit constituted "Administrator action" for purposes of section 509 review.¹³⁹ The Second Circuit rejected both arguments. First, the court stated that the process for approval of a state program and the elimination of a federal program "creates a separate and independent State authority to administer the NPDES pollution controls, in keeping with the stated Congressional purpose to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce and eliminate pollution."¹⁴⁰ The court found that the legislative history of the CWA supported the proposition that Congress intended the state program to be a separately administered program in which the Administrator should only be involved if absolutely necessary.¹⁴¹

137. *Id.* at 902.

138. *Id.*

139. *Id.* at 902-03.

140. *Id.* at 905 (quoting 33 U.S.C. § 1251(b)); *accord* *Shell Oil Co. v. Train*, 585 F.2d 408 (9th Cir. 1978). In *Shell Oil*, the court stated that:

[N]othing "in the Act suggest[s] the existence of an agency relationship between the Administrator and a state so that the latter's action in issuing or denying a permit could be deemed [an] action of the Administrator. To the contrary [§ 1342] makes clear that once the state has secured approval of its own permit program, its actions in permit matters are those of the state itself, subject to the Administrator's veto."

Id. at 412 (quoting *Washington v. EPA*, 573 F.2d 583, 586 (9th Cir. 1978)).

141. *See* 541 F.2d at 908. The Court quoted the following language for support of this proposition:

The Committee considered extensively the proposition that all the permits issued by the States ought to be subject to review and possible veto by the Administrator. During the Committee's hearings, the Governors and other representatives of the States, almost unanimously, stressed the need to put the maximum responsibility for the permit program in the States. They deplored the duplication and second guessing that could go on if the Administrator could veto the State decisions. The Committee believes that the States ought to have the opportunity to assume the

The Second Circuit summarily rejected the petitioner's second argument. The court stated that this situation did not cause the Administrator to become "inextricably involved in the issuance of the State permit."¹⁴²

In a case similar to the one at bar, but one in which the plaintiff alleged that a State agency had merely "rubber stamped" an EPA permit recommendation, the District Court for the Northern District of California held that "the mere failure to disapprove a state administrative action cannot be deemed decision-making by a federal body."¹⁴³

Thus, the court determined that no federal "Administrator action" existed upon which the federal circuit court of appeals could base jurisdiction to review the NPDES permit.¹⁴⁴

Generally, federal courts have held that they do not have original jurisdiction to review state-issued water discharge permits.¹⁴⁵ The courts have advanced two basic rationales for re-

responsibilities that they have requested. If, however, a State fails to carry out its obligations and misuses the permit program, the Administrator is fully authorized under subsection (c)(3) of this section to withdraw his approval of a State program.

Id. (quoting H.R. REP. NO. 911, 92d Cong., 2d Sess. (1972).

142. *Id.* at 909.

143. *Id.* (citing *Shell Oil Co. v. Train*, 415 F. Supp. 70, 78 (N.D. Cal. 1976)).

144. *Id.* at 909-10.

145. See *American Paper Inst. Inc. v. EPA*, 890 F.2d 869 (7th Cir. 1989); *District of Columbia v. Schramm*, 631 F.2d 854 (D.C. Cir. 1980); *Shell Oil Co. v. Train*, 585 F.2d 408 (9th Cir. 1978); *Chesapeake Bay Found. v. Virginia State Water Control Bd.*, 495 F. Supp. 1229 (E.D. Va. 1980). *But cf.* *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980) (holding that the court of appeals had jurisdiction under the Federal Water Pollution Control Act Amendments of 1972 to review EPA actions that were functionally similar to a denial of a state-issued permit). The Seventh Circuit distinguished *Crown Simpson* in *American Paper Institute*, stating that:

The challenge brought in *Crown Simpson* preceded the 1977 amendments to FWPCA which empowered the EPA to issue its own permit if the state refused to modify its proposed permit. The Supreme Court, however, reviewed the challenge after FWPCA was amended [in 1977]. Because the law applicable to the *Crown Simpson* challenge did not include the Clean Water Act amendment of 1977, the Supreme Court declined to "consider the impact, if any, of this amendment on the jurisdictional issue presented."

890 F.2d at 874 n.7 (citations omitted). The court further stated that the EPA objections to a state-issued permit are no longer functionally equivalent to denying a permit since 33 U.S.C. § 1342(d) (1988) gives EPA the authority to take over permitting authority from the state on the objectional permit. 890 F.2d at 874.

fusing jurisdiction in these cases. The first rationale involves the theme of state and local primacy in enforcement of the water pollution control laws. "In light of the pervasiveness of this theme, the specific references to the veto power . . . and the conferral of broad discretion to waive review of individual permits,"¹⁴⁶ the courts have readily recognized that state-issued permits fall within the ambit of state law.¹⁴⁷ Tangentially, advice given by the EPA when it objects to a state-issued permit does not constitute final agency action upon which federal court jurisdiction can be grounded.¹⁴⁸

The second rationale that the courts express for the proposition that state-issued permits are not reviewable in federal courts involves the result of such a system. In *American Paper Institute, Inc. v. EPA*,¹⁴⁹ the Seventh Circuit held that federal judicial review of a state-issued NPDES permit would create "an undesired bifurcated system whereby both state and federal district courts would hear challenges to state NPDES permits issued after EPA objection."¹⁵⁰ The court found no support in the CWA for the proposition that the CWA requires such a bifurcated system.¹⁵¹ Also, since the "Act demonstrates an intent for the EPA and the states to work through differences in permitting decisions to accomplish" the goal of state primacy in water regulation, the court held that the EPA's discretion in objecting to state-issued permits precluded judicial review under the Administrative Procedure Act.¹⁵²

146. *Save the Bay, Inc. v. EPA*, 556 F.2d 1282, 1294 (5th Cir. 1977).

147. *Id.*

148. *See Shell Oil Co.*, 585 F.2d at 414. In *Shell Oil*, the court stated that: [A] holding that statutorily sanctioned advice by the EPA to a state agency constitutes final federal agency action reviewable in the federal courts would permit an applicant, dissatisfied with a decision of a state board, to circumvent the appellate process envisioned by the statute and bestow jurisdiction upon a federal court simply by alleging coercion or undue influence.

Id.

149. 890 F.2d 869 (7th Cir. 1989).

150. *Id.* at 875.

151. *Id.*

152. *Id.* (citing 5 U.S.C. § 701); *accord* *Save the Bay, Inc. v. EPA*, 556 F.2d 1282, 1295 (5th Cir. 1977). Section 701 of the APA states, in pertinent part, that "(a) [t]his chapter (for judicial review of agency actions) applies, according to the provisions thereof, except to the extent that . . . (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a) (1988).

At least one court has argued that there are two exceptions to the general rule that EPA failure to veto a state-issued permit is not reviewable in a federal court. In *Save the Bay, Inc. v. EPA*,¹⁵³ the Fifth Circuit Court of Appeals held that limited judicial review in the federal district courts of the EPA's failure to veto a state permit could be granted: (1) if the EPA failed to consider and veto a permit that violates applicable federal guidelines, or (2) if the EPA considered impermissible factors, such as political popularity of the decision, in deciding not to veto a permit.¹⁵⁴ The District of Columbia Court of Appeals criticized this decision in *District of Columbia v. Schramm*,¹⁵⁵ saying that the court "doubt[ed] that Congress intended federal court review in these situations."¹⁵⁶ Given the discretionary nature of the EPA's power to veto state-issued permits, the court in *Schramm* presents the better reasoned approach under the present CWA.¹⁵⁷

B. *Federal District Courts and Federal Question Jurisdiction:
Implying a Cause of Action*

One may argue that, although the federal circuit courts may not possess original jurisdiction to review NPDES permits issued by a delegated state, the federal district courts do possess "federal question" jurisdiction to review such matters.¹⁵⁸ Under 28 U.S.C. § 1331, federal districts courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."¹⁵⁹

153. 556 F.2d 1282 (5th Cir. 1977).

154. *Id.* at 1295-96. Although this issue was not before the court, the court stated that its conclusion raised a number of issues that would have to be decided again at a later date. *Id.* at 1292. Therefore, the court held that "[c]onsiderations of judicial economy" required determination of the issue, as the issue would have to be raised in the district court on remand. *Id.*

155. 631 F.2d 854 (D.C. Cir. 1980).

156. *Id.* at 861 n.12.

157. The dates of these two decisions support part of this conclusion. *Save the Bay* was decided before the 1977 Amendments to FWPCA, whereas *Schramm* was decided after the 1977 Amendments. For a discussion of how these amendments affected the EPA's discretionary power, see *American Paper Inst., Inc. v. EPA*, 890 F.2d 869, 874-75 (7th Cir. 1989). See also *supra* note 147.

158. 28 U.S.C. § 1331 (1988). For a more comprehensive explanation of federal question jurisdiction, see ERWIN CHERMERINSKY, FEDERAL JURISDICTION § 5.2.3 (1989).

159. 28 U.S.C. § 1331.

[A] case arises under federal law if it is apparent from the face of the plaintiff's complaint either that the plaintiff's cause of action was created by federal law; or, if the plaintiff's cause of action is based on state law, a federal law that creates a cause of action is an essential component of the plaintiff's claim.¹⁶⁰

In order to invoke federal question jurisdiction, the plaintiff must satisfy a three prong test. First, a federal question must be clear from the face of the plaintiff's complaint.¹⁶¹ Second, the case arises under federal law if the federal law creates a cause of action.¹⁶² Third, when the plaintiff does not allege a federal law cause of action, a federal question may exist "if it is clear from the face of the plaintiff's complaint that a federal law that creates a cause of action is an essential component of the plaintiff's state law claim."¹⁶³

Against this backdrop, the federal courts have grappled with whether federal question jurisdiction gives district courts the power to review state-issued discharge permits which the EPA has failed to veto. Judge Merhige of the District Court for the Eastern District of Virginia encountered this specific issue in *Chesapeake Bay Foundation, Inc. v. Virginia State Water Control Board*.¹⁶⁴

CBF challenged the issuance of a VPDES permit by the SWCB to the Hampton Roads Energy Company.¹⁶⁵ The court stated that 28 U.S.C. § 1331 permitted federal question jurisdiction to determine if the State Board had satisfied the minimum requirements for issuing an NPDES permit.¹⁶⁶ Therefore, the case involved a federal question. However, because the CWA did not expressly grant federal district courts jurisdiction to review state NPDES permits, the requirements of federal

160. CHEMERINSKY, *supra* note 160, at 231.

161. *Id.*; see also *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908).

162. CHEMERINSKY, *supra* note 160, at 236.

163. *Id.* at 237.

164. 495 F. Supp. 1229 (E.D. Va. 1980).

165. *Id.* at 1230. CBF was joined in its suit by Citizens Against the Refinery's Effects (CARE), a corporation organized under Virginia law.

166. *Id.* at 1233. Judge Merhige tepidly determined that the court could exercise federal question jurisdiction by stating that "the Court is cognizant and respectful of the state character of Virginia's NPDES program." *Id.*

question jurisdiction dictated that a cause of action had to be implied from the statute.¹⁶⁷ To determine whether the CWA contained such an implied cause of action, the court applied the four part test found in *Cort v. Ash*.¹⁶⁸

First, the court stated that the CWA was intended to benefit the plaintiffs because Congress defined the CWA's goal as being the restoration and maintenance of the integrity of the Nation's navigable waters.¹⁶⁹ However, under the second prong, the plaintiffs failed to point to any clear expression of congressional intent to create a federal cause of action. In fact, an examination of Congress' intent showed the contrary.¹⁷⁰ Under the third prong, the court held that each of the policies and goals enumerated under section 101 of the CWA were not mutually exclusive, and that "[t]he Act's purpose, then, was to combat water pollution problems through a 'delicate partnership' of the state and federal governments."¹⁷¹ Fourth, the court found that the CWA, as written, was intended to be within the realm of state law.¹⁷² After balancing the *Cort v. Ash* factors, Judge Merhige concluded that a federal cause of action could not be implied to challenge state NPDES permit decisions.¹⁷³

The goal of expressly recognizing the "primary responsibilities and rights of the states to prevent, reduce and eliminate pollution"¹⁷⁴ coupled with the state's historical role in water regulation did not lead the court to conclude that Congress

167. *Id.* at 1234.

168. 422 U.S. 66 (1975). The Supreme Court identified several factors that are germane to the determination of the existence of an implied cause of action:

First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (citations omitted).

169. 495 F. Supp. at 1235.

170. *Id.*

171. *Id.* at 1236.

172. *Id.* at 1237.

173. *Id.* at 1237-38.

174. 33 U.S.C. § 1251(b) (1988).

intended the Act to supplant state law.¹⁷⁵ In explaining this position, Judge Merhige expressed some specific concerns about the role of federalism:

There is a second area of traditional state concern which plaintiffs did not address and which clearly raises issues of federalism. That concern is the administration and supervision of a state's executive agencies. Implying a federal cause of action under the circumstances of this case would substantially undermine the efficacy of the state administrative process. As a practical matter, the exercise of the purported federal cause of action would also present pending state law claims. The federal district courts would then be forced to assume a general review position over the state agency. An intrusion of that magnitude cannot be easily countenanced.¹⁷⁶

In *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*,¹⁷⁷ the Supreme Court held that the Clean Water Act did not contain an implied cause of action. Justice Powell, writing for the Court, gave three basic justifications for this holding. First, under the factors identified in *Cort v. Ash*,¹⁷⁸ the legislative history of the CWA indicated that Congress did not intend for private remedies to be implied in the Act.¹⁷⁹ Second, the CWA provisions for citizen enforcement¹⁸⁰ and citizen review of EPA actions¹⁸¹ indicate Congress' intent to expressly provide a broad but defined cause of action.¹⁸² Third, the savings clause in section 505¹⁸³ referred to other

175. 495 F. Supp. at 1237.

176. *Id.*

177. 453 U.S. 1 (1981).

178. 422 U.S. 66 (1975); *see supra* note 168.

179. *Middlesex County*, 453 U.S. at 17-18.

180. 33 U.S.C. § 1365(a) (1988). This provision grants the district courts jurisdiction over suits filed by "any citizen" against "any person" alleged to be in violation of an effluent standard or order issued by the EPA of a state, or a suit against the EPA for failure to perform any non-discretionary duty as required by the Act. *Id.*

181. 33 U.S.C. § 1369(b) (1988).

182. *Middlesex County*, 453 U.S. at 16-17.

183. 33 U.S.C. § 1365(e) (1988). The section states that "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)." *Id.*

statutes, not the CWA, and thus did not imply any causes of action not contained in the statute.¹⁸⁴

The federal courts have consistently held that Congress did not intend the CWA to contain an implied cause of action.¹⁸⁵ Under the federal question analysis contained in 28 U.S.C. § 1331, challenges to the sufficiency of water discharge permits clearly do not present a federal question. The CWA contains no express provision for citizens to challenge water discharge permits issued by state agencies. Therefore, the judicial construction of the CWA prohibits district courts from invoking their federal question jurisdiction to determine the sufficiency of state-issued NPDES permits. Citizens seeking to challenge the issuance of NPDES permits must seek resolution of that challenge in state court.¹⁸⁶

V. THE REMEDIES

The foregoing discussion leads to the conclusion that non-permit holders in Virginia who wish to challenge the issuance of a VPDES permit have no remedy in state¹⁸⁷ or federal¹⁸⁸ court. This fact raises several of the concerns that led to the nationalization of pollution standards in the Clean Air Act¹⁸⁹

184. *Middlesex County*, 453 U.S. at 16-17. In support of this proposition, the Court quoted the following from the legislative history of the 1972 FWPCA Amendments: "It should be noted, however, that the section would specifically preserve any rights or remedies under any *other* law. Thus, if damages could be shown, other remedies would remain available." *Id.* at 16 n.26 (quoting S. REP. NO. 414, 92d Cong., 2d Sess. 81 (1971), reprinted in 1972 U.S.C.C.A.N. 3746).

185. See, e.g., *id.*; *American Paper Inst., Inc. v. EPA*, 890 F.2d 869, 874 n.8 (7th Cir. 1989) ("Precedent strongly suggests that there is no general implied private cause of action to challenge EPA objections under the Act."); *District of Columbia v. Schramm*, 631 F.2d 854, 863 (D.C. Cir. 1980); *Consolidated Edison Co. v. New York Dep't of Env'tl. Conservation*, 726 F.Supp. 1404, 1410 (S.D.N.Y. 1989); *Chesapeake Bay Found. v. Virginia State Water Control Bd.*, 495 F. Supp. 1229, 1234-38 (E.D. Va. 1980).

186. See, e.g., *Schramm*, 631 F.2d at 863; *Consolidated Edison Co.*, 726 F. Supp. at 1410; *Natural Resources Defense Council, Inc. v. Outboard Marine Corp.*, 702 F. Supp. 690, 694 (N.D. Ill. 1988).

187. See *supra* part III.B.

188. See *supra* part IV.

189. The Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (codified at 42 U.S.C. §§ 7401 to 7671q (Supp. III 1991)). Eleven separate Acts of Congress are buried in the Clean Air Act. RODGERS, *supra* note 18, at 124. The first comprehensive version of the Act that included national air quality standards was the

and Clean Water Act in the early 1970s.¹⁹⁰ By allowing a state to deny citizens standing to challenge a permit issued under the guidelines of a federal statute, where that same person would have standing to challenge a similar permit in a sister state, Virginia's implementation of the Clean Water Act raises the specter of the "race of laxity" which existed before the 1970s nationalization of minimum pollution standards.¹⁹¹ Although the CWA requires the state to uphold federal effluent limitations, "a state agency is more likely to pay attention to the interests of permit applicants who can take their grievances to court, than it is to others who have equally important interests but no recourse to the courts."¹⁹²

In order for private citizens to gain the right of review any interested person possesses when the EPA administers the NPDES program,¹⁹³ some changes must occur in the administration of Virginia's permitting authority. Three possible solutions exist: (1) amend the CWA to require states to give citizens standing in order to have the state permitting program approved for delegation; (2) change Virginia's standing laws to accommodate citizen attorneys general; or (3) withdraw the Virginia program and allow the EPA to run the program.

1970 amendments. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676.

190. ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 727 (1992).

191. *Id.* at 726-27. The authors describe pre-1970's environmental regulation as follows:

Exacerbating local pressures for non-enforcement of environmental laws was the ominous threat of industrial flight from states that vigorously enforced environmental protection laws. As the national infrastructure and methods of transport of commodities improved, industries could convincingly threaten to relocate to avoid local conditions that were unfavorable—e.g. high taxes, high labor costs, unionization, or environmental controls that imposed high pollution control costs. States wishing to attract industries to bolster their local economies competed to attract firms by engaging in what some observers called "the race of laxity" in environmental protection laws.

Id.

192. *Southern Environmental Law Center Petition*, *supra* note 11, at 13.

193. See 33 U.S.C. § 1369(b)(1) (1988); see also *supra* note 101; *supra* part III.A.

A. Amend the Clean Water Act

As previously discussed,¹⁹⁴ the Administrator must determine whether a state has adequate authority to comply with the requirements of the CWA before she can delegate permitting authority to the state.¹⁹⁵ The CWA lists a number of requirements that the state must fulfill before delegation can take place.¹⁹⁶ The Clean Water Act does not require states to grant citizens standing to challenge water discharge permits in state court. However, Congress could amend the CWA to include a citizen standing provision in the delegation requirements.¹⁹⁷

Congress has legislated in this area before by requiring states to grant citizen access to state courts as a part of the state's requirements to receive permitting authority. The Clean Air Act contains a provision that requires approved state programs to provide "an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law."¹⁹⁸ The processes of granting state permitting authority under the Clean Air Act and Clean Water Act are

194. See *supra* part II.C.1.

195. 33 U.S.C. § 1342(b) (1988).

196. *Id.*

197. To draft such a provision would not be difficult. The best approach would be to add a subpart to 33 U.S.C. § 1342(b), which outlines the requirements that state permit programs must fulfill in order to receive delegated authority. This additional subpart could be drafted as follows:

The Administrator shall approve each submitted program unless he determines that adequate authority does not exist: . . . (10) To insure that any interested person have an opportunity for judicial review in a State court of competent jurisdiction of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law.

198. 42 U.S.C. § 7661a(b)(6) (1988). The Clean Air Act requires the Administrator to promulgate regulations establishing minimum standards for a permit program to be administered by "any air pollution control agency." 42 U.S.C. § 7661a(b). The Act also requires the Governor of each state to develop and submit a proposed permit program to implement the Act, and provides sanctions if the state fails to submit a permit plan. 42 U.S.C. § 7661a(d). Section 7661a(b) lists the requirements that an air pollution control agency must meet in order to issue air pollution permits. This list of requirements resembles the requirements for state permit programs under the CWA.

similar.¹⁹⁹ Thus, the Clean Air Act serves as an instructive model upon which Congress can base amendments to the Clean Water Act's citizen standing provisions as they pertain to state-issued NPDES permits.

The difficulty with amending the Clean Water Act to resemble the standing provision in the Clean Air Act discussed above lies in the concepts of federalism that Judge Merhige voiced concern for in *Chesapeake Bay Foundation v. Virginia State Water Control Board*.²⁰⁰ Such an action would require states to incorporate administrative procedures as required by federal law. Although states would retain the authority to determine what standard of review that courts would employ, the seemingly popular concept of "states rights" would probably overcome any argument in support of this amendment. Considering the present political climate, such an amendment would receive little support.²⁰¹

B. *Change Virginia's Standing Laws*

A recent report of the Joint Legislative Audit and Review Commission (JLARC) to the Virginia General Assembly stated that Virginia overly restricted citizen access to state courts, and that more access should be given to persons seeking review of agency decisions.²⁰² The Commission found that eighty-six percent of the administrative law attorneys it surveyed felt that judicial review, as implemented in Virginia, provided for stability and finality to administrative agency factfinding.²⁰³ Howev-

199. *See id.*

200. 495 F. Supp. 1229 (E.D. Va. 1980); *see supra* part IV.B.

201. *See* Kenneth J. Cooper, *House Votes to Curb Unfunded U.S. Mandates*, WASH. POST, Feb. 2, 1995, at A1. Governors and local officials in several states have argued that federal water pollution regulations instituted by the EPA have caused states to incur large expenses without any federal monies to alleviate the costs. *Id.* This "unfunded mandates" legislation was one of the targets of the Republican candidates for the House of Representatives, as stated in their "Contract with America." *Id.* Some have argued that the "unfunded mandates" legislation "will restore state and local governments to their true places as partners in our federal system. . . ." *Id.* (quoting Rep. William F. Clinger, Jr.).

202. REPORT OF THE JOINT LEGISLATIVE AUDIT AND REVIEW COMMISSION, Review of Virginia's Administrative Process Act, H. Doc. No. 51, at 91-97 (1993) [hereinafter JLARC REPORT].

203. *Id.* at 90.

er, only forty-seven percent of those surveyed agreed that "judicial review, as implemented in Virginia provides a high degree of protection to the public from potentially arbitrary or capricious agency case decisions."²⁰⁴ The JLARC Report proposed several changes to the state water control law and VAPA to reduce restrictions on standing to challenge water and air permits issued by the state.

The JLARC Report proposed that VAPA amended to clarify when the basic law precludes VAPA.²⁰⁵ For instance, VAPA states that its provisions "[do] not apply to any agency action which (i) is placed beyond the control of the courts by constitutional or statutory provisions expressly precluding court review."²⁰⁶ The water control law states that "[a]ny owner aggrieved by a final decision of the Board . . . is entitled to judicial review thereof in accordance with the provisions of the [VAPA]."²⁰⁷ As the JLARC Report points out, the words in the water control law do not "expressly preclude" the VAPA, but rather incorporates the statute.²⁰⁸ However, the Virginia state courts have held that the water control law precludes judicial review under VAPA.²⁰⁹ The JLARC Report proposed that VAPA be amended to ensure that VAPA judicial review provisions are only excluded when the General Assembly expressly states that VAPA is superseded by the basic law.²¹⁰

The Commission recommended that the General Assembly change the word "owner" to "person" aggrieved in the state

204. *Id.*

205. *Id.* at 92-93.

206. VA. CODE ANN. § 9-6.14:15 (Michie 1993).

207. VA. CODE ANN. § 62.1-44.29 (Michie 1992).

208. JLARC REPORT, *supra* note 202, at 93.

209. *See, e.g.,* Town of Fries v. State Water Control Bd., 409 S.E.2d 634 (Va. Ct. App. 1991); Environmental Defense Fund v. Virginia State Water Control Bd., 404 S.E.2d 728 (Va. Ct. App. 1991).

210. JLARC REPORT, *supra* note 202 at 94. The report gave the following explanation for this proposal:

As a matter of policy, access to judicial review could be considered a fundamental check against unlawful agency actions. Therefore, it may be desirable to provide clearly and consistently in VAPA that agency basic law can only restrict judicial review of VAPA agency actions where that intent is explicitly stated in the basic law, and cannot do so by implication.

Id.

water control law.²¹¹ Furthermore, the Commission recommended that the word "aggrieved" be defined to include both "imminent injury" and "non-economic injury."²¹² These two changes, taken together, would clarify and expand the holding of *Virginia Beach Beautification Commission v. Board of Zoning Appeals*.²¹³ According to the report, these changes would allow persons substantially affected by the issuance of a water or air permit to challenge the issuance of that permit.²¹⁴

Finally, the Commission recommended that the General Assembly grant standing for persons to challenge agency actions when those persons participate in the public comment process.²¹⁵ This requirement would grant citizens standing independent of whether they are injured by agency action. This requirement would emulate the standing approach taken by the Clean Air Act and EPA regulations.²¹⁶

The proposals in the JLARC Report would alleviate the current problems with standing to challenge VPDES permits in Virginia. These changes would broaden the class of potential plaintiffs by including more persons who can challenge agency action. Also, the amended meaning of the word "aggrieved" would permit a person who received a non-pecuniary or imminent injury to redress that injury. Furthermore, representative citizen groups who provide public comment would be able to gain standing to challenge agency actions. These changes would help ensure that citizens would have "recourse for inequities and injuries resulting from unlawful agency actions."²¹⁷

211. *Id.* at 95 (citing VA. CODE ANN. §62.1-44.29 (Michie 1992)).

212. *Id.* at 95-96.

213. 344 S.E.2d 899 (Va. 1986); *JLARC Report, supra* note 202, at 95.

214. JLARC REPORT, *supra* note 202, at 96. The JLARC Report lists several illustrations of persons who presently would not be able to challenge water and air permits issued by Virginia but would be able to challenge the permits with these proposed changes. Those illustrations include "parents of children who attend a school immediately downwind' from a toxic polluter;" "a 'municipality which takes its drinking water immediately downstream' from a river contaminated by discharges;" "an 'asthmatic who suffers health effects' from air pollution;" and "recreational users (hikers, campers, fishermen)' of a park near the discharge facility." *Id.*

215. *Id.* at 96-97.

216. *Id.*

217. *Id.* at 90.

C. *Withdrawal*

Withdrawal of a state water program by the EPA constitutes a drastic measure. "Many of the same forces that lead to eventual state program approvals create formidable obstacles to takebacks of authority. The procedures for withdrawal of state programs would be suitable for the Nuremburg trials, and will be invoked only upon epochal occasions."²¹⁸ Because of the disruptive and demeaning nature of such an action, the EPA and state governments typically try to avoid such an outcome to preserve peaceful coexistence of the state and federal governments.²¹⁹

Although withdrawal appears to be unlikely in light of the prevailing regulatory and political climate, the *CBF Petition* illustrates how a petition for withdrawal can produce positive results. The Chesapeake Bay Foundation recently received a letter from the EPA's Region III Office stating that the EPA was taking specific actions while it reviewed CBF's withdrawal petition.²²⁰ The letter states that the EPA has drafted a proposed rule to address the judicial standing requirements that apply to state water programs which will soon be published.²²¹ The Region III Office is also revising its oversight approach to evaluate Virginia's NPDES permitting program.²²² Finally, the Region III Office stated that it wanted to ensure meaningful opportunities for the public to "follow up on major comments on proposed permits submitted during the public notice period."²²³ To meet this goal, the Region III Office plans to "establish a process under which it will review any proposed permit where a significant comment has been submitted and a member of the public requests EPA to follow-up on that comment."²²⁴ This

218. RODGERS, *supra* note 18, at 367-68 (footnote omitted).

219. *See id.* at 368.

220. Letter from Robert Perciasepe, EPA Assistant Administrator & Peter H. Kostmayer, EPA Regional Administrator, to William C. Baker, President, Chesapeake Bay Foundation (Jan. 24, 1995) (on file with the *University of Richmond Law Review*) [hereinafter EPA Letter].

221. *Id.* at 1.

222. *Id.* at 2.

223. *Id.*

224. *Id.* The Region III Office plans to take this action in accordance with Section III8(d) of the current Memorandum of Understanding between EPA and Virginia. *Id.* For a discussion of Virginia's Memorandum of Understanding with EPA, see *supra*

approach will provide an additional forum in which interested persons can "[raise] and [address] permit concerns until the standing issue is resolved."²²⁵

The Region III Office's initial approach will not necessarily give Virginia citizens standing to challenge VPDES permits.²²⁶ However, these approaches create a second level of review upon which SWCB actions, theoretically, will be scrutinized by a third party who will be responsive to public comments. Also, as the EPA continues to review the *CBF Petition*, the EPA will be collecting evidence and gaining an informed understanding of the VPDES program. This information will help the EPA make final determination on the withdrawal petition, and may lead to discussions with the state as to the efficacy of its restrictions on citizen standing. These actions cannot replace the broad federal standing provisions citizens would enjoy if the EPA withdrew Virginia's permitting authority. However, discussions between EPA and Virginia may preserve the state/federal relationship while eventually giving Virginia's citizens broader rights to challenge VPDES permits in state courts.

VI. CONCLUSION

Because of the federalism model envisioned by Congress under the Clean Water Act, Virginia has been successful in keeping non-permit applicants from seeking judicial review of VPDES permits. Virginia's restrictive standing requirements contradict the broad federal standing provisions. However, the federal courts addressing this issue have generally held that state-issued permits are not reviewable in federal court.

Congress could amend the Clean Water Act to require states to grant standing in state courts to citizens seeking review of state agency decisions to issue or deny an NPDES permit. However, this proposal is not likely to occur in light of the present political climate. Additionally, the EPA could grant the Chesa-

part II.C.3.

225. EPA Letter, *supra* note 220, at 2.

226. This assumes that the EPA will not veto VPDES permits on a regular basis. If the EPA vetos a VPDES permit, this action would convey standing on "any interested person" as defined by the CWA. See *supra* part III.A. See also *supra* part IV.A.

peake Bay Foundation's petition to withdraw Virginia's permitting authority. Although the petition has received some initial successes, the EPA is not likely to do so.

The best solution to this problem lies within the grasp of the General Assembly. In order for Virginia's citizens to gain access to Virginia state courts, the General Assembly must amend the water control law to expand the present standing requirements. As a matter of policy, this change is desirable because it allows citizens to protect their own rights against unlawful agency actions. Without this right, Virginia's citizens will continue to be foreclosed from protecting their health and property because of their inability to gain standing to challenge VPDES permits.

D. Brennen Keene