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# Citizen Litigants Citizen Regulators: Four Cases Where Citizen Suits Drove Development of Clean Water Law

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# Citizen Litigants Citizen Regulators: Four Cases Where Citizen Suits Drove Development of Clean Water Law

**Karl S. Coplan\***

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## I. INTRODUCTION

One of the key innovations of the 1970s regulatory environmental revolution was the provision for citizen enforcement of regulatory standards. This innovation upset the previous bipolar regulatory model, which was a two-way negotiation between the regulated industries and the often captive regulatory agencies. By removing agency enforcement discretion as a means of underenforcing statutory norms, the citizen suit brought a new constituency to the regulatory bargaining table. The citizen suit had the intended effect of implementing a regime of full enforcement of the new environmental norms.

But the revolutionary effect of the newly-minted citizen suit was not limited to full enforcement of environmental norms. By allowing environmental interests to bypass the agency regulatory process and proceed directly to court to enforce statutory standards, the citizen suit allowed citizens to play a primary role in the development of environmental jurisprudence. The citizen suit bypasses the administrative rule-making process and resulting judicial deference to agency interpretations. In a radical shift from the classic administrative law model, where the responsible agency answered questions of first impression and judicial review of its answers was highly deferential, the citizen suit provided nongovernmental organizations the opportunity to develop their own interpretations of the environmental norms and test these interpretations in enforcement actions in the courts as a matter of first impression. Citizen enforcers thereby necessarily took on the role of citizen regulators as well, developing interpretations of statutory standards and enforcing these citizen-generated interpretations directly against violators in front of judges untainted by regulatory accommodations negotiated in a prior rule-making process.

This Article will examine the role of citizen enforcement litigation in the development of the Clean Water Act (“CWA”) jurisprudence and in the implementation of the CWA regulatory scheme. This Article will focus on four examples where citizen enforcement litigation under the CWA had the effect of initiating the regulatory process, drawing responses from both the Environmental Protection Agency (“EPA”) and Congress. These case studies will include enforcement litigation brought to apply underenforced CWA regulation of sport shooting ranges, land application of Confined Animal Feed Operations (“CAFO”) wastes, pesticide application, and water transfers.

Part II of this Article explores the origins and experience of the CWA citizen suit provision, with a particular focus on the factors which made the CWA citizen suit a more successful enforcement vehicle than its siblings under other environmental statutes such as the Clean Air Act.

Part III of this Article describes the fundamental change in the structure of the regulatory state effected by the availability of the citizen enforcement remedy under the citizen suit. Part III further discusses the change effected through the citizen suit's elimination of an agency's option of interpreting a statute through nonenforcement and the ultimate disruption of the bilateral agency-industry dynamic. Part IV of this Article examines the four case studies where citizen enforcement in the face of agency nonenforcement had the effect of driving the regulatory agenda. Part V of this Article seeks to assess the impact these four citizen initiatives had on the overall development of CWA law, and the pluralistic regulatory dynamic between EPA, regulated industries, Congress, and environmental interests.

## II. BACKGROUND AND EXPERIENCE OF THE CLEAN WATER ACT CITIZEN SUIT: NOT FIRST, BUT FOREMOST

### *A. Origins of the Environmental Citizen Suit*

The CWA citizen suit was not the first environmental citizen suit to be enacted by Congress. That honor goes to the Clean Air Act, which implemented the first environmental citizen suit provision in 1970.<sup>1</sup> The Clean Air Act citizen suit was itself an innovation. Private remedies for statutory violations had long been a staple of federal legislation, from the nineteenth-century Clayton Act<sup>2</sup> and Section 1983 of the Civil Rights Act of 1871<sup>3</sup> right up through more recent consumer protection statutes.<sup>4</sup> However, the new environmental citizen suit was the first statutory remedy that empowered so-called "private attorneys general"<sup>5</sup> to litigate personal interests in environmental values that went beyond traditional common law interests in damages remedies and protection of person and

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1. Clean Air Act § 304, 42 U.S.C. § 7604 (2012); Pub. L. 91-604 § 12(a) (1970).

2. Clayton Antitrust Act, 15 U.S.C. §§ 15, 26 (2012); Pub. L. 63-212 §§ 4, 16 (1914).

3. Civil Rights Act of 1871, 42 U.S.C. § 1983 (2012).

4. Consumer Product Safety Act § 24, 15 U.S.C. § 2073 (2012).

5. The term "private attorneys general" was first used by Judge Jerome Frank to refer to private litigants seeking to enforce the public interest by compelling government agencies to comply with congressional directives. *Associated Indus. v. Ickes*, 134 F.2d 694 (2d Cir. 1943).

property.<sup>6</sup> The Clean Air Act citizen suit was an outgrowth of the successful initiative by Professor Joseph Sax, then at the University of Michigan Law School, to incorporate a citizen's right to litigate to protect environmental and public trust resources into the Michigan Environmental Protection Act of 1969.<sup>7</sup> The Senate then incorporated this citizen enforcement idea into its version of the 1970 Clean Air Act.<sup>8</sup> Although the initial Senate version of the citizen suit would have allowed citizens to sue EPA to compel the agency to bring enforcement proceedings against violators, the final 1970 Clean Air Act that emerged from the Conference Committee provided for a direct citizen suit against violators to compel compliance, and it allowed a suit against the agency only in the case of its failure to perform a nondiscretionary duty.<sup>9</sup> Proponents of the citizen enforcement suit initially pointed to lax environmental enforcement by government agencies to justify inclusion of a citizen suit in the landmark air legislation,<sup>10</sup> but later shifted their rationale to point to the efficiencies of supplementing limited government enforcement resources.<sup>11</sup> The federal environmental citizen suit thus had its origins in a desire for full enforcement of environmental standards, untempered by prior traditions of agency prosecutorial discretion or allocation of resources.

The Clean Air Act accordingly provided for an enforcement action directly against the violator of any emissions standard or limitation (broadly defined) by "any person."<sup>12</sup> The availability of the citizen remedy was conditioned only on the provision of prior notice to the violator and enforcement agencies, and the failure of government agencies to enforce.<sup>13</sup>

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6. See generally Louis Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968).

7. For a history of the origins of the environmental citizen suit in the Michigan Environmental Protection Act, see generally MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS Ch. 1 (1991); see also JEFFREY G. MILLER, CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS (1987).

8. MILLER, *supra* note 7, at 4 n.6 (citing ENVTL. POLICY DIV., CONG. RESEARCH SERV., A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970, at 226 (1970)).

9. Clean Air Act Amendments of 1970, Pub. L. No. 91-604 § 304(a), 84 Stat. 1706 (1970).

10. S. REP. NO. 91-1196, at 36-39 (1970).

11. See ENVTL. POLICY DIV., CONG. RESEARCH SERV., A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970, at 277, 280-81, 355-57 (1970), *reprinted in* NRDC v. Train, 510 F.2d 692, 727-30 (D.C. Cir. 1974).

12. 42 U.S.C. § 7604(a) (2012).

13. *Id.* § 7604(b).

When Congress enacted the Federal Water Pollution Control Act Amendments of 1972, it incorporated and slightly modified the Clean Air Act version of the citizen suit. The CWA Citizen suit provides:

(a) Authorization; jurisdiction

Except as provided in [S]ubsection (b) of this section and [S]ection 1319 (g)(6) of this title, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.<sup>14</sup>

Like the Clean Air Act, the CWA citizen suit provision originally authorized direct citizen enforcement against violators of a broadly defined set of “effluent standard[s] or limitation[s].”<sup>15</sup> But, incorporating the Supreme Court’s recent recognition of constitutional standing on the part of affected individuals to enforce aesthetic, recreational and environmental interests in *Sierra Club v. Morton*,<sup>16</sup> the CWA limited its citizen suit provision to “any citizen,” defined as “a person or persons having an interest which is or may be adversely affected.”<sup>17</sup>

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14. 33 U.S.C. § 1365 (2012).

15. Compare *id.*, with 42 U.S.C. § 7604(a)(1) (authorizing citizen suits against any person for an alleged violation of any “emission standard or limitation”). Section 502(11) of the Clean Water Act defines an “effluent limitation” to mean “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). However, for the purposes of the citizen suit provision, Section 505(f) defines an enforceable “effluent standard or limitation” more broadly to include violations of the prohibition against unpermitted discharges in Section 301(a) of the Act, as well as violations of conditions in permits issued under Section 402 of the Act, and other violations in addition to violations of restrictions on rates and concentrations of pollutants. *Id.* § 1365(f).

16. *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972) (holding that “the interest alleged to have been injured may reflect aesthetic, conservational, and recreational as well as economic values.”) (internal quotations omitted).

17. 33 U.S.C. § 1365(g). “[P]erson” is further defined by the Clean Water Act to include associations, corporations, and States, among other entities. *Id.* § 1362(5).

The direct-enforcement citizen suit provisions of both the Clean Air Act and CWA turned out to be something of a sleeper provision. Relatively few citizen enforcement suits<sup>18</sup> were brought in the early years of the Clean Air Act and CWA.<sup>19</sup> But when citizen enforcement litigation did catch on, toward the end of the 1980s, citizen enforcement of the CWA far outstripped citizen enforcement of its older Clean Air Act sibling, both in terms of sheer number of suits and effectiveness.<sup>20</sup> Not only did the CWA citizen suit provision have its intended effect of implementing more comprehensive enforcement, but by bypassing the traditional model of agency interpretation through enforcement discretion, the CWA upset the bilateral model of regulation and fundamentally altered the dynamic between executive agencies, Congress, regulated entities, and the courts in CWA implementation and interpretation.

### *B. Factors Favoring Clean Water Act Citizen Suit*

More citizen enforcement cases have been brought under the CWA than under any other environmental statute.<sup>21</sup> This has made the citizen suit a unique force both in CWA enforcement and in CWA interpretation. There are several reasons for the relative popularity of the CWA citizen suit. These factors include the absoluteness of the CWA permitting requirement, the relative ease of proving CWA violations, and the relative ease of organizing waterbody-based plaintiff organizations.

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18. I use “citizen enforcement suits” to mean direct enforcement suits against violators, in contradistinction to the “nondiscretionary duty” suits against the EPA also authorized. See *Id.* § 1365(a)(2).

19. See MILLER, *supra* note 7, at 12–14.

20. See James R. May, *Now More than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 7–8, 30–32 (2003); David R. Hodas, *Enforcement of Environmental Law in A Triangular Federal System: Can Three Not Be A Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?* 54 MD. L. REV. 1552, 1572 (1995).

21. See Martin A. McCrory, *Standing in the Ever-Changing Stream: The Clean Water Act, Article III Standing, and Post-Compliance Adjudication*, 20 STAN. ENVTL. L.J. 73, 75–76 (2001) (“Historically, there have been more citizen suits filed pursuant to the CWA than any other environmental statute.”); Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L & POL’Y F. 39 (2001); Adeeb Fadil, *Citizen Suits Against Polluters: Picking Up the Pace*, 9 HARV. ENVTL. L. REV. 23, 66 (1985).



### *1. Clean Water Act's Zero-Discharge Standard for Permitting*

The CWA famously incorporated a zero-discharge goal into its statement of legislative purposes in CWA Section 101: “[I]t is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985.” This ambitious and so far unrealized goal was a bold statement of Congress’s commitment to addressing the problem of water pollution,<sup>22</sup> and it incorporated the environmental ethic underlying the 1972 legislation that “[n]o-one has a right to pollute.”<sup>23</sup> As a statement of legislative purpose, the Section 101 zero-discharge goal is not enforceable in the Section 505 citizen suit, which is limited to violations of defined “effluent standards or limitations.”<sup>24</sup>

Nevertheless, the CWA does in fact contain a citizen-enforceable zero-discharge standard: the standard for the permitting requirement under the National Pollutant Discharge Elimination System (“NPDES”) is based on a zero-discharge standard. That is, a point source discharge of water pollutants other than a zero discharge requires a permit. Section 301 of the Act provides that “[e]xcept as in compliance with this section and [permitting requirements under] [S]ections . . . 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.”<sup>25</sup> Section 505, the CWA citizen suit provision, specifically defines the “effluent standards or limitations” enforceable by citizens to include any violation of Section 301, so the prohibition against unpermitted discharges is unambiguously within the ambit of the citizen enforcement

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22. See Bradley C. Bobertz, *The Tools of Prevention: Opportunities for Promoting Pollution Prevention Under Federal Environmental Legislation*, 12 VA. ENVTL. L.J. 1, 3 (1992) (“Immersed in the complexities of clean water regulation, one can too easily forget a simple fact: The Clean Water Act demands nothing short of eliminating the discharge of pollutants into the nation’s waters.”); Roger Flynn, *New Life for Impaired Waters: Realizing the Goal to “Restore” the Nation’s Waters Under the Clean Water Act*, 10 WYO. L. REV. 35, 38 (2010) (“Although these lofty goals were never achieved, the passage of the CWA was a “bold and sweeping legislative initiative” protecting water quality across the country.”); Michael P. Healy, *Still Dirty After Twenty-Five Years: Water Quality Standard Enforcement and the Availability of Citizen Suits*, 24 ECOLOGY L.Q. 393, 442 (1997) (“These goals reflect the Act’s concern with ensuring healthful water quality and articulate an environmental protection purpose . . . [that] is entirely consistent with permitting direct citizen suit enforcement.”); Hodas, *supra* note 20, at 1555–56 (“Congress . . . recognized that government enforcement alone would not be sufficient to insure that the[se] goals were met. It therefore extended its allocation of enforcement responsibility directly to the citizens of the United States.”).

23. S. REP. NO. 92-414, at 42 (1972), reprinted in CONG. RESEARCH SERV., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1426 (1973) [hereinafter 1972 LEGISLATIVE HISTORY].

24. 33 U.S.C. § 1365(a), (f) (2006).

25. *Id.* § 1311(a).

suit.<sup>26</sup> Section 502 of the Act defines the “discharge of a pollutant” to mean “any addition of any pollutant to navigable waters from any point source.”<sup>27</sup> The phrase “any addition of any pollutant” makes clear that the permitting requirement applies to all point source discharges of water pollution, no matter how small.<sup>28</sup>

Thus, the CWA imposes no threshold for the permitting requirement. This lack of a permitting threshold stands in marked contrast to the Clean Air Act, which generally does not require review or permits for air discharges less than 100 tons per year of any given pollutant.<sup>29</sup> It is thus no surprise that the CWA citizen suit has led to many more enforcement actions against un-permitted pollution than the Clean Air Act.

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26. *Id.* § 1365(f).

27. *Id.* § 1362(12)(a). “Navigable waters” subject to the prohibition against unpermitted discharges are not limited to waters that are navigable in fact, as “navigable waters” is defined to include all “waters of the United States.” *Id.* at 7. The precise scope of waters subject to Clean Water Act jurisdiction continues to be the subject of disagreement. *See Rapanos v. United States*, 547 U.S. 715, 716–17, 759 (2006). Writing in a plurality opinion for a deeply divided Court in *Rapanos*, Justice Scalia held that navigable waters consist only of “relatively permanent bodies of water . . . with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right,” *id.* at 733, 742, but Justice Kennedy’s concurring opinion that a water body is considered navigable for CWA purposes only if it possesses a “significant nexus” to waters that “are or were navigable in fact or that could reasonably be so made”, *id.* at 759 (Kennedy, J., concurring), has since been most commonly interpreted as the controlling test. *See N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999–1000 (9th Cir. 2007); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724–25 (7th Cir. 2006); *United States v. Robison*, 505 F.3d 1208, 1221–22 (11th Cir. 2007). The First Circuit has held that either the significant nexus test, or Justice Scalia’s “continuous surface connection” test can be used to establish federal jurisdiction over a water body for purposes of the CWA. *See United States v. Johnson*, 467 F.3d 56, 64–66 (1st Cir. 2006). For further discussion of this issue, *see Robin Kundis Craig, Justice Kennedy and Ecosystem Services: A Functional Approach to Clean Water Act Jurisdiction After Rapanos*, 38 ENVTL. L. 635 (2008); Jamie J. Janisch, *Scope of Federal Jurisdiction Under Section 404 of the Clean Water Act: Rethinking “Navigable Waters” After Rapanos v. United States*, 11 U. DENV. WATER L. REV. 91 (2007); Bradford C. Mank, *Implementing Rapanos—Will Justice Kennedy’s Significant Nexus Test Provide A Workable Standard for Lower Courts, Regulators, and Developers?*, 40 IND. L. REV. 291 (2007); Jenny L. Routheaux, *Western Wetlands in Jeopardy After Rapanos v. United States: Congressional Action Needed to Define “Navigable Waters” Under the Clean Water Act*, 8 NEV. L.J. 1045 (2008).

28. *See Rybachek v. EPA*, 904 F.2d 1276, 1298 (9th Cir. 1990) (upholding zero-discharge requirement in CWA regulations for placer mining); *Tex. Oil & Gas Ass’n v. EPA*, 161 F.3d 923, 933 (5th Cir. 1998) (upholding zero-discharge limit for sand in produced water and drilling wastes from coastal oil and gas wells).

29. *See* 42 U.S.C. §§ 7479(1), 7602(j) (2012).

## *2. Ease of Proof of Clean Water Act Violations*

This general ease of proof is another factor which makes the CWA citizen suit a much more attractive option than its Clean Air Act sibling. It is much easier for a citizens group to identify, and prove, a discharge of water pollutants of any amount than it is for a similar group to assess whether a given source of air pollutants adds up to 100 tons of a particular air pollutant in a year. It is relatively easy to gather proof of a water discharge, and laboratory water analyses are readily available and relatively inexpensive. Water contamination is often visible to the naked eye in the form of turbidity or color variation. Lab tests for water quality are readily available throughout the country, as public health departments routinely make laboratory facilities available for testing drinking water wells. Proving that a source of air pollution discharges more than 100 tons of a particular pollutant per year requires expensive expert analysis and modeling to determine the constituents and concentrations of the air emissions, their rate of discharge, and rates of facility operation.

Another factor making water pollution cases easier to prove than air cases is the fact that, since navigable streams are public trust resources,<sup>30</sup> access to water discharge pipes can often be accomplished without trespassing on private property. This is a huge advantage for water monitoring as compared to air monitoring. A concerned member of the public can often walk (or paddle) up to a water pollution discharge to fill a jar with a sample. Similar citizen monitoring of a smokestack at a power plant or industrial facility is simply impossible.

## *3. NPDES Permit Monitoring and Reporting Requirements*

In addition to the ease of proving that an un-permitted outfall contains “any pollutant” in any amount, compliance by water dischargers with permits is similarly easy for members of the public to assess. NPDES permits require self-monitoring and reporting for all but the smallest water pollution dischargers.<sup>31</sup> These “discharge monitoring reports,” or DMRs, are filed with both state environmental agencies and EPA, making them subject to disclosure under freedom of information

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30. See *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Prot.*, 130 S. Ct. 2592, 2598 (2010); *Montana v. United States*, 450 U.S. 544, 551–53 (1981); *Shively v. Bowlby*, 152 U.S. 1, 16 (1894).

31. 40 C.F.R. § 122.41(j), (l) (2013).

laws at both state and federal levels.<sup>32</sup> Some compliance information is available on EPA and state agency websites.<sup>33</sup>

Courts have held that discharge monitoring reports, filed by the NPDES permittee, admitting violations are admissible as proof of violation of the CWA.<sup>34</sup> Many citizen enforcement actions require no more than an open records request, a visit to the state environmental office to review DMR records, and a complaint followed swiftly by a summary judgment motion based on the defendant's own written, signed reports.<sup>35</sup> Until the implementation of Title V permits under the 1990 Amendments to the Clean Air Act, there was no comparable monitoring and reporting requirement for air permittees. Even with the implementation of Title V, there has not been a comparable experience of monitoring and self-reporting of violations.

#### *4. Ease of Organizing Waterbody Organizations*

As Justice Douglas eloquently observed in his dissenting opinion in *Sierra Club v. Morton*,

[t]he river, for example, is the living symbol of all the life it sustains or nourishes—fish, aquatic insects, water ouzels, otter, fisher, deer,

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32. See, e.g., Freedom of Information Act, 5 U.S.C. § 552 (2006); N.Y. PUB. OFF. LAW §§ 84–90 (McKinney's 1988 & Supp. 1995). Philip H. Gitlen, *Private Attorneys General: Let's Do It Right*, 2 ALB. L. ENVTL. OUTLOOK 17 (1995).

33. See, e.g., EPA, *Enforcement & Compliance History Online (ECHO)*, EPA-ECHO.GOV, <http://www.epa-echo.gov/echo/index.html> (last visited Sept. 30, 2013); Ill. Env'tl. Protection Agency, *DMR Search*, EPA.ILLINOIS.GOV, <http://dataservices.epa.illinois.gov/dmrdata/dmrsearch.aspx> (last visited Sept. 30, 2013).

34. See, e.g., *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 157 (4th Cir. 2000); *Pub. Interest Research Group of N.J., Inc. v. Hercules, Inc.*, 50 F.3d 1239, 1252 (3d Cir. 1995); *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1115 (4th Cir. 1988), *cert. denied*, 491 U.S. 904 (1989).

35. See Richard E. Schwartz & David P. Hackett, *Citizen Suits Against Private Industry Under the Clean Water Act*, 17 NAT. RES. LAW. 327, 328, 335–36 (1984) (stating that “most of the recent notices of intent to sue have been submitted by environmental organizations which reviewed discharge monitoring reports (DMRs) to identify noncomplying companies,” and that, “a citizen plaintiff may establish a prima facie case for liability based solely on the DMRs prepared by the defendant discharger.”); James L. Thompson, *Citizen Suits and Civil Penalties Under the Clean Water Act*, 85 MICH. L. REV. 1656, 1658 (1987) (explaining that in a typical citizen suit, “the evidence used to prove . . . violations comes from the polluter's discharge monitoring reports (DMRs), which the plaintiff can review in order to determine whether the case is winnable before filing suit.”); see also Robert F. Kennedy, Jr. & Steven P. Solow, *Environmental Litigation As Clinical Education: A Case Study*, 8 J. ENVTL. L. & LITIG. 319, 324 (1994).

elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water—whether it be a fisherman, a canoeist, a zoologist, or a logger—must be able to speak for the values which the river represents and which are threatened with destruction.<sup>36</sup>

Justice Douglas's key insight, in arguing for broader environmental standing than the majority was willing to accept, is that people form "meaningful relationships" with water bodies in ways that are uniquely different from their relationship with many other environmental resources. Anglers, canoeists, swimmers and boaters all form a sort of identity with their habitual waterways, giving rise to a sense of ownership in the water as well as a sense of outrage to those who would defile the water. This sense of connection to particular water bodies makes it relatively easy to organize water protection advocacy organizations<sup>37</sup> and to motivate citizens to give time and financial support to citizen enforcement efforts to protect a water body. Combined with the relative ease of proof of the CWA case and the availability of attorney's fees to prevailing plaintiffs,<sup>38</sup> the ease of organizing to protect water resources synergizes with low-risk contingency fees for lawyers to create an effective, self-funded citizen enforcement mechanism.

While the Clean Air Act citizen suit also provides for attorney's fees, it enjoys no similar natural organizing principle for advocacy groups—people simply do not personally identify with their airshed the way they do with their local bay, lake, or river. This factor also helps explain why the CWA citizen suit has been invoked so much more frequently than the Air Act citizen suit.

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36. *Sierra Club v. Morton*, 405 U.S. 727, 743 (1972) (Douglas, J., dissenting).

37. See National Parks Services, *National Water Trails System*, NPS.GOV, <http://www.nps.gov/WaterTrails/home/about> (last visited Sept. 26, 2012) (discussing efforts of the National Park Service to "connect Americans to the nation's waterways" in order to "strengthen the conservation and restoration of these waterways through the mutual support and cooperation of federal, state, local, and nonprofit entities"); Marc Yaggi, *Go Jump in a Lake!*, ECOWATCH.ORG (Sept. 30, 2013), <http://ecowatch.org/2012/go-jump-in-a-lake-2/> ("[T]he more we use our waterways, the more we will understand, and value, the importance of clean water to our communities. Access to clean swimmable waters gives us a day of recreation without fear of harmful pollutants, provides a sense of place and inspires us to act as stewards of our waterways.").

38. 33 U.S.C. § 1365(d) (2012).

### 5. *Relative Ease of Establishing Standing.*

Closely related to the political ease of organizing communities around water issues is the relative ease of establishing legal standing to sue in connection with water quality. The Article III standing doctrine requires that plaintiffs be able to establish injury-in-fact, causation, and redressability in order to have standing to bring litigation, including a citizen suit. Of these requirements, the requirement of “injury in fact” has often proven problematic for environmental plaintiffs, as the Supreme Court has rejected injuries found to be too “abstract” even while it has recognized injuries to recreational and aesthetic interests. Thus, while the Supreme Court long ago recognized in *Sierra Club v. Morton*<sup>39</sup> that injuries to recreational and aesthetic interests would support standing for environmental plaintiffs, the Court has rejected claimed aesthetic and professional interests in the well-being of endangered species as being insufficiently concrete to establish “injury in fact.”<sup>40</sup> On the other hand, the Supreme Court has been receptive to plaintiffs who allege a tangible injury based on the regular use of a water body for recreational purposes. Thus, in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,<sup>41</sup> the Court found sufficient injury on the part of plaintiffs who alleged that they had fished and boated on a river in the past and would do so in the future were the river not polluted. The Court reached this holding despite a specific finding by the trial court that the defendant’s water pollution had not caused any perceptible environmental harm. The relative liberalness of this recognition of standing for water plaintiffs contrasts with the difficulty citizen plaintiffs have had in establishing standing to protect endangered species,<sup>42</sup> groundwater,<sup>43</sup> and airsheds,<sup>44</sup> because their injuries were considered too abstract or generalized.

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39. *Sierra Club*, 405 U.S. 727.

40. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

41. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000).

42. *Lujan*, 504 U.S. at 566–67.

43. *Am. Petroleum Inst. v. EPA*, 216 F.3d 50 (D.C. Cir. 1990) (rejecting environmental plaintiffs standing to challenge regulations allowing disposal of tank residues in landfills absent proof of actual contamination of groundwater in plaintiffs’ vicinity).

44. *See Ogden Projects, Inc. v. New Morgan Landfill Co.*, 911 F.Supp. 863 (E.D. Pa. 1996).

### III. STRUCTURAL CHANGES EFFECTED BY THE CLEAN WATER ACT CITIZEN SUIT

The CWA was revolutionary legislation in many ways—from its idealistic zero-discharge goal to its radical restructuring of federal-state authority to regulate water pollution discharges.<sup>45</sup> The citizen participation provisions of the Clean Air Act and CWA also effected a fundamental restructuring of the administrative state, upsetting the ossified, bipolar regulatory model in which all regulatory decisions were made by negotiations between regulators and the regulated industries. The CWA citizen participation provisions empowered organized environmental interests by giving them a seat at the negotiating table, and, even more fundamentally, stripped the regulatory agency of its formerly exclusive power to set the agenda for interpretation, implementation, and enforcement of statutory regulatory mandates.

#### *A. Disruption of the Bipolar Model of the Administrative State*

The traditional model of the administrative state, from its inception with nineteenth-century railroad rate regulation well through the mid-twentieth century implementation of the Administrative Procedure Act, has been described as a bipolar, or bilateral model.<sup>46</sup> Under this model, there are only two sides considered in the largely discretionary implementation of statutory regulatory mandates: that of the agency, which was presumed to represent the public interest, and that of the regulated entity, which asserts its economic and autonomy interests in freedom from regulation. In this model, the function of administrative

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45. See William L. Andreen, *Delegated Federalism Versus Devolution: Some Insights from the History of Water Pollution Control*, University of Alabama Public Law Research Paper No. 1452794, in PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION (William W. Buzbee ed., 2009); Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1242, 1243 (1995).

46. Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795, 824 (2005) (“The typical resource management agency uses regulatory and other administrative tools to allocate resources among client stakeholders and competing uses, often doling out valuable benefits while trying simultaneously to conserve the underlying resource. Relationships are bilateral between the agency and the regulated entity or client stakeholder.”); Mark Seidenfeld, *An Apology for Administrative Law in the Contracting State*, 28 FLA. ST. U. L. REV. 215, 220 (2000) (describing the traditional model of the administrative state as “bilateral in nature, with the two parties entitled to participate being the regulated entity—usually envisioned as a member of some industry—and the regulating agency.”)

procedures and judicial review of agency action was to protect the due process rights of regulated entities against administrative agencies compromising their property or liberty interests beyond the congressional grant of authority or without appropriate procedures.<sup>47</sup> Regulatory implementation in the bilateral model can be seen as negotiated compromise between regulator and regulated. Indeed, contemporary commentators noting the resurgence of this bilateral model of regulation have analyzed it in contractarian terms.<sup>48</sup>

By the 1960s, critical commentators noted the problem of “agency capture,” in which regulatory agencies become subject to the control of the industries that they were meant to regulate.<sup>49</sup> Agency capture resulted from various organic factors, including agency dependence on industry cooperation for successful implementation, agency dependence on industry for regulatory information gathering, agency avoidance of long-term adversarial relationships, and “revolving door” employment relationships between agency personnel and industry.<sup>50</sup> By the mid-1960s, courts and agencies had responded to this problem of agency capture by the recognition of expanded standing, first for economic competitors,<sup>51</sup> and later for organized stakeholder groups<sup>52</sup> representing the public interest in the processes of regulatory implementation and judicial review.<sup>53</sup>

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47. See Richard Stewart, *The Transformation of Administrative Law*, 88 HARV. L. REV. 1669, 1717–25 (1975).

48. See Seidenfeld, *supra* note 46; Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155 (2000).

49. See, e.g., Stewart, *supra* note 47, at 1713–15; Simon Lazarus & Joseph Onek, *The Regulators and the People*, 57 VA. L. REV. 1069 (1971); Arthur E. Bonfield, *Representation for the Poor in Federal Rulemaking*, 67 MICH. L. REV. 511 (1969); Roger C. Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525 (1972); Mary Gardner Jones, *Observations by Outgoing FTC Member Mary Gardner Jones on the Outlook for the FTC*, BNA ANTITRUST & TRADE REG. REP., No. 636, at D-3 (1973).

50. See generally Stewart, *supra* note 47, at 1713–15; Lazarus & Onek, *supra* note 49; Bonfield, *supra* note 49; Cramton, *supra* note 49.

51. See *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154 (1970).

52. See *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (“[A]n organization whose members are injured may represent those members in a proceeding for judicial review.”); *Scenic Hudson Pres. Conference v. Fed. Power Comm’n*, 354 F.2d 608, 617 (2d Cir. 1965) (“Representation of common interests by an organization such as Scenic Hudson serves to limit the number of those who might otherwise apply for intervention and serves to expedite the administrative process.”).

53. See generally Stewart, *supra* note 47, at 1742–47 (“‘Public interest’ advocates . . . espouse the position of important, widely-shared (and hence ‘public’) interests that assertedly have not heretofore received adequate representation in the process of agency decision.”); Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the*



The CWA citizen suit both reflected and amplified the trend away from the traditional bilateral model of administration. Reflecting the trend toward enhanced public stakeholder power in regulatory procedures, the CWA citizen suit (like the Clean Air Act citizen suit) specifically empowered any citizen to bring an action to compel EPA to perform any duty that is nondiscretionary.<sup>54</sup> While this “mandatory duty” citizen suit reflected the existing trend toward citizen participation in the regulatory process and the break from the bilateral model, it was not itself a revolutionary advance in public participation because the Administrative Procedure Act already gave citizens the right to compel agency action unlawfully withheld.<sup>55</sup> The citizen enforcement suit, on the other hand, radically expanded the evolving interruption of the bipolar regulatory model because it gave citizens not only the power to seek review of agency action and inaction, but also the power to preempt agency interpretation by nonenforcement. Judicial review of agencies’ interpretation of the law and the deference agencies received for these tools of implementation prior to the citizen suit fundamentally changed the administrative model.

### *B. Disruption of Judicial Deference to Agency Interpretation*

Consider the various interpretive tools available to an agency in the absence of a citizen enforcement suit, and the level of judicial deference afforded to each. An agency such as EPA has a range of tools to implement its interpretation of a statute such as the CWA, ranging from direct enforcement through agency interpretative regulations and guidance, right up to a policy of nonenforcement against particular categories of conduct. Each of these interpretive tools receives a unique form of judicial review and judicial deference to the agency interpretation.

#### *1. Interpretation through Direct Judicial Enforcement: No Deference*

Perhaps the most straightforward means for an agency to implement its interpretation of statutory requirements is to bring a direct

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*Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411, 414–16 (2000) (“In order to level the field of administrative confrontation, representatives of so-called public interest groups, acting on behalf of individuals for whom Congress purported to have enacted regulatory statutes, had to be given a similar ability to provide input to agencies in a manner that the agency was not free to ignore.”).

54. 33 U.S.C. § 1365(a) (2012).

55. 5 U.S.C. § 706(1) (2012).

enforcement action applying its interpretation, without any prior agency interpretive procedures such as guidance or regulations. The agency simply decides how it wishes to interpret the statute and brings (or refers to the Department of Justice) an action to enforce against a violator based on that interpretation. An example of this sort of interpretive implementation is the *United States v. Plaza Health Laboratories, Inc.*<sup>56</sup> case. In that case, the manager of a blood analysis laboratory was caught disposing of unneeded human blood samples and other medical waste by loading them in the trunk of his car, driving to the banks of the Hudson River, and disposing of the waste blood samples into the River by hand. The conduct presented the interpretive question of whether a human discarding pollutants by hand could be considered to be a “point source” subject to the permit requirements of the CWA.<sup>57</sup> The government brought a criminal enforcement action reflecting EPA’s interpretation of the term “point source” to include direct disposal by human beings.

When EPA or another agency seeks to implement an agency interpretation through direct enforcement, its interpretation receives no deference from the courts. Indeed, the Supreme Court has declared that no judicial deference is due “to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.”<sup>58</sup> Far from giving deference to EPA’s interpretation of the term “point source” to include human discharges, the Second Circuit in *Plaza Health* applied the criminal law doctrine of the “rule of lenity” to resolve ambiguities in the scope of the term “point source” against the government and in favor of the criminal defendant. Accordingly, the Second Circuit held that contrary to EPA’s interpretation (and at least for the purposes of a criminal CWA prosecution), a human being could not be a “point source” subject to regulation.

Thus, direct agency enforcement is one means to implement an agency interpretation of a statute such as the CWA, but such interpretations are subject to de novo review by the enforcement court and receive no deference unless supported by other agency interpretative tools such as guidance or regulations.

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56. *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643 (2d Cir. 1993).

57. The Clean Water Act Sections 301 and 402 require a permit for all point source discharges of pollutants to waters of the United States. *See* 33 U.S.C. §§ 1311, 1342. “Point source” is defined as any discrete and confined conveyance, and goes on to list examples of specific point sources covered by the permitting requirement. *Id.* § 1362(12).

58. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

## 2. *Informal Agency Interpretations and Guidance: Some Deference*

Given the ad hoc nature of interpretation through enforcement, as well as the lack of deference such interpretations receive, it is no wonder that EPA prefers to embody its statutory interpretations in some sort of agency policy statement of more generality than an enforcement action. EPA may issue guidance documents and counsel opinion letters reflecting EPA interpretive positions that fall short of notice-and-comment rule makings with the force of law.<sup>59</sup> Although such interpretations have at times been given substantial deference by courts,<sup>60</sup> the Supreme Court in *United States v. Mead*<sup>61</sup> established that only agency interpretations that have undergone more formal procedures, such as notice and comment rule making or adjudication, are entitled to the maximum *Chevron* deference. Under current law, informal agency interpretive guidance is entitled to “*Skidmore* deference”—a court will defer to the agency’s interpretation to the extent that it is persuasive, taking into account agency expertise and responsibility for administering the statute.<sup>62</sup>

Despite the relatively weak deference afforded to informal agency guidance, EPA may have some incentive to prefer guidance documents over notice and comment rule making. This is because agency guidance may defer, or even avoid, judicial review on ripeness grounds. Thus, EPA guidance documents directing states to implement water quality criteria have been held unripe for judicial review.<sup>63</sup> One court has suggested that water quality criteria standards do not become ripe for

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59. See, e.g., EPA, DRAFT GUIDANCE ON IDENTIFYING WATERS PROTECTED BY THE CLEAN WATER ACT (2011), available at [http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous\\_guidance\\_4-2011.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf); Final Water Guidance for the Great Lakes System, 60 Fed. Reg. 15,366 (Mar. 23, 1995) (to be codified at 40 C.F.R. §§ 9, 122–23, 131–32), available at <http://www.epa.gov/fedrgstr/EPA-WATER/1995/March/Day-23/pr-82DIR/pr-82.html>; EPA, AGENCY INTERPRETATION ON APPLICABILITY OF SECTION 402 OF THE CLEAN WATER ACT TO WATER TRANSFERS (2005), available at [http://www.epa.gov/npdespub/pubs/water\\_transfers.pdf](http://www.epa.gov/npdespub/pubs/water_transfers.pdf). See also *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000) (holding that EPA guidance document broadened scope of the underlying rule and was thus improper in absence of formal rulemaking procedures).

60. See, e.g., *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156 (DC Cir. 1982); *Nat’l Wildlife Fed’n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988).

61. *United States v. Mead Corp.*, 533 U.S. 218, 218 (2001).

62. See *id.* at 218–19 (2001) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944)).

63. See *Am. Paper Inst., Inc. v. EPA*, 882 F.2d 287 (7th Cir. 1989); *Am. Paper Inst., Inc. v. EPA*, 726 F. Supp. 1256 (S.D. Ala. 1989).

judicial review until incorporated into an enforceable permit.<sup>64</sup> More recently, even in light of suggestions by the Supreme Court to resolve ambiguities in the statutory definition of jurisdictional “waters of the United States” through rule making,<sup>65</sup> EPA and Corps of Engineers have thus far preferred to respond through guidance documents rather than rule making.<sup>66</sup> This is so despite the Supreme Court’s rejection of the existing regulations defining the scope of jurisdictional “waters of the United States” in *Rapanos v. United States*.<sup>67</sup>

### *3. Agency Rule Making and Adjudication: Strong Deference under Chevron*

The next rung up on the ladder of interpretive formality and judicial deference consists of notice-and-comment rule making or formal adjudication.<sup>68</sup> Such procedures enlist some level of adversarial public review and the considered judgment of the agency, and they are accordingly given the highest possible deference in judicial review. Under the *Chevron, U.S.A., Inc. v. NRDC* case, such interpretations are subject to review in a two-step process:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . . Rather, if the statute is silent or ambiguous with respect to this specific issue, the question for the court is whether the agency’s answer is based on a permissible interpretation of the statute.<sup>69</sup>

Under step one of this test, the court determines whether Congress has answered the specific question at issue, either through clear statutory text or based on traditional tools of statutory construction. If not, the

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64. See *NRDC v. EPA*, 16 F.3d 1395, 1406–07 (4th Cir. 1993).

65. See *Rapanos v. United States*, 547 U.S. 715, 726, 757–58, 782 (2006).

66. See EPA, DRAFT GUIDANCE ON IDENTIFYING WATERS PROTECTED BY THE CLEAN WATER ACT (2011), available at [http://www.epa.gov/tp/pdf/wous\\_guidance\\_4-2011.pdf](http://www.epa.gov/tp/pdf/wous_guidance_4-2011.pdf).

67. *Rapanos*, 547 U.S. 715 (2006).

68. Although notice and comment rule making is a more formal process than internal adoption of agency guidance without public procedures, notice and comment rule making is still considered “informal” rule making under the Administrative Procedure Act, unless it is accompanied by on-the-record fact-finding hearings. See Annotation, *Formal and Informal Rulemaking Distinguished*, 2 FED. PROC., L. ED. § 2:104 (2013).

69. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984).

agency interpretation is upheld so long as the interpretation is “permissible.” *Chevron* step two review is thus highly deferential. The question before the court is not whether the court would have arrived at the same legal interpretation as the agency; rather, the question is solely whether the agency’s interpretation is “permissible,” i.e., is not foreclosed by specific legislative language or intent. Given that specific congressional intent was eliminated in step one, *Chevron* step two review nearly always results in affirmation of the agency’s legal position.<sup>70</sup>

Agency authority to amend statutory norms through interpretive rule making is not absolute, however. Even under *Chevron* review, an agency may not adopt a regulation exempting conduct from regulation that falls within the plain letter of the statutory command. *NRDC v. Costle*<sup>71</sup> provides an early (pre-*Chevron*) unsuccessful example of an EPA attempt to narrow the scope of the CWA through interpretive rule making. EPA, in 1973, adopted regulations purporting to exempt from NPDES permitting requirements several categories of point source discharges, including silvicultural point sources, small confined animal feeding operations, and separate storm sewers.<sup>72</sup> In rejecting EPA’s attempt to narrow the scope of the CWA regulatory program through interpretive regulation, the D.C. Circuit noted the unique scope of the CWA’s mandates:

Under EPA’s interpretation the Administrator would have broad discretion to exempt large classes of point sources from any and all requirements of the FWPCA. This is a result the legislators did not intend. Rather they stressed that the FWPCA was a tough law that relied on explicit mandates to a degree uncommon in legislation of this type.<sup>73</sup>

*Costle* establishes the limits on EPA’s ability to amend the CWA through regulation. Although *Costle* was a pre-*Chevron* case that did not apply the two-step *Chevron* analysis, it limited EPA’s ability to countermand express congressional directions about the scope of the NPDES permitting program. Subsequent cases have similarly rebuffed EPA’s attempts to exempt point sources that were within the literal

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70. See Kristine Cordier Karnezis, Annotation, *Construction and Application of “Chevron Deference” to Administrative Action by United States Supreme Court*, 3 A.L.R. FED. 2d 25 (2005); Charles H. Koch, Jr., *Review of Policymaking and Statutory Interpretation Within the “Chevron Framework”*, 4 ADMIN. L. & PRAC. § 11:30 (3d ed.).

71. *NRDC v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977).

72. 40 C.F.R. § 125.4 (1975). See 38 Fed. Reg. 18,000, 18,000–04 (July. 5, 1973).

73. *Costle*, 568 F.2d at 1375.

meaning of the NPDES program from permitting requirements, such as pesticide application<sup>74</sup> and nonsewage vessel discharges.<sup>75</sup>

*4. Agency Nonenforcement:  
Ultimate Deference (Nonreviewable)*

At the opposite extreme from agency interpretation through enforcement is the possibility of agency interpretation through nonenforcement. Just as a decision to bring a direct enforcement action may reflect an agency's interpretation of the underlying statutory norm to prohibit the conduct in question, a decision not to enforce may reflect a decision by the agency that the underlying statutory norm does not—or should not—prohibit the underlying conduct.

Unlike interpretation through enforcement, which receives nondeferential judicial review, an agency determination not to enforce receives the most highly deferential judicial review possible: that is, no judicial review at all. In *Heckler v. Chaney*,<sup>76</sup> the Supreme Court declared that agency enforcement decisions are “committed to agency discretion by law” in the words of Section 701(a) of the Administrative Procedure Act,<sup>77</sup> and thus not subject to any form of judicial review. In *Heckler*, the Supreme Court rejected a challenge by death row inmates to the Food and Drug Administration's refusal to enforce drug approval requirements against the unapproved use of prescription drugs for execution by lethal injection. The Court reasoned that, in light of the strong tradition of respecting prosecutorial discretion, agency decisions to forgo enforcement should be presumed to be committed to agency discretion beyond judicial review, in the absence of clear congressional intent to establish binding guidelines for enforcement priorities. The Court noted that agencies lack resources to enforce against every conceivable violation of statutory requirements and recited several factors supporting a strong presumption of nonreviewability of agency nonenforcement decisions:

The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the

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74. *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927 (6th Cir. 2009). The issue of Clean Water Act regulation of pesticide application is discussed in greater detail *infra*.

75. *See* *Nw. Env'tl. Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008).

76. *Heckler v. Chaney*, 470 U.S. 821 (1985).

77. 5 U.S.C. § 701(a)(2) (2012).

particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.<sup>78</sup>

Significantly, this list of nonjudicially reviewable factors guiding agency enforcement discretion includes an agency's "overall policies." This suggests that enforcement discretion may be used to exempt from agency enforcement those violations deemed unimportant by agency "policy." In essence, under the *Heckler* model of unreviewable enforcement discretion, agencies can effectively amend statutory norms to permit, on "agency policy" grounds, conduct that a statutory regulatory scheme prohibits. Agencies can achieve this effective statutory amendment simply by adopting a policy of nonenforcement against particular categories of violators. To return to the *Costle* example of unsuccessful regulatory exemptions, the *Heckler* principle of nonreviewability of enforcement priorities would allow EPA to adopt a policy of nonenforcement against each of the categories it sought to exempt by regulation from NPDES permitting, effectively achieving the same result while avoiding judicial review.

Indeed, several courts have declared that EPA's enforcement decisions are beyond judicial review, just like the FDA's nonenforcement in *Heckler*, despite language in the CWA Section 309 providing that the Administrator "shall" commence an enforcement action in case of violations.<sup>79</sup> Nor is the adoption of such a policy of nonenforcement as a means of carrying out administration policy contrary to statutory command farfetched: in the 1980s, Reagan administration EPA Administrator Ann Gorsuch adopted a policy of nonenforcement of CERCLA, ultimately leading to congressional amendments strengthening the Act.<sup>80</sup>

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78. *Heckler*, 470 U.S. at 831-32.

79. *S. Pines Ass'n v. United States*, 912 F.2d 713 (4th Cir. 1990); *Hoffman Grp. v. EPA*, 902 F.2d 567 (7th Cir. 1990); *DuBois v. Thomas*, 820 F.2d 943 (8th Cir. 1987); *Sierra Club v. Train*, 557 F.2d 485 (5th Cir. 1977); *Caldwell v. Gurley Ref. Co.*, 533 F.Supp. 252 (E.D. Ark. 1982), *aff'd*, 755 F.2d 645 (8th Cir. 1985).

80. See James Sherman, *Altered States: The Article I Commerce Power and the Eleventh Amendment in Pennsylvania v. Union Gas*, 56 BROOKLYN L. REV. 1413, 1436 (1991) (citing H.R. REP. NO. 96-1016, pt. 1, at 18, *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120 ("Existing law is clearly inadequate to deal with this massive problem")); H.R. REP. NO. 99-253, pt. 1, at 55, *reprinted in* 1986 U.S.C.C.A.N. 2835, 2837. For a comprehensive discussion of more recent EPA efforts at deregulation through

In the administration of the CWA itself, after EPA's attempted regulatory exemptions for municipal stormwater systems was struck down in *Costle*, the agency adopted an explicit policy of nonenforcement of NPDES permitting requirements against municipalities, pending a final rule making for stormwater permitting.<sup>81</sup> This nonenforcement policy had the effect, at least as far as agency enforcement was concerned, to exempt stormwater discharges from statutory coverage under the NPDES program—exactly the result that the *Costle* decision forbade as an exercise of interpretive rule-making authority. And this nonenforcement policy is effectively exempt from judicial review under *Heckler*.<sup>82</sup> Another example of EPA statutory modification through nonenforcement is its consent agreement with animal feeding operations exempting them from prosecution for violations of the Clean Air Act and the Emergency Planning and Community Right-to-Know Act pending development of regulations.<sup>83</sup> This nonenforcement agreement was held to be judicially nonreviewable under *Heckler*.<sup>84</sup>

The implementation of the CWA technology-based Best Practicable Technology (“BPT”) standards lead to yet another variant of nonenforcement. Recognizing the statutory deadline for achievement of BPT by July 1, 1977, in the absence of timely effluent limitations guidelines on the part of EPA, EPA adopted the so-called Enforcement Compliance Schedule Letter (“ECSL”) program. In the ECSL program, EPA would issue final NPDES permits for dischargers that contained the July 1, 1977 deadline for achievement of BPT, but would at the same time issue a side letter binding the agency to refrain from enforcing the permit deadline as long as the permittee was in compliance with a deferred schedule for achievement of BPT limitations as negotiated between EPA and the permittee.<sup>85</sup> However, as with the enforcement deferral assurances for stormwater compliance, these agency

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nonenforcement, see Daniel T. Deacon, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795 (2010).

81. 49 Fed. Reg. 37,998, 38,012 (Sept. 26, 1984). See generally Joel B. Eisen, *Toward a Sustainable Urbanism: Lessons from Federal Regulation of Urban Stormwater Runoff*, 48 WASH. U. J. URB. & CONTEMP. L. 1 (1995).

82. See *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007) (“[I]n *Heckler v. Chaney* we held that an agency’s refusal to initiate enforcement proceedings is not ordinarily subject to judicial review.”) (internal citation omitted).

83. Animal Feeding Operations Consent Agreement and Final Order; Notice, 70 Fed. Reg. 4958, 4959 (Jan. 31, 2005).

84. *Ass’n of Irrigated Residents v. EPA*, 494 F.3d 1027 (D.C. Cir. 2007).

85. See *Republic Steel v. Costle*, 581 F.2d 1228, n.8 (6th Cir. 1978); *Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 659–60 (3d Cir. 1976).



nonenforcement assurances are not binding as against citizen enforcement.<sup>86</sup>

Agency nonenforcement policy would thus be a means of statutory interpretation that would be completely exempt from judicial review, except for the availability of citizen suits. The citizen suit innovation effectively removes this powerful tool for agency modification of statutory regulatory programs. Indeed, in recognition that citizen suits are beyond the reach of an agency nonenforcement policy, the stormwater nonenforcement letters issued in response to the *Costle* decision specifically exempted citizen enforcement.<sup>87</sup>

Agency interpretive tools run the gamut from affirmative enforcement decisions (subject to the most searching judicial review), through informal interpretive guidance (given some deference), and notice and comment or on-the-record rule making (given highly deferential judicial review), to agency nonenforcement policies (subject to no judicial review). Given the nonreviewability of agency nonenforcement policies, it seems that nonenforcement would ordinarily be the most powerful tool for agency modification of statutory norms. The addition of independent citizen enforcement changes that calculus fundamentally. As Judge J. Skelly Wright observed in another context of citizen judicial empowerment, “[the courts’] duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.”<sup>88</sup> Proponents of strong executive power object to citizen suits for precisely this reason, that they remove an unchecked ability of executive agencies to undo congressional regulatory programs.<sup>89</sup> Then-Judge Antonin Scalia answered Judge Wright’s observation with his own counterargument for limiting citizen standing and enhancing executive authority to

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86. See *Citizens for a Better Env’t v. Union Oil of Cal.*, 83 F.3d 1111, 1116 (9th Cir. 1996).

87. See 53 Fed. Reg. 49,416, 49,420 (Dec. 7, 1988).

88. *Calvert Cliffs’ Coordinating Comm., Inc. v. U. S. Atomic Energy Comm’n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

89. See Charles S. Abell, *Ignoring the Trees for the Forests: How the Citizen Suit Provision of the Clean Water Act Violates the Constitution’s Separation of Powers Principle*, 81 VA. L. REV. 1957, 1966 (1995) (arguing that the CWA’s citizen enforcement provision “impermissibly undermines the power of the President in his duty to ‘take Care that the Laws be faithfully executed.’ “); Harold J. Kent & Ethan G. Shenkman, *Of Citizens Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1798 (1993) (asserting that “the structural imperative in Article II for a unitary executive precludes Congress from delegating outside the Executive’s control the power to protect the interests of the public as a whole in the face of external or internal threats.”); cf. Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163 (1992).

underenforce statutory norms: “Where no peculiar harm to particular individuals or minorities is in question, lots of once-heralded programs ought to get lost or misdirected, in vast hallways or elsewhere . . . . The ability to lose or misdirect laws can be said to be one of the prime engines of social change . . . .”<sup>90</sup>

Thus, the citizen suit innovation had the potential to radically disrupt executive agencies’ most powerful (and judicially unchecked) tool for reducing the scope of congressional regulatory mandates. Citizens were given the ability effectively to preempt agency nonenforcement policy through a program of citizen enforcement. And the relative ease of citizen enforcement in CWA cases made the CWA the front line in the new empowerment of citizens to drive the regulatory agenda by enforcing underenforced statutory norms.

#### IV. FOUR CITIZEN ENFORCEMENT INITIATIVES THAT DROVE THE CLEAN WATER ACT AGENDA

The four enforcement initiatives discussed in this section illustrate how the citizen enforcement suit of the CWA fulfilled its promise of disrupting the bipolar regulatory model. These citizen enforcement initiatives consisted of suits against recreational shooting clubs, concentrated animal feeding operation discharges associated with manure spreading, pesticide application, and municipal water transfers. Each of these enforcement initiatives implicated the scope of the NPDES permitting requirement; the precise legal issues involved varied from case to case but all involved the interpretation of the four elements of the NPDES permitting trigger: (1) a “discharge,” (2) of a “pollutant,” (3) from a “point source,” and (4) to “waters of the United States.” They share an additional critical feature in common. Each involved enforcement against activities or actors, such as agricultural interests and gun owners that have active political lobbies which may have been a factor in EPA underenforcement of the CWA requirements in these particular cases. Furthermore, in each case, citizen enforcement was successful in the judicial system which led to an EPA regulatory response—either in the form of regulations or guidance incorporating the citizen successes or in the form of regulations seeking to exempt the regulated activities from continued CWA coverage. This is not to suggest that citizen enforcement cases have been the most profound impact of citizen involvement in the implementation of the CWA—arguably, more

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90. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 897 (1983).

traditional litigation initiatives seeking to compel mandated CWA rule making had a bigger impact on the overall implementation of the CWA.<sup>91</sup>

### A. Recreational Shooting Ranges

According to a white paper issued by the National Shooting Sports Foundation, approximately 7.5 million Americans compete annually in trap and skeet shooting activities, at over 7,500 outdoor shooting ranges in the United States.<sup>92</sup> Many trap and skeet shooting facilities are located near surface waters and wetlands and are oriented such that both the shot and the targets land in “waters of the United States” subject to regulatory jurisdiction under the CWA. Traditionally, the shot used was metallic lead, which shooters favor for its cheap cost and ballistic properties. More recently (and partially in response to the citizens enforcement efforts described below), some ranges have adopted steel shot in place of lead. Lead, of course, is a toxic metal with well-known neurological effects. Although the targets are called “clay pigeons,” they have traditionally been manufactured using coal tars, which are high in carcinogenic PAHs.

Sport shooting facilities that discharge into jurisdictional waters fall within the literal prohibition of the CWA; shot and targets are “discharged” in that they are “added” to the receiving water, the target launchers and the shooting pads are “discrete and confined conveyances” that fall within the literal definition of “point source,” and targets and shot fall within the definition of a “pollutant,” which includes both “munitions” and “solid waste.”<sup>93</sup> Nevertheless, EPA and state

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91. In particular, NRDC’s lawsuits seeking to compel EPA to issue regulations establishing effluent limitations for toxic pollutants had a much more profound effect on CWA implementation, leading to a statutory amendment and a complete restructuring of Clean Water Act regulatory priorities. See Rosemary O’Leary, *The Courts and the EPA: The Amazing Flannery Decision*, 5 NAT. RESOURCES & ENV’T 18 (1990).

92. Leo P. Dombrowski, *Environmental Laws as They Apply to Shooting Ranges*, in FOURTH NATIONAL SHOOTING RANGE SYMPOSIUM 186 (2008), available at <http://www.nssf.org/ranges/rangeresources/library/NSRS/08PolicyTrack/EnvLaws.pdf>.

93. As discussed below, the Southern District of New York held in a citizen enforcement action that these sport shooting activities did indeed fall within the scope of the NPDES permitting program. *Long Island Soundkeeper Fund, Inc. v. N.Y. Athletic Club*, 94 CIV. 0436 (RPP), 1996 WL 131863 (S.D.N.Y. Mar. 22, 1996). See generally Nicholas J. Johnson, *Testing the States’ Rights Second Amendment for Content: A Showdown Between Federal Environmental Closure of Firing Ranges and Protective State Legislation*, 38 IND. L. REV. 689, 693 (2005) (“The discharge of firearms can trigger literal violations of three federal environmental statutes: The Clean Water Act, the Resource Conservation Recovery Act and the Comprehensive Environmental Response,

enforcement agencies had traditionally refrained from bringing any CWA enforcement action against sport shooting ranges.<sup>94</sup> It is probably not coincidental that gun owners belong to one of the most powerful political organizations in the United States.<sup>95</sup>

However, lead toxicity from the accumulation of spent shot resulted, in some cases, in serious, visible adverse environmental consequences. At the Lordship Point Gun Club operated by Remington Arms in Stratford, Connecticut, accumulated lead shot began to show up in the gizzards of dead black ducks washing up on the beach. As it turned out, the lead shot was precisely the size of the gravel grains that diving ducks seek to ingest in order to aid in digesting their food.<sup>96</sup> One single shot was sufficient to deliver a toxic dose of lead to these protected migratory birds.<sup>97</sup> The Lordship Point Gun Club was located

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Compensation, and Liability Act (CERCLA or “Superfund”).”); David G. Cotter, *Outdoor Sport Shooting Ranges Under the Environmental Gun—The Final Assault or Merely a Manageable Dilemma?* 20 T.M. COOLEY L. REV. 453 (2003).

94. See Johnson, *supra* note 93, at 693 (“EPA has exercised its discretion to set enforcement priorities in a fashion that has left ranges relatively unimpaired”); Dombrowski, *supra* note 92 (“Until recently, NPDES permits were not required for ranges because regulatory authorities had not considered ranges subject to Clean Water Act permitting requirements.”). In the *New York Athletic Club* litigation itself, the shooting range obtained a letter from the New York State Department of Environmental Conservation opining, without legal analysis, that recreational shooting activities were not covered by the federal Clean Water Act NPDES permitting program or the delegated New York SPDES program. *Long Island Soundkeeper Fund, Inc.*, 1996 WL 131863, at \*14.

95. See Sari Horwitz & James V. Grimaldi, *NRA-led Gun Lobby Wields Powerful Influence Over ATF, U.S. Politics*, WASH. POST (Dec. 15, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/14/AR2010121406045.html> (“Over nearly four decades, the NRA has wielded remarkable influence over Congress, persuading lawmakers to curb ATF’s budget and mission and to call agency officials to account at oversight hearings.”); *The NRA’s Electoral Influence*, WASH. POST (Dec. 15, 2010), <http://www.washingtonpost.com/wp-srv/special/nation/guns/nra-endorsements-campaign-spending/> (The National Rifle Association spent nearly \$7 million dollars endorsing candidates in two-thirds of congressional races during the 2010 elections, and 80% of those endorsed won.); Brian Palmer, *Why is the NRA so Powerful?* SLATE, (June 29, 2012), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2012/06/eric\\_holder\\_charged\\_with\\_contempt\\_how\\_did\\_the\\_nra\\_swing\\_the\\_votes\\_of\\_so\\_many\\_democrats.html](http://www.slate.com/articles/news_and_politics/explainer/2012/06/eric_holder_charged_with_contempt_how_did_the_nra_swing_the_votes_of_so_many_democrats.html) (citing polling data indicating that gun-owner rights advocates tend to be single-issue voters, and perception of National Rifle Association members as active and effective grassroots campaigners as sources of the organizations influence over politicians).

96. MASS. DEP’T OF ENVTL. PROT., ASSESSMENT OF ECOLOGICAL RISK ASSOCIATED WITH LEAD SHOT AT TRAP, SKEET & SPORTING CLAYS RANGES 6–7 (2009), *available at* <http://www.mass.gov/dep/toxics/stypes/lusersk.pdf>.

97. See *id.* at 3.

immediately adjacent to critical habitat for black ducks. During its ninety years of operations, the Lordship Point facility deposited over 2,400 tons of lead onto surrounding lands and into adjacent tidal areas of the Long Island Sound, as well as over 11 million pounds of target fragments.<sup>98</sup>

In 1985, the State of Connecticut responded to citizen concerns by commencing an administrative cleanup action pursuant to the Connecticut clean water law.<sup>99</sup> Remington was ordered to study the extent of contamination and remediate the contamination. Nevertheless, Remington Arms proposed to continue operation of the facility, switching from lead shot to steel shot. Now that public attention was drawn to the issue, a fledgling environmental organization—the Connecticut Coastal Fishermen’s Association—issued a sixty-day notice letter under the CWA citizen suit provision to prevent the continued discharge of target materials and shot in any form into the Long Island Sound. While the notice letter was pending, Remington Arms closed the facility and announced that it would not reopen.

When CCFA sued under both the CWA and the Resource Conservation and Recovery Act (“RCRA”)<sup>100</sup>, Remington raised defenses based on a claim that Connecticut DEP’s administrative order precluded a citizen suit, that the complaint failed to allege the continuing violation of the CWA requisite for a citizen suit, and that the lead shot and target materials could not be considered hazardous solid wastes subject to regulation under RCRA. The District Court for the District of Connecticut dismissed the CWA citizen suit, holding that the Connecticut DEP cleanup order constituted diligent administrative prosecution under a comparable state law, despite the fact that no penalty had been assessed.<sup>101</sup> On appeal, the Second Circuit Court of Appeals affirmed the dismissal of the CWA citizen suit, but did so exclusively on the grounds that there was no good-faith allegation of an ongoing violation of the CWA discharge prohibition.<sup>102</sup> The court noted,

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98. *Conn. Coastal Fishermen’s Ass’n v. Remington Arms Co.*, 989 F.2d 1305, 1308 (2d Cir. 1993).

99. *See Conn. Coastal Fishermen’s Ass’n. v. Remington Arms Co.*, 777 F. Supp. 173 (D. Conn. 1991), *aff’d in part, rev’d in part*, 989 F.2d 1305 (2d Cir. 1993).

100. 42 U.S.C. § 6962 (2012).

101. *See Conn. Coastal Fishermen’s Ass’n.*, 777 F. Supp. at 173. The district court also denied the range’s motion for summary judgment on liability under RCRA, holding that the lead shot was hazardous waste subject to regulation under Subtitle D of the RCRA.

102. *See Remington Arms Co.*, 989 F.2d at 1305. The Second Circuit also reversed the district court’s holding that the spent shot constituted a hazardous waste regulated under Subtitle D of the RCRA, holding that for the purpose of RCRA’s regulatory program, the spent shot did not fall within EPA’s regulatory definition of “solid waste.”

incidentally, that had the Lordship Point Gun Club continued in operation with steel shot, the CWA citizen suit would not have been foreclosed, as “[t]he Act’s definition of ‘pollutant’ does not distinguish between lead and steel shot; both are pollutants.”<sup>103</sup>

While the Remington Arms litigation was not successful as a CWA citizen suit, Connecticut Coastal Fishermen’s Association, and its successor organization, Long Island Soundkeeper Fund were now alerted to the toxic impacts of gun clubs that discharge into water, and their unenforced regulatory obligations under the CWA NPDES program. Soundkeeper next gave notice of intent to sue another gun club that discharged directly into the Long Island Sound, the New York Athletic Club facility located at Travis Island in New Rochelle Harbor, New York. This facility was located directly across the harbor channel from Glen Island, a popular Westchester County park. Shooting was limited to the winter months of the year, as otherwise boaters using the harbor channel complained of lead shot raining down on them in the channel.

Unlike the Lordship Point Gun Club, New York Athletic Club chose to contest their coverage under the NPDES permitting program rather than simply shut down to moot a citizen suit. The shooting range argued that it was not a “point source” subject to the CWA prohibition against unpermitted discharges, relying on recent Second Circuit precedent holding that individual human beings were not within the definition of “point source.”<sup>104</sup> The range also argued that the lead shot and targets were not within the definition of a pollutant as they were not “solid wastes” at the time they were discharged, and that the inclusion of the term “munitions” in the definition of “pollutants” was meant to be limited to military munitions. Despite its history of no enforcement against shooting ranges, EPA submitted an amicus curiae brief supporting Soundkeeper’s claims that the gun club constituted a “point source” “discharge” of “pollutants” subject to regulation under the NPDES program.

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*Id.* at 1315–16. At the same time, the circuit court held that the spent shot and targets materials could constitute “solid waste” for the purpose of the statutory definition of “solid waste,” allowing the citizens’ claim for remediation of an imminent and substantial endangerment to human health or the environment to proceed under Section 7002(a)(1)(B) of the RCRA. *Id.* at 1316.

103. *Id.* at 1313.

104. *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643 (2d Cir. 1993). In *Plaza Health*, the Second Circuit reversed the criminal Clean Water Act conviction of a manager of a blood testing laboratory who had disposed of medical waste—human blood vials—by throwing the vials into the Hudson River. The Court held that, at least for a criminal prosecution in which the “rule of lenity” applied, the statutory definition of “point source” could not be extended to an individual.

The District Court for the Southern District of New York rejected each of defendant's arguments and granted summary judgment in favor of the plaintiffs on the CWA claims. The court held that even though individuals were not considered point source, the entire facility could be considered a point source since it concentrated shooting and target activities into one location.<sup>105</sup> The court also held that shot and targets fell within the CWA's broad definition of pollutants, which was broad enough to include previously useful substances, and noted the Second Circuit's dicta in *Remington* that both lead and steel shot are "pollutants."

*Soundkeeper* remains the leading case on CWA coverage of gun clubs that discharge into jurisdictional waters. It has been followed by federal courts in Illinois<sup>106</sup> and Maryland.<sup>107</sup> No case since *Soundkeeper* has rejected the application of the CWA permitting requirement to gun ranges that discharge shot or targets into jurisdictional waters.<sup>108</sup> As for the New York Athletic Club Travis Island facility itself, the facility was unable to get a NPDES permit because, regardless of the toxicity of the shot, deposition of the targets and target fragments on the bottom of New Rochelle Harbor would violate New York State water quality criteria providing that settle-able solids shall not create a substantial visible contrast to the natural bottom. This particular water quality criterion is typical among state water quality criteria. The National Shooting Sports Foundation now advises its member shooting ranges that any shooting activities that will result in discharges to surface waters or jurisdictional wetlands should obtain a NPDES permit, or should reorient their shooting activities to avoid such discharges.<sup>109</sup>

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105. *Long Island Soundkeeper Fund, Inc. v. N.Y. Athletic Club of N.Y.C.*, 94 CIV. 0436 (RPP), 1996 WL 131863 (S.D.N.Y. Mar. 22, 1996). In holding that the entire facility could be considered a point source, the Court relied on a Second Circuit CAFO case, *Concerned Area Residents For The Env't v. Southview Farm*, 34 F.3d 114, 118 (2d Cir. 1994), *cert. denied*, 115 S.Ct. 1795 (1995), which held that the entire CAFO facility could be considered a Clean Water Act "point source," not just the feeding portions of the facility. This case is discussed in more detail, *infra*, in the discussion of the role of citizen suits in developing CWA CAFO law.

106. *Stone v. Napierville Park Dist.*, 38 F. Supp. 2d 651 (N.D. Ill. 1999).

107. *Potomac Riverkeeper v. Nat'l Capital Skeet & Trap Club, Inc.*, 388 F.Supp.2d 582 (D. Md. 2005).

108. The one reported unsuccessful CWA citizen suit since *Soundkeeper* failed because the plaintiffs failed to establish a discharge into jurisdictional "waters of the United States" covered by the NPDES permitting requirement. *See Cordiano v. Metacorn Gun Club, Inc.*, 575 F.3d 199 (2d Cir. 2009).

109. *See Dombrowski*, *supra* note 92, at 188 ("The CWA makes it unlawful to discharge any pollutant into a navigable water without first obtaining a NPDES permit"); *see also* Richard Peddicord, *Lead Ammunition and Environmental Protection*, NAT'L

The effect of the gun club citizen enforcement cases was to bring an entire class of activities—recreational shooting ranges—within the regulatory scope of the CWA NPDES permitting program where previously such activities had effectively been exempted through agency nonenforcement. EPA, however, made no nationwide response to this change in the NPDES program’s scope. On the other hand, EPA Region 2 has accommodated this change in the NPDES program by issuing a guidance document for CWA regulatory compliance by recreational shooting ranges.<sup>110</sup> While this regional guidance document does not take any position about the nationwide applicability of the holding in *New York Athletic Club*, it does suggest measures gun clubs should take to comply with NPDES permitting requirements. Despite the favorable court rulings establishing CWA permitting coverage for gun clubs, EPA has not embarked on a program of enforcement actions itself against any shooting ranges, and citizen suits continue to be the primary enforcers of the permitting requirement.<sup>111</sup>

### *B. CAFO Manure Spreading*

Concentrated Animal Feeding Operations, or “CAFOs,” are feedlots where animals destined for slaughterhouses are fed until they reach market weight. CAFOs subject to regulation under the CWA do not include small-scale family farms; rather, they consist of the largest and most intense of the industrial agriculture operations in the United States. For example, to be considered a “medium CAFO” under EPA’s regulations, a facility must house as many as 9,999 sheep, 54,999 turkeys, or 124,999 chickens (other than laying hens).<sup>112</sup> A large CAFO can contain over a million animals, such as hogs.

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SHOOTING SPORTS FOUND. (1993), [http://www.nssf.org/ranges/rangeresources/library/detail.cfm?filename=facility\\_mngmnt/environment/lead\\_ammunition.htm&CAT=Facility%20Management](http://www.nssf.org/ranges/rangeresources/library/detail.cfm?filename=facility_mngmnt/environment/lead_ammunition.htm&CAT=Facility%20Management) (citing allegations that “target machines, accumulation of spent shot and target fragments, earthen backstops and drainage ditches holding lead and/or target fragments, shooting stations and individual guns are all point sources of pollutants under the CWA and thus require individual permits under the National Pollution Discharges Elimination System,” and advising “clubs may want to consider avoiding range orientations that result in shotfall in waterways, wetlands or natural areas . . .”).

110. EPA, BEST MANAGEMENT PRACTICES FOR LEAD AT OUTDOOR SHOOTING RANGES (2012), *available at* [http://www2.epa.gov/sites/production/files/documents/epa\\_bmp.pdf](http://www2.epa.gov/sites/production/files/documents/epa_bmp.pdf).

111. For an example of a rare EPA enforcement action against a gun club, at the instigation of a citizen activist, *see* Andy Bromage, *Long Shot*, SEVEN DAYS (July 13, 2011), *available at* <http://www.7dvt.com/2011/montpelier-gun-club-lead-shot-pollution>.

112. 40 C.F.R. § 122.23(b)(6) (2013).



The environmental and water impacts of CAFOs arise primarily as a function of their generation of animal wastes—urine and feces. Nationwide, EPA estimates that confined livestock and poultry generate 500 million tons of manure annually, more than three times the amount of human sanitary waste generated annually in the United States.<sup>113</sup> A large CAFO, with hundreds of thousands to even a million head of livestock, creates the fecal equivalent of a major city.<sup>114</sup> But unlike human sewage, which the CWA requires to be subject to secondary treatment, CAFO waste has traditionally received no treatment—it is simply piped into lagoons where it is left to settle and evaporate. The contents of the lagoons are periodically pumped out and sprayed onto fields. The spray fields are not generally used to grow crops of any economic value.<sup>115</sup>

Two competing statutory provisions bear on the scope of regulation of CAFO discharges under the CWA. On the one hand, Section 502(14) specifically includes “concentrated animal feeding operations” within the definition of point sources subject to NPDES permitting requirements and the Section 301(a) prohibition against unpermitted discharges. On the other hand, the CWA was amended in 1987 specifically to exclude “agricultural stormwater discharges” from the definition of point sources

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113. NPDES Permit Regulation and Effluent Limitation Guidelines and Standards for CAFOs, 68 Fed. Reg. 7176, 7180 (Feb. 12, 2003).

114. See John Ikerd, *Concentrated Animal Feeding Operations and the Future of Agriculture*, MO. CATHOLIC CONFERENCE (Sept. 29, 2007), <http://web.missouri.edu/ikerdj/papers/Jeff%20City%20Catholic%20-%20CAFO%20Agriculture.htm> (“The ‘smallest’ Class 1-A CAFO (7,000 animal units) creates more biological waste than a city of 70,000 people.”); see also Elanor Starmer, *Environmental and Health Problems in Livestock Production: Pollution in the Food System*, THE AGRIBUSINESS ACCOUNTABILITY INITIATIVE 1, 2 (2006), [http://www.ase.tufts.edu/gdae/Pubs/rp/AAI\\_Issue\\_Brief\\_2\\_1.pdf](http://www.ase.tufts.edu/gdae/Pubs/rp/AAI_Issue_Brief_2_1.pdf) (“[H]og CAFOs in North Carolina alone produce nearly 20 million tons of waste a year—more than the human residents of New York, Chicago, and Los Angeles combined”); see also KATHRYN COCHRAN, ET. AL, DOLLARS AND SENSE: AN ECONOMIC ANALYSIS OF ALTERNATIVE HOG WASTE MANAGEMENT TECHNOLOGIES (2000), available at [http://s3.amazonaws.com/zanran\\_storage/www.environmentaldefense.net/ContentPages/2470902728.pdf](http://s3.amazonaws.com/zanran_storage/www.environmentaldefense.net/ContentPages/2470902728.pdf); Peter S. Goodman, *An Unsavory Byproduct: Runoff and Pollution*, WASH. POST, Aug. 1, 1999, at A1, available at <http://www.washingtonpost.com/wp-srv/local/daily/aug99/chicken1.htm> (describing an industrial chicken farm in Maryland as producing more fecal waste than a city of four million people).

115. See generally JoAnn Burkholder et. al, *Impacts of Waste from Concentrated Animal Feeding Operations on Water Quality*, 115 ENVTL. HEALTH PERSP. 308 (2007). See also EPA, MANAGING MANURE NUTRIENTS AT CONCENTRATED ANIMAL FEEDING OPERATIONS (2004), available at <http://tammi.tamu.edu/final-manure-guidance.pdf>; DOUG GURIAN-SHERMAN, UNION OF CONCERNED SCIENTISTS, CAFOs UNCOVERED: THE UNTOLD COSTS OF CONFINED ANIMAL FEEDING OPERATIONS (2008), available at [http://www.ucsusa.org/assets/documents/food\\_and\\_agriculture/cafos-uncovered.pdf](http://www.ucsusa.org/assets/documents/food_and_agriculture/cafos-uncovered.pdf).

subject to permitting requirements. The statute does not specifically address the question of whether runoff from landspreading of manure is a CAFO discharge requiring a permit or is exempt as an “agricultural stormwater runoff.”

EPA has a mixed record of regulating CAFOs under the CWA. As noted, in the same regulations purporting to exempt municipal storm water discharges from the CWA struck down in *Costle*, the agency also sought to exempt small CAFOs from regulation. EPA’s initial CAFO regulations specifically subjected only the direct runoff from feedlots and liquid discharges from waste lagoons to permitting and effluent limitations under the NPDES permitting program. Significantly, the regulations exempted facilities that grow crops from the definition of a CAFO; to be a CAFO under the regulations, the facility must be one where “[c]rops, vegetation forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.”<sup>116</sup>

The classification of a production facility as a CAFO under the regulations also depended on the existence of a conveyance of waste runoff directly to waters of the United States; facilities that claimed to have no discharge from their waste lagoons could claim exemption from the CAFO definition even though they sprayed the contents of those lagoons onto adjacent fields subject to runoff into surface waters. In addition, facilities could claim to be “no-discharge” facilities even if they had periodic discharges from their waste lagoons so long as they fell within the twenty-five year, twenty-four hour storm exemption—that is, if waste lagoons were designed to avoid discharges in a twenty-five year, twenty-four hour rain event, the facility was not considered a CAFO.<sup>117</sup> The regulations were silent on the impact of surface water discharges from the sprayfields, leading factory farms to claim exemption from permitting requirements so long as the lagoons themselves were not designed to discharge more-frequently than the twenty-five year, twenty-four hour storm. This definition of a “CAFO” effectively exempted land application discharges from triggering NPDES permitting requirements.<sup>118</sup> Only if a facility had a discharge was it subject to

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116. 40 C.F.R. § 122.23(b)(ii) (2013). See 39 Fed. Reg. 5704 (Feb. 14, 1974); NPDES CAFOs Regulations, 41 Fed. Reg. 11,458 (Mar. 18, 1976).

117. See NPDES CAFOs Regulations, 41 Fed. Reg. at 11,460 (proposing 40 C.F.R. §124.82(a)(2)(ii)(I), “[N]o animal feeding operation is a concentrated animal feeding operation . . . if such animal feeding operation discharges only in the event of a 25 year, 24 hour storm event.”).

118. See 39 Fed. Reg. 5704; see also NPDES CAFOs Regulations, 41 Fed. Reg. 11,458. See also James H. Andreasen, *Concentrated Animal Feeding Operations: A Program in Transition*, 21 NAT’L RESOURCES & ENVT. 45 (2007); Dustan J. Cross &

NPDES permitting under EPA regulations. Once subject to the NPDES permitting requirement, however, the permit would regulate land application of manure through a nutrient management plan that was incorporated into the permit.

Land application of the huge quantities of animal waste generated by CAFOs causes severe environmental degradation of adjacent water bodies. These wastes were applied to the spray fields at rates far exceeding any possible uptake by the “crops” grown on the fields—generally, Bermuda Grass in the case of industrial hog CAFOs. The vast majority of the waste spread onto the fields simply washes off with the rain, or even flows through erosion channels and gullies directly from the spray application equipment to the nearest surface water body. These wastes contain overwhelming levels of nutrients, as well as pathogens, salts, and animal medication residues. Eighty-five percent of the nitrogen in the liquid manure is discharged to the environment and of the fifteen percent taken up by cover crops like Bermuda Grass, ninety percent of that is redeposited by grazing cattle.<sup>119</sup> The effect of this land application of wastes is to overwhelm the receiving water bodies, by causing algae blooms and eutrophication. Hog waste discharges have also been implicated in the outbreak of highly toxic *Pfiesteria piscicida* bacteria in the Southeastern United States.<sup>120</sup> Thus, the operation of CAFOs in the United States resulted in the untreated discharge of nearly all the animal wastes produced by these facilities to nearby water bodies in the form of stormwater runoff, and the effect of EPA CAFO regulations was to ignore these discharges for permit purposes. Most CAFOs routinely

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Matthew C. Berger, *Regulations Governing Discharges of Pollutants from Concentrated Animal Feeding Operations*, MINN. STATE BAR ASS'N (March 5, 2009), available at <http://www.mnbar.org/SECTIONS/agricultural-law/03-05-09%20Cross%20Berger%20Handouts.pdf>.

119. See *Regulation of Concentrated Animal Feeding Operations for the Protection of the Environmental and Public Health: Hearing on S. 1323 Before the S. Comm. on Agric., Nutrition, & Forestry*, 105th Cong. (1998) (testimony of Michelle Nowlin, Attorney, Southern Environmental Law Center), available at <http://gos.sbc.edu/n/nowlin.html>; see also JOHN F. MONCRIEF ET AL., MINN. ENVTL. QUALITY BOARD, *GENERIC ENVIRONMENTAL IMPACT STATEMENT ON ANIMAL AGRICULTURE: A SUMMARY OF THE LITERATURE RELATED TO MANURE AND CROP NUTRIENTS* (1999), available at [http://www.eqb.state.mn.us/geis/LS\\_Manure.pdf](http://www.eqb.state.mn.us/geis/LS_Manure.pdf).

120. See Don Anderson, *Why are Outbreaks of Pfiesteria and Red Tides Suddenly Threatening our Oceans?*, SCI. AM. (Apr. 20, 1998), <http://www.scientificamerican.com/article.cfm?id=why-are-outbreaks-of-pfie>; Aya Ogishi, David Zilberman & Mark Metcalfe, *Integrated Agribusinesses and Liability for Animal Waste*, 6 ENVTL. SCI. & POL'Y 181, 183 (2003) (“Eutrophication from animal waste runoff is also linked to the outbreak of toxic microorganisms such as *Pfiesteria piscicida*.”)

pumped out their lagoons into their sprayfields, and avoided permitting by claiming that there was zero discharge from the lagoons.<sup>121</sup>

Like gun owners, industrial agriculture constitutes a powerful, well organized lobby in the U.S. political system.<sup>122</sup> It is thus not surprising that, as with gun clubs, EPA did not aggressively enforce the CWA NPDES permitting program against land application of animal wastes.<sup>123</sup> The CAFOs took the position that land application of animal waste was exempted from regulation under the NPDES permitting program by Section 502(14) of the CWA, which exempts agricultural storm water discharges from the definition of “point sources” subject to the permitting requirement. States similarly failed to enforce water permitting requirements against CAFO operations; indeed, the complete failure of the State of Indiana to enforce water permitting requirements against CAFOs became the subject of a petition for withdrawal of the Indiana delegated NPDES permit program and a subsequent lawsuit seeking to compel EPA to withdraw approval of the Indiana NPDES permitting program.<sup>124</sup>

As in the cases of shooting ranges, citizen litigators stepped into the regulatory breach where EPA and state regulators feared to tread. Despite the omission of land application of waste as a trigger for the CAFO permitting program under EPA regulations, citizens in several states brought enforcement suits against animal feeding facilities whose manure spreading activities caused substantial impacts to surface waters. These suits alleged that the facilities were point sources subject to CWA permitting requirements even if they did not fall within the letter of the regulatory CAFO definition.

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121. See Bob Edwards & Adam Driscoll, *From Farms to Factories: The Environmental Consequences of Swine Industrialization in North Carolina*, in TWENTY LESSONS IN ENVIRONMENTAL SOCIOLOGY 158–59 (Kenneth A. Gould & Tammy L. Lewis eds., 2008) (stating that “the slurry of liquid and solid excreta from confinement buildings is transferred to waste lagoons and subsequently sprayed on “sprayfields” and that in small systems with a “a low enough hog to land ratio, there is no pollution and you have a zero-discharge system.”).

122. See *Sector Profile: Agribusiness*, CTR. FOR RESPONSIVE POL., <http://www.opensecrets.org/lobby/background.php?id=A&year=2013> (last visited Nov. 19, 2013) (“The agribusiness sector has contributed \$480.5 million to federal candidates during the past two decades.”); *Industry Influence: Agriculture*, NAT’L INST. ON MONEY IN STATE POL., <http://www.followthemoney.org/database/IndustryTotals.phtml?f=0&s=0&g%5B%5D=1> (last visited Jan. 25, 2013) (detailing hundreds of millions of dollars in political contributions from the agriculture industry to influence state-level elections and initiatives between 2000 and 2012).

123. See Terence J. Centner, *Enforcing Environmental Regulations: Concentrated Animal Feeding Operations*, 69 MO. L. REV. 697, 710–11 (2004).

124. See *Save the Valley v. EPA*, 223 F. Supp. 2d 997, 1013 (S.D. Ind. 2002).

In the leading case,<sup>125</sup> *Concerned Area Residents for the Environment v. Southview Farms* (“CARE”), a community group and neighboring landowners sued a dairy farm in upstate New York that contained both an animal feeding operation and neighboring fields where unspecified crops were grown. As is typical with animal feeding operations, the dairy collected liquid manure in lagoons and spread the liquid manure on adjacent fields. Testimony at trial established that so much liquid manure was spread on the fields that it collected in pools and ran off through ditches, pipes, and swales off the dairy property and eventually into the East Genesee River. The landowners brought the suit as a citizen enforcement action under the CWA, and they also alleged common law trespass. Although the district court denied the defendants’ motion to dismiss, it granted the dairy’s motion for judgment as a matter of law after a jury found five instances of unpermitted discharges from the sprayfields.<sup>126</sup> The district court relied on the exemption for agricultural stormwater discharges and EPA regulations’ failure to spell out whether sprayfields were part of the CAFO or not. The court noted that “neither the Act itself, the regulations promulgated by EPA, the legislative history, nor the case law provides much guidance as to the meaning of ‘agricultural stormwater discharge.’ ” The district court threw out all the claimed CWA violations, holding that the spreading of liquid manure fell under the agricultural stormwater exception, and it held that the one clear instance of manure spreading for disposal purposes was not from a CAFO because the CAFO, by definition, did not include areas where crops were grown. The court specifically cited the regulation defining CAFOs to exclude facilities where crops are grown.

The Second Circuit reversed the judgment for the defendants and reinstated the jury verdict.<sup>127</sup> Interestingly, despite the ambiguous CAFO regulations and a history of nonenforcement against spreading of manure on land, EPA filed an amicus brief in support of the plaintiffs on appeal. In reversing the district court, the Court of Appeals reasoned that the facility as a whole fell within the definition of a CAFO, as it contained the requisite number of livestock, and the livestock were not pastured. The court limited the CAFO exception for crop areas to operations where

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125. In an earlier case, *Higby v. Starr*, 598 F. Supp. 323, 325 (E.D. Ark. 1984), *aff’d without opinion*, 782 F.2d 1048 (8th Cir. 1985), the district court suggested that landspreading that caused a discharge to surface waters would be included in the definition of a CAFO, but found that the plaintiff had failed to prove any such discharge from landspreading had occurred.

126. *Concerned Area Residents for the Env’t v. Southview Farm*, 834 F. Supp. 1422 (W.D.N.Y. 1993).

127. *Concerned Area Residents for the Env’t v. Southview Farms*, 34 F.3d 114, 123 (2d Cir. 1994).

crops were grown in the same area as the livestock were fed. According to the Second Circuit:

The district court's holding misreads the regulations and particularly paragraph (ii). A lot or facility is an AFO when it confines and maintains animals on a lot which does not contain vegetation in the normal growing season. The vegetation criterion applies to the lot or facility in which the animals are confined.<sup>128</sup>

Thus, the Second Circuit, in response to a citizen enforcement suit, significantly expanded the scope of animal feeding operations subject to NPDES permitting requirements: no longer were facilities that avoided direct discharges of manure from lagoons while landspreading exempt, at least within the Second Circuit.

*CARE* was followed by a mirror image case on the West Coast. Another community group, coincidentally abbreviated CARE, sued four Washington state dairies for similar land manure application activities. As in the New York case, the dairies claimed that the land application areas were not included within the definition of a CAFO and were thus not point source discharges. The district court granted summary judgment to the plaintiffs, noting that

[d]efendants are incorrect in asserting that only the area where the animals are confined and the adjacent areas without vegetation can be considered a point source. Congress and the EPA were concerned with the amount of animal wastes generated by a CAFO and the threat those wastes pose to the waters of the United States. Regulation of a CAFO as narrowly defined by Defendants would mean that a CAFO could remove the wastes from the denuded land where the animals are confined and distribute or apply them elsewhere without regard to the potential of those animal wastes to discharge into the waters of the United States. This would avoid the clear intent of Congress as expressed in the CWA and by EPA in its NPDES regulations to insure that the animal wastes produced by CAFOs do not pollute the waters of the United States.<sup>129</sup>

Of course, EPA's ambiguous regulations and pattern of nonenforcement would have resulted in exactly the evasion of congressional intent the court feared had it not been for the citizen enforcement provision. The Ninth Circuit affirmed the grant of summary judgment to plaintiffs, holding that "[d]efining a CAFO to include any manure spreading vehicles, as well as manure storing fields, and ditches

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128. *Id.* at 123.

129. *Cnty. Ass'n for Restoration of the Env't v. Sid Koopman Dairy*, 54 F. Supp. 2d 976, 981 (E.D. Wash. 1999).

used to store or transfer the waste serves the purpose of the CWA to control the disposal of pollutants in order to restore and maintain the waters of the United States.”<sup>130</sup> The two *CARE* cases were followed by district court cases in the Fourth Circuit that sustained CWA citizen suits based on landspreading activities by CAFOs.<sup>131</sup>

Citizen enforcement suits thus brought within the ambit of NPDES permitting an entire environmentally destructive category of pollution discharges—landspreading of feedlot manure—which otherwise would have been unregulated. EPA’s regulatory response to this citizen initiative was more-formal and more accommodating than its response in the gun club cases. When EPA revised its CAFO regulations in 2003, it included within the definition of a CAFO “land under the control of a CAFO owner or operator, whether it is owned, rented, or leased, to which manure, litter, or process wastewater from the production area is or may be applied.”<sup>132</sup> The 2003 regulations also confirmed that land application of manure in excess of agronomic rates triggers the NPDES permitting requirement and is not an exempt agricultural stormwater discharge:

(e) Land application discharges from a CAFO are subject to NPDES requirements. The discharge of manure, litter or process wastewater to waters of the United States from a CAFO as a result of the application of that manure, litter or process wastewater by the CAFO to land areas under its control is a discharge from that CAFO subject to NPDES permit requirements, except where it is an agricultural storm water discharge as provided in 33 U.S.C. § 1362(14). For purposes of this paragraph, where the manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater, as specified in § 122.42(e)(1)(vi)–(ix), a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO is an agricultural stormwater discharge.<sup>133</sup>

The preamble to the proposed rule making that resulted in the 2003 regulations recited the environmental problems caused by the unregulated discharge of excess landspread manure, and relied on

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130. Cmty. Ass’n for Restoration of the Env’t v. Henry Bosma Dairy, 305 F.3d 943 (9th Cir. 2002).

131. Am. Canoe Ass’n v. Murphy Farms, Inc., 1998 U.S. Dist. LEXIS 21402 (E.D.N.C. Dec. 22, 1998), *aff’d in part*, 326 F.3d 505 (4th Cir. 2003); Water Keeper Alliance, Inc. v. Smithfield Foods, Inc., 4:01-CV-27-H(3), 2001 WL 1715730 (E.D.N.C. Sept. 20, 2001).

132. 40 C.F.R. § 122.23(b)(3) (2013).

133. *Id.* § 122.23(e).

Southview Farms to support its new regulatory scope for covered CAFO point sources.<sup>134</sup> In the preamble to the final rule, EPA specifically rejected comments by agricultural industry groups claiming that all manure spreading should be considered exempt agricultural stormwater runoff and that EPA lacked authority to define landspreading operations as point source pollution subject to NPDES permitting as opposed to nonpoint source pollution exempt from permitting requirements.<sup>135</sup> Citizen enforcement litigation thus led directly to an expansion of the scope of the NPDES regulatory program, one ultimately adopted by the agency itself, despite its initial reluctance.<sup>136</sup>

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134. See NPDES Permit Regulation and Effluent Limitation Guidelines and Standards for CAFOs, 66 Fed. Reg. 2960, 3029 (Jan. 12, 2001).

135. NPDES Permit Regulation and Effluent Limitation Guidelines and Standards for CAFOs, 68 Fed. Reg. 7176, 7196 (Feb. 12, 2003).

136. EPA has subsequently modified two aspects of the 2003 CAFO regulations, in both instances in response to judicial decisions striking down parts of the regulations. First, in 2008, EPA modified the procedure for regulatory approval of an individual farm CNMP, in response to the decision of the Second Circuit in *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005), holding that the 2003 regulations providing for Comprehensive Nutrient Management Planning (“CNMP”) approval without public review violated the Clean Water Act’s requirements for public notice and comment on individual NPDES permit requirements. Revised NPDES Regulations and Guidelines for CAFOs in Response to the *Waterkeeper* Decision, 73 Fed. Reg. 70,418 (Nov. 20, 2008). Second, in 2012, EPA removed the provisions in the 2003 regulations that required all CAFOs subject to the regulatory definition to apply for a NPDES permit, whether or not such CAFOs actually discharged. The 2003 regulations had removed the exemption for facilities that were designed to have no discharge except in the twenty-five year, twenty-four hour storm, and instead required all CAFOs to seek a NPDES permit unless they could prove that they had no potential to discharge. In a 2010 case, *Nat’l Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011), the Fifth Circuit held that EPA could not require NPDES permits of facilities that did not actually have a discharge. EPA amended the CAFO regulations in 2012 to remove the requirement that all CAFOs apply for a NPDES permit. NPDES Regulation for CAFOs: Removal of Vacated Elements in Response to 2011 Court Decision, 77 Fed. Reg. 44,494 (July 30, 2012) (codified at 40 C.F.R. § 122.23(d), (f) (2012)). The net effect of this judicial-regulatory dialectic is to leave some of the pre-2003 regulatory ambiguity in place: a CAFO with a NPDES permit must have a CNMP, compliance with which shields land application from Clean Water Act liability as exempt “agricultural stormwater” discharges. A CAFO that does not discharge from its manure lagoons (and is thus exempt from NPDES permitting) may not be required to have a CNMP, and may thus not enjoy the agricultural stormwater shield for landspreading discharges, so long as citizens or regulators bringing an enforcement action can prove the existence of a discharge from the landspreading activities. For an example of the difficulties in proving such a discharge, see *Assateague Coastkeeper v. Alan & Kristin Hudson Farm*, 727 F. Supp. 2d 433 (D. Md. 2010).



### *C. Pesticide Application into or over Water*

Pesticides are known as “economic poisons.”<sup>137</sup> They are toxic by design and by intention—their purpose is to kill undesired living organisms. Pesticides in general are regulated by the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”),<sup>138</sup> which establishes a program of registration with EPA combined with regulation of use and application.<sup>139</sup> Under FIFRA, a pesticide may be approved for a specific use so long as the pesticide manufacturer demonstrates, to the Administrator’s satisfaction, that, among other requirements, “it will perform its intended function without unreasonable adverse effects on the environment; and . . . when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.”<sup>140</sup> The definitions section of FIFRA specifically directs EPA to take the economic, social, and health benefits of pesticide use into account and weigh these benefits in making a determination whether projected adverse environmental impacts are “unreasonable.”<sup>141</sup> In contrast to the CWA approach to NPDES permitting, which requires all permits to ensure that discharges will not violate water quality standards,<sup>142</sup> FIFRA specifically contemplates that adverse environmental impacts will occur when FIFRA registered pesticides are used as directed, or used in accordance with common practice.

Even when used according to registered label instructions, toxic pesticides may enter waters in many different ways. Crop pesticide residues will contaminate agricultural stormwater runoff, which, as

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137. *Economic poison*, MERRIAM-WEBSTER UNABRIDGED ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/economic%20poison> (last visited Sept. 30, 2013).

138. Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136–136y (2012).

139. 72A C.J.S. *Products Liability* § 123 (2013); William H. Rodgers, Jr., *Registration—Labeling and Misbranding*, 3 ENVTL. L. (West) § 5:12 (2012); *Federal Insecticide, Fungicide, and Rodenticide Act*, 5 WEST’S FED. ADMIN. PRAC. § 5264 (4th ed. 2012).

140. 7 U.S.C. § 136a(c)(5)(C), (D).

141. *Id.* § 136(bb).

142. Section 301(b)(1)(C) of the CWA requires the establishment of “more stringent limitation[s]” on permitted levels of pollutants in effluent wherever “necessary to meet water quality standards.” 33 U.S.C. § 1311(b)(1)(C) (2012). *See also* 40 C.F.R. § 122.4(i) (2012) (prohibiting the issuance of any permits with terms or numerical limitations that would cause or contribute to a violation of water quality standards); 40 C.F.R. § 122.44(d) (effluent limits in permits must not cause, contribute, or have a reasonable potential to cause, a violation of water quality standards).

noted, is specifically exempted from the NPDES permitting program. Aquatic pesticides, including aquatic herbicides, piscicides, and larvicides, are specifically formulated and expected to be applied directly to water. Mosquito adulticides are designed to be applied directly over water in order to kill mosquitos in their breeding territory. Despite the near certainty that these adulticides will end up in water, the labels for common adulticides such as Malathion acknowledge that when used as directed, “[t]his pesticide is toxic to fish, aquatic invertebrates, and aquatic life stages of amphibians.”<sup>143</sup> Pesticide contaminated runoff from agricultural pesticide use has been associated with several fish die-off incidents,<sup>144</sup> as have applications of larvicides into marshes,<sup>145</sup> and adulticides sprayed over waters.<sup>146</sup> For many years, EPA required aquatic pesticide labels specifically to alert the user to the need to obtain a NPDES permit before discharging to waters: pesticides could not be

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143. See 25% Malathion Wettable Spray Concentrate, S. AGRIC. INSECTICIDES, INC., [http://www.southernag.com/docs/labels\\_msds/mal25.pdf](http://www.southernag.com/docs/labels_msds/mal25.pdf) (last accessed Nov. 19, 2013).

144. Md. Wasim Aktar, Dwaipayan Sengupta & Ashim Chowdhury, *Impact of Pesticides Use in Agriculture: Their Benefits and Hazards*, 2 INTERDISC. TOXICOLOGY 1, 7 (2009) (Slovk.) (The pesticide Chlorpyrifos “has caused fish kills in waterways near treated fields or buildings.”); 3 STEVEN J. LARSON ET AL., PESTICIDES IN SURFACE WATERS: DISTRIBUTION, TRENDS, AND GOVERNING FACTORS 278 (Robert J. Gillom ed., 1997) (“[I]t has been estimated that 10 to 15 million fish were killed between 1960 and 1963 in the Mississippi and Atchafalaya Rivers and associated bayous” as a result of exposure to the agricultural insecticide endrin.).

145. See Jan Ellen Spiegel, *Pesticides Found in LI Sound Lobsters for the First Time: More Study Planned*, CT MIRROR (July 10, 2012), [www.ctmirror.org/story/16864/pesticides-found-li-sound-lobsters-first-time-more-study-planned](http://www.ctmirror.org/story/16864/pesticides-found-li-sound-lobsters-first-time-more-study-planned); John Rather, *Mosquito Arrives, Its Enemies Divided*, N.Y. TIMES (June 17, 2007), <http://www.nytimes.com/2007/06/17/nyregion/nyregionspecial2/17mainli.html>; Debbie Tuma, *Alarm Over Crab Dieoff: Fishermen Eying Tie to Pesticides*, N.Y. DAILY NEWS (Sept. 1, 2000), <http://www.nydailynews.com/archives/boroughs/alarm-crab-dieoff-fishermen-eying-tie-pesticides-article-1.893632#ixzz2J81VXK7W>. See also Anna N. Walker et al., *Bioaccumulation and Metabolic Effects of the Endocrine Disruptor Methoprene in the Lobster, Homarus americanus*, 45 INTEGR. COMP. BIOL. 118 (2005), available at <http://intl-icb.oxfordjournals.org/content/45/1/118.full>; TA Stueckle et al., *Multiple Stressor Effects of Methoprene, Permethrin, and Salinity on Limb Regeneration and Molting in the Mud Fiddler Crab (Uca pugnax)*, 28 ENVTL. TOXICOLOGY & CHEMISTRY 2348 (2009).

146. *Peconic Baykeeper, Inc. v. Suffolk Cnty*, 585 F. Supp. 2d 377, 380–81 (E.D.N.Y. 2008), *aff’d in part, vacated in part*, 600 F.3d 180 (2d Cir. 2010) (discussing links between pesticide applications in response to West Nile virus outbreak and suspicious fish kills in several water bodies in Suffolk County, New York); *No-Spray Coal., Inc. v. City of New York*, No. 00 CIV. 5395 (GBD), 2005 WL 1354041, at \*2 (S.D.N.Y. June 8, 2005) (referencing “evidence of pesticides found in dead fish in Clove Lake in Staten Island”); see also Kirk Johnson, *Pesticide Effect, Hard to Assess, Stays in Shadow Of Disease Fight*, N.Y. TIMES (July 26, 2000), <http://www.nytimes.com/2000/07/26/nyregion/pesticide-effect-hard-to-assess-stays-in-shadow-of-disease-fight.html>.

“discharge[d] into lakes, streams, ponds, or public waters unless in accordance with an NPDES permit.”<sup>147</sup> Agricultural interests are among the heaviest users of pesticides. Thus, it is not surprising that, as with land application of CAFO wastes, EPA has not sought to enforce the CWA NPDES permitting requirement against pesticide application. Yet the CWA contains no exemption from the NPDES program for pesticides registered under FIFRA, and many pesticide applications into and overwater fall neatly into the triggering elements of the NPDES permitting requirement. Pesticides are “discharged” or “added” into water. The addition takes place from a “discrete conveyance”—usually a spray nozzle mounted on a vehicle or aircraft. Vehicles and aircraft have both been held to constitute CWA point sources in their own right.<sup>148</sup> The pesticides potentially fall within the definition of “pollutants,” which specifically includes “biological material” and “chemical wastes.”<sup>149</sup> Finally, many of these pesticides are applied to waters that are clearly jurisdictional “waters of the United States,” including tidal marshes and estuaries immediately adjacent to waters that are navigable in fact.

When over 100,000 juvenile steelhead salmon died in May, 1996 after the application of the aquatic herbicide Magnacide H (a trade name for acrolein) to an irrigation canal that drained into the Bear Creek in Oregon, a local conservation group broke the pattern of nonenforcement of NPDES permitting requirements against pesticide application. The group, Headwaters, Inc., served a notice letter and filed a citizen enforcement suit against the Talent Irrigation District (“TID”), alleging that TID’s application of the aquatic pesticide without a NPDES permit violated Section 301 of the CWA. The defendant irrigation district moved for summary judgment, arguing both that pesticides could not be considered “pollutants” because they are useful products, and that FIFRA-regulated pesticides are implicitly exempted from the statutory NPDES permitting requirement. While acknowledging that the application of acrolein to the irrigation canal satisfied all of the triggering elements of the NPDES permit requirement, the district court nevertheless granted summary judgment to the defendants, reasoning that pesticide applications were adequately regulated under FIFRA.<sup>150</sup>

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147. EPA, POLICY AND CRITERIA NOTICE 2180.1 (1977).

148. See *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982); *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41 (5th Cir. 1980); *Am. Mining Cong. v. U.S. Army Corps of Eng’rs*, 951 F. Supp. 267, 271 (D.D.C. 1997), *aff’d sub nom.*, *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399 (D.C. Cir. 1998).

149. 33 U.S.C. § 1362(6) (2006).

150. *Headwaters, Inc. v. Talent Irrigation Dist.*, Civil No. 98-6004-AA, 1999 U.S. Dist. LEXIS 21569 (W.D. Or. Feb. 1, 1999).

Headwaters, Inc. appealed to the Ninth Circuit, and EPA filed an amicus brief in its support of the appeal. The Ninth Circuit reversed the district court, holding that FIFRA and the CWA could easily be read to give both statutes effect, with FIFRA addressing the general impacts of pesticide use and the CWA NPDES permitting program addressing local impacts. According to the court, “The NPDES permit requirement under the CWA thus provides the local monitoring that FIFRA does not.”<sup>151</sup> The Ninth Circuit also rejected the irrigation district’s argument that pesticides, as useful products, could not be considered a “pollutant.” The court expressed skepticism that a toxic chemical like a pesticide would fall outside the definition of “pollutant,” but held that “the residual acrolein left in the water after its application qualifies as a chemical waste product and thus as a ‘pollutant’ under the CWA.”<sup>152</sup>

*Headwaters* was followed in the Ninth Circuit by *League of Wilderness Defenders v. Forsgren*,<sup>153</sup> where the court sustained a challenge to aerial spraying of insecticides to control the Douglas Fir Tussock Moth over United States Forest Service (“USFS”) Lands, including streams and other surface waters. In the *Forsgren* case, the USFS relied on several informal letters issued by EPA indicating that the aerial pesticide spraying did not require NPDES permitting. The Ninth Circuit, relying on the *Headwaters* case, rejected these EPA letters as unpersuasive, and held that the aerial spraying from aircraft constituted a discharge from a point source. The court held that:

In the present case, the insecticides at issue meet the definition of “pollutant” under the Clean Water Act, and Forest Service aircraft spray these insecticides directly into rivers, which are waters covered by the Clean Water Act. Further, an airplane fitted with tanks and mechanical spraying apparatus is a “discrete conveyance.” Therefore all the elements of the definition of point source pollution are met.<sup>154</sup>

Once the Ninth Circuit established that pesticide application was subject to NPDES permitting, citizen groups in other parts of the country sought to enforce the requirement. In *No-Spray Coalition v. City of New York*, a citizen group sued a municipality to challenge its program of spraying mosquito larvicides and adulticides into and over marshes and open water areas as part of municipal efforts to control mosquito-borne West Nile virus.<sup>155</sup> The district court in *No-Spray*, like the district court

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151. *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 531 (9th Cir. 2001).

152. *Id.* at 533 (citing *Hudson River Fishermen’s Ass’n v. City of New York*, 751 F.Supp. 1088, 1101–02 (S.D.N.Y. 1990), *aff’d*, 940 F.2d 649 (2d Cir. 1991)).

153. *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2008).

154. *Id.* at 1185.

155. *No-Spray Coal., Inc. v. City of New York*, 351 F.3d 602 (2d Cir. 2003).

in *Headwaters*, dismissed the plaintiffs' complaint based on a perceived conflict with FIFRA; rather than focus on any substantive conflict between the statutes, the court simply held that the CWA citizen suit should not be available to enforce against CWA violations that were also technical violations of FIFRA. The court reasoned that the lack of a citizen suit provision in FIFRA precluded invocation of the CWA citizen suit for pesticide-related violations.<sup>156</sup>

The Second Circuit, like the Ninth Circuit, reversed the district court's dismissal.<sup>157</sup> The court held that the lack of a citizen remedy under FIFRA does not affect the availability of a citizen enforcement remedy under the CWA, finding no reason "to eliminate from the CWA a remedy which it expressly provides, merely because another related statute does not similarly provide such a remedy."<sup>158</sup> The court refused to address the City's alternative argument that regulation of pesticides under FIFRA precluded their regulation under the NPDES permitting program. Instead, it remanded to the district court for further proceedings to determine whether the City's spraying program had committed a substantive violation of the CWA. On remand,<sup>159</sup> the district court denied the pending cross motions for summary judgment, essentially siding with the plaintiffs on the contested legal issues of whether pesticides sprayed into the air directly over surface waters constituted "additions" to water, whether pesticides could be considered to be "pollutants," and whether the spray vehicles and aircraft could be considered "point sources."

The combined effect of the legal holdings in the citizen enforcement initiatives in *Headwaters*, *Forsgren*, and *No-Spray* was, once again, to bring environmentally deleterious activities that had previously been exempted *sub rosa* through a policy of administrative nonenforcement within the regulatory ambit of the NPDES permitting program. However, unlike the administrative response in the case of gun clubs and landspreading of CAFO wastes, EPA refused to incorporate the citizen enforcement regulatory initiative for FIFRA into its agency regulatory program. Instead EPA sought, first through an interpretive statement,<sup>160</sup> and then through notice-and-comment rule making, to reverse the citizen enforcement/judicial expansion of the NPDES permitting program to cover pesticide application to waters. In November 2005, EPA adopted a

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156. *Id.*

157. *Id.*

158. *Id.* at 605.

159. *No-Spray Coal., Inc. v. City of New York*, No. 00 Civ. 5395, 2005 U.S. Dist. LEXIS 11097 (S.D.N.Y. June 8, 2005).

160. Notice and Request for Comment, 68 Fed. Reg. 48,385, 48,387-88 (Env'tl. Prot. Agency Aug. 13, 2003).

final rule that amended 40 C.F.R. § 122.23 to provide an exemption from the NPDES permitting program for pesticide application:

(h) The application of pesticides consistent with all relevant requirements under FIFRA (i.e., those relevant to protecting water quality), in the following two circumstances:

(1) The application of pesticides directly to waters of the United States in order to control pests. Examples of such applications include applications to control mosquito larvae, aquatic weeds, or other pests that are present in waters of the United States.

(2) The application of pesticides to control pests that are present over waters of the United States, including near such waters, where a portion of the pesticides will unavoidably be deposited to waters of the United States in order to target the pests effectively; for example, when insecticides are aerially applied to a forest canopy where waters of the United States may be present below the canopy or when pesticides are applied over or near water for control of adult mosquitoes or other pests.<sup>161</sup>

However, the EPA Pesticide Rule was not the last word on the issue of NPDES coverage of pesticide application. Both environmental interests and agricultural interests challenged the final Pesticide Rule in *National Cotton Council v. EPA*.<sup>162</sup> Environmental groups challenged the rule on the grounds that the Pesticide Rule illegally sought to exempt activities plainly covered by the statutory language of the CWA. Industry petitioners challenged the rule on the grounds that the rule did not go far enough, as it failed to exempt pesticide applications that violate pertinent FIFRA requirements as well as those that complied with FIFRA requirements.

As in the citizen enforcement cases, the challenge to the EPA Pesticide Rule turned on the interpretation of the CWA terms “pollutant” and “point source.” Because EPA formulated its rule through notice-and-comment rule making, the Sixth Circuit reviewed the challenge through the deferential lens of *Chevron*, examining first the question of whether EPA’s interpretation contravened Congress’s specific intent. EPA argued in defense of its rule that chemical pesticides are not pollutants as they are not “chemical wastes” included in CWA § 502(12), since, in EPA’s view, these pesticides were being used, not disposed of. EPA argued that since chemical pesticides fell outside the definition of waste,

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161. Application of Pesticides to Waters of the United States in Compliance with FIFRA, 71 Fed. Reg. 68,483, 68,485 (Nov. 27, 2006) (codified at 40 CFR § 122.3(h)(1)–(2) (2012)).

162. Nat’l Cotton Council of Am. v. EPA, 553 F.3d 927 (6th Cir. 2009).

nonchemical biological pesticides should likewise be excluded from the definition. The agency reasoned that it would be absurd to exempt chemical pesticides that are generally more hazardous from permitting while including more benign biological pesticides. Finally, EPA argued that although pesticide residues (including excess pesticides) might fall within the definition of chemical wastes, these residues were not discharged from a “point source” since they were not wastes at that time in the process. According to EPA, since the transformation from useful product to chemical waste takes place away from the point source, pesticide residues should be considered nonpoint source pollution, outside the scope of the NPDES permitting scheme.<sup>163</sup>

The Sixth Circuit vacated the Pesticide Rule, finding no ambiguity in the definitions of “pollutant” or “addition from a point source” that would leave room for EPA interpretation. Under an ordinary understanding of the term “chemical wastes,” both excess pesticides and pesticide residues are waste materials, so the only pesticide applications that could be exempted were those aquatic pesticide applications that left no excess pesticides and no residues in the water.<sup>164</sup> The court similarly rejected EPA’s reasoning that excess pesticides and residues were not discharged “from” a point source, holding that there was no temporal element in the definition of a discharge so long as the point source was a but-for cause of the pesticide wastes in the water.<sup>165</sup> Although the court relied on a plain meaning approach, the court noted the inconsistency between EPA’s position and the goals of the Act: “EPA’s interpretation ignores the directive given to it by Congress in the CWA, which is to protect water quality.”<sup>166</sup> Interestingly, although the preamble to the EPA Pesticide Rule cites the successful citizen enforcement suits as part of the impetus for the rule, the Sixth Circuit does not cite these cases in explaining its “plain meaning” approach to the scope of the NPDES program. Ultimately, despite the availability of *Chevron* deference for an EPA rule making, the CWA interpretation established in the citizen enforcement initiatives—that pesticide application requires a NPDES permit—prevailed over the agency position.

The Supreme Court denied review of *Cotton Council*.<sup>167</sup> On October 31, 2011, following a stay of the mandate in the Cotton Council case, EPA issued a nationwide general permit under the NPDES program for

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163. *Id.* at 934–35, 939.

164. *Id.* at 936.

165. *Id.* at 940.

166. *Id.* at 939.

167. *Am. Farm Bureau Fed’n v. Baykeeper*, 130 S. Ct. 1505 (2010).

the application of pesticides over and near water bodies.<sup>168</sup> As in the case of gun clubs and CAFO manure landspreading, an activity within the letter and intent of the NPDES program was brought into the regulatory program by the initiation of citizen enforcement cases against a backdrop of agency nonenforcement.<sup>169</sup> However, the regulatory political dynamic for pesticide regulation under the NPDES program is not yet complete: a bill passed the House of Representatives in the 112th Congress that would have exempted pesticide application from NPDES regulation.<sup>170</sup>

#### *D. Interbasin Water Transfers*

Various enterprises move water within and between watersheds. Huge quantities of water are moved for the purpose of irrigated agriculture, drinking water supplies, flood control, hydroelectric power generation, and even snowmaking in ski areas. Artificial water diversions pose unique challenges both environmentally and legally. Transfer of water contaminated with pollutants from runoff in agricultural, suburban, and urban areas introduces these contaminants to the receiving water body. High levels of nutrients in agricultural and suburban runoff promote algae blooms and eutrophication in receiving waters. Water

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168. EPA, PESTICIDE GENERAL PERMIT (PGP) FOR DISCHARGES FROM THE APPLICATION OF PESTICIDES (2011), available at [http://www.epa.gov/npdes/pubs/final\\_pgp.pdf](http://www.epa.gov/npdes/pubs/final_pgp.pdf).

169. As this Article is being written, another, similar dynamic of citizen enforcement leading to an agency regulatory rollback is playing out before both EPA and the Supreme Court. In *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063 (9th Cir. 2011), cert. granted sub nom. *Decker v. Nw Env'tl. Def. Ctr.*, 133 S. Ct. 22 (2012), citizen plaintiffs argued successfully to the Ninth Circuit Court of Appeals that channeled stormwater runoff from logging roads required NPDES permits, and were not exempted by the regulatory exemption for silvicultural activities in 40 C.F.R. § 122.27 (2012). The Supreme Court granted certiorari, and shortly after argument before the Supreme Court, EPA issued a final regulation purporting to clarify the exemption from NPDES permitting requirements for stormwater discharges from logging roads. *Revisions to Stormwater Regulations to Clarify That an NPDES Permit Is Not Required for Stormwater Discharges from Logging Roads*, 77 Fed. Reg. 72,970 (December 7, 2012) (to be codified at 40 C.F.R. § 122). The Supreme Court has permitted supplemental briefing on the effect of the regulations on its decision concerning the applicability of NPDES permitting requirements to logging road stormwater runoff. The Supreme Court ultimately upheld EPA's interpretation of the preexisting regulation to exclude logging road runoff from regulation in *Decker v. Northwest Environmental Defense Center*, 133 S.Ct. 1326 (2013).

170. H.R. 872, 112th Cong. § 2 (2011) (proposing to restrict "the Administrator or a State" from requiring a NPDES permit for any "discharge from a point source into navigable waters of a pesticide authorized for sale, distribution, or use"). This bill has been reintroduced in the 113th Congress as H.R. 935. H.R. 935, 113th Cong. (2013).



supply transfers may introduce contaminants and heat from degraded watersheds to pristine watersheds. These may include contaminants that are naturally occurring in the donor watershed but impair the natural quality of receiving water bodies. Industrial effluents in the donor water body can contaminate otherwise pristine receiving waters. Water transfer impoundments may add heat to the transferred waters, and hydroelectric facilities can kill and grind up fish and other aquatic life. Transferred water may differ in color, turbidity, solids content, or clarity from the receiving water, causing visual and aesthetic impacts. Designated uses and water quality criteria in receiving water bodies may differ from those in the donor water body, so water that meets water quality standards where it is withdrawn may violate water quality standards where it is discharged.<sup>171</sup> Finally, water transfers can introduce invasive species to the receiving water body.

The status of water transfers under the NPDES permitting requirements of the CWA poses another problem of statutory interpretation in which a widely practiced activity falls within the literal statutory ambit of regulated point source discharges. There is no question that the contaminants transferred by water transfers are “pollutants”—after all, the definition of “pollutant” specifically includes “biological materials” and “heat,” as well as “rock” and “sand” (the components of turbidity-inducing suspended solids). The CWA specifically identifies “suspended solids” as a “conventional pollutant” regulated according to Best Conventional Pollution Control Technology under the CWA.<sup>172</sup> Similarly, the typical infrastructure of water transfers easily fits the definition of a “point source,” which specifically includes a “channel,” “ditch,” or “tunnel.” Receiving waters are typically permanent surface water bodies that are navigable in fact, or tributary to waters that are navigable in fact, thus falling within the definition of “waters of the United States.” So any controversy concerning the application of the NPDES permitting requirement to water transfers turns on the interpretation of the “addition” element of the CWA permitting scheme.

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171. Section 303 of the Clean Water Act requires states to designate uses for each distinct segment of every navigable waterway within its borders. Clean Water Act of 1972 § 303(c)–(d), 33 U.S.C. § 1313 (c)–(d) (2012). Designated uses may range from simple suitability for fish propagation, to use for fishing and primary contact recreation (swimming), to use as a public potable water supply. *Id.* § 1313 (c)(2)(A). States must then promulgate numerical standards for various pollutants and pollutant properties that each body of water must meet in order to safely support its designated uses. *Id.* § 1313(c)(2)(B). Thus, a water body that is designated as a public water supply will be assigned far more stringent water quality standards than another body of water in the same state that is designated only for fish propagation.

172. 33 U.S.C. § 1314(a)(4) (2000).

Water transfers seem to fall literally within the common sense and dictionary definitions of the term “addition”—they clearly “add” to the receiving waters pollutants that were not already there.

The legislative purpose sections of the CWA provide support for the inclusion of water transfers within the scope of NPDES permitting. On the one hand, the legislative purposes of the act specifically declare a national goal “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>173</sup> The conference report explained the idea of water body “integrity” as a “concept that refers to a condition in which the natural structure and function of ecosystems is maintained . . . defined as that condition in existence before the activities of man invoked perturbations which prevented the system from returning to its original state of equilibrium.”<sup>174</sup> This ecological integrity goal is clearly inconsistent with unregulated transfers of contaminated water from one water body to another. On the other hand, another section of the legislative purposes (added in 1977) declares that “it is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this chapter.”<sup>175</sup> Senator Wallop, the sponsor of this amendment, made clear, however, that it was not intended to take precedence over “legitimate and necessary water quality considerations.”<sup>176</sup> Thus, the legislative purposes seem to support the notion that water transfers should be considered in the NPDES permitting program so long as permitting is related to water quality issues and not water quantity regulation.

Structurally, the CWA also supports inclusion of water transfers and even intrabasin discharges, at least under some circumstances. Section 303 of the CWA, establishes a regime of water quality standards consisting of use designations and criteria for individual water body segments, and Sections 402(a) and 301(b)(1)(C) of the CWA contemplate the implementation and achievement of these segment-based water quality standards through the NPDES permitting regime.<sup>177</sup>

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173. 33 U.S.C. § 1251(a) (2012).

174. H.R. REP. NO. 92-911 (1972), *reprinted in* 1972 LEGISLATIVE HISTORY, *supra* note 23.

175. 33 U.S.C. § 1251(g) (1987).

176. *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 179 n.67 (D.C. Cir. 1982); 123 CONG. REC. 39,212 (1977) (statement of Sen. Wallop).

177. Clean Water Act § 402(a) sets forth the basics of the NPDES permitting program, through which EPA or delegated state agencies may issue permits that allow facilities to discharge effluent with levels of pollutants at or below specified amounts and concentrations without violating the Act’s blanket prohibition on the discharge of pollutants from point sources into navigable waterways. 33 U.S.C. § 1342 (2012).

In addition, by including the Section 404 dredge-and-fill materials permitting requirement within the same triggering elements of the basic Section 301 prohibition of the CWA, Congress clearly contemplated that, at least in some cases, redeposit of materials already present in the very same “waters of the United States” would trigger the permitting requirement.<sup>178</sup>

As with gun clubs, CAFO landspreading, and pesticides, citizen suits played a major role in the evolution of the application of NPDES permitting to water impoundments and transfers. Early on in the implementation of the CWA, in 1973, EPA issued a guidance document that discussed control of dam-induced water pollution as a nonpoint source pollution problem.<sup>179</sup> Based on this guidance, EPA did not require dams to acquire NPDES permits, even though they might fall within the literal application of the terms “point source” and “addition of any pollutant.” In 1979, the National Wildlife Federation (“NWF”), joined by other environmental groups and the State of Missouri, sued EPA to challenge this policy and force EPA to require permits in *National Wildlife Federation v. Gorsuch*.<sup>180</sup> EPA defended its policy of failing to require NPDES permits of dams on the grounds that pollutants “pass[] through the dam from one body of navigable water (the reservoir) into another (the downstream river),”<sup>181</sup> and thus the “addition” element of the NPDES trigger was lacking. The D.C. Circuit ultimately rejected NWF’s challenge, relying heavily on the nascent agency deference

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Section 301(b)(1)(C) of the Act requires the application of more stringent effluent limitations in NPDES permits as necessary to ensure that the water quality standards of receiving bodies are met for all pollutants and pollutant properties. *Id.* § 1311.

178. Clean Water Act Section 301 (when read in tandem with the Section 502 definitions section) prohibits the discharge of pollutants from point sources to waters of the United States “except as in compliance with” various other sections, including both the Section 402 (NPDES) permits and Section 404 (dredge and fill) permits. *Compare* 33 U.S.C. § 1311, *with id.* § 1342. Thus, the same elements trigger the permitting requirement, which may be satisfied by either a Section 402 permit or a 404 permit depending on the circumstances. Courts have upheld the application of permitting requirements to the redeposit of dredged material into the same water from which it was removed. *See United States v. M.C.C. of Fla., Inc.*, 863 F.2d 802 (11th Cir. 1989); *Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983); *Am. Mining Cong. v. U.S. Army Corps of Eng’rs*, 951 F. Supp. 267 (D.D.C. 1997). *But see United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997) (sidecasting not considered an “addition” of a pollutant).

179. EPA, THE CONTROL OF POLLUTION FROM HYDROGRAPHIC MODIFICATIONS 68–72 (1973).

180. *Gorsuch*, 693 F.2d 156. Unlike the other citizen initiatives discussed in this Article, the NWF suit was brought against EPA to force EPA to regulate dams, not as an enforcement action against putative violators of the NPDES permitting requirement.

181. *Id.* at 165.

principle to uphold EPA's litigation position that releases of pollutants from dams did not constitute "additions" of pollutants subject to NPDES regulations.<sup>182</sup>

Deference to EPA's statutory interpretation embodied in its guidance was critical to the D.C. Circuit's rejection of the citizen claims for NPDES regulation. The court anticipated the approach later adopted by the Supreme Court in *Chevron* in its statement of the role of the reviewing court:

If we conclude that EPA's interpretation is inconsistent with the language of the Clean Water Act, as interpreted in light of the legislative history, or if it "frustrates the policy that Congress sought to implement," no amount of deference can save it. . . . But if the agency's construction neither contradicts the language of the statute nor frustrates congressional policy, our inquiry is a limited one. The agency's construction must be upheld if, in light of the appropriate degree of deference, it is "sufficiently reasonable," even if it is not "the only reasonable one or even the reading the court would have reached" on its own."<sup>183</sup>

As noted, the *Gorsuch* case was not a case of direct citizen enforcement against an unpermitted discharger under the new citizen enforcement provisions; rather, citizens sought the more traditional route of seeking judicial review of an agency interpretation—a citizen remedy that had previously been available under the Administrative Procedure Act. This choice of the traditional remedy proved fatal to the legal position advanced by the citizen groups in *Gorsuch*—as deference to the agency interpretation proved to be an insurmountable obstacle to implementation of the NWF interpretation of the Act to include dams in the NPDES program. Ironically, the level of deference given by the D.C. Circuit to EPA's dam policy would not apply under current Supreme Court precedent, as the Court held in *Mead* that agency guidance documents such as those involved in *Gorsuch* do not merit full *Chevron*-style deference.<sup>184</sup>

Once established in *Gorsuch*, judicial acceptance of EPA's position on dams persisted even where NWF later sought to bring a citizen enforcement action in a similar case involving a pumped storage hydroelectric power facility. Pumped storage hydroelectric facilities store excess energy generated during periods of low-demand by using the electricity to pump water uphill into an impoundment, then releasing this water through generators to generate electricity during periods of higher

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182. *Id.* at 170–71.

183. *Id.* at 171 (citations omitted).

184. *United States v. Mead, Corp.*, 533 U.S. 218 (2001).

demand. In *National Wildlife Federation v. Consumers Power*,<sup>185</sup> NWF sued an electric utility, alleging that its pumped storage facility discharged pollutants, in the form of the ground up remains of fish killed by the electric generating turbines, from a point source into the waters of Lake Michigan. The Sixth Circuit ultimately rejected NWF's claims. The court agreed that the discharge was from a "point source" and that fish remains (and even fish) were clearly within the definition of "pollutants" covered by the NPDES program which specifically includes "biological materials." Nevertheless, the court rejected NWF's contention that the utility "added" these pollutants to waters. Relying heavily on *Gorsuch* and the newly minted *Chevron* deference, the court deferred to EPA's interpretation and held that no "addition" of pollutants had occurred, as the pollutants had never been removed from "waters of the United States."<sup>186</sup>

*Gorsuch* and *Consumers Power* seemed to settle the question of the application of NPDES permitting to dams and impoundments, at least where the same contaminants passing through the dam end up downstream in the same water body. What about water transfers between watersheds, or from downstream to upstream where the contaminants would never naturally migrate? Such a circumstance formed the basis of a citizen suit in *DuBois v. United States Department of Agriculture*.<sup>187</sup> In *DuBois*, a citizen and an environmental group challenged the United States Forest Service's approval for the expansion of the Loon Mountain ski area located within USFS lands in New Hampshire. As part of the expansion, Loon Mountain proposed to increase pumping of water from the East Branch of the Pemigawasset River uphill to Loon Pond, a pristine mountain pond that the ski area used as a snowmaking reservoir. The citizen litigation was a hybrid case, seeking judicial review of the USFS approval as a violation of NEPA and accusing USFS of violating the CWA by discharging the polluted Pemigawasset water into Loon Pond without a NPDES permit.<sup>188</sup> The ski resort intervened as a party

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185. *NWF v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988).

186. *Id.*

187. *Dubois v. USDA*, 102 F.3d 1273 (1st Cir. 1996).

188. There is some ambiguity in the reported decisions about whether the citizen plaintiffs relied on the Clean Water Act citizen enforcement provision, CWA § 505(a)(1). The opinions do not identify Section 505 as the basis of the cause of action, but the Court does apply the citizen suit notice requirement of Section 505(b)(1)(A), implying that the NPDES claims against the United States Forest Service and the intervenor defendant could be considered a citizen enforcement suit. The First Circuit suggested that the illegality of the proposed discharge under the CWA would be an independent ground to set aside the expansion approval even in the absence of jurisdiction under the CWA citizen enforcement suit provision. *DuBois*, 102 F.3d at 1301.

defendant. In defending the case, USFS expanded on EPA's position in *Gorsuch*, arguing that the "waters of the United States" regulated by the CWA constituted a "singular entity," such that pollutants that were already in any portion of the "waters of the United States" (such as Pemigewasset River) could not logically be "added" to another portion of the "waters of the United States" (such as Loon Pond). Although the district court dismissed the NPDES claim, the First Circuit Court of Appeals reinstated it, distinguishing *Gorsuch* and *Consumers Power* on the grounds that those cases involved single water bodies, not transfers between water bodies in a direction that water (and pollutants) would never naturally flow. The First Circuit accordingly held "that the Pemigewasset River and Loon Pond are two distinct 'waters of the United States,' and that the proposed transfer of water from one to the other constitutes an 'addition.'"<sup>189</sup>

The First Circuit's "distinct waters" distinction was a crack in EPA's dam, so to speak, against applying NPDES permitting to water transfers and impoundments. Two citizen suits challenging unpermitted water transfers followed, and leapfrogged their way through the judicial and administrative statutory interpretation process in a way that illustrates the complex interaction between citizen, judicial, and administrative interpretations of the statute. In the first case, brought in 1998, *Miccosukee Indian Tribe v. South Florida Water Management District*, the Miccosukee tribe of Indians brought a citizen enforcement suit against a flood control district that pumped stormwater runoff contaminated with phosphorus and other nutrients from flood control canals into Lake Okeechobee, causing algae blooms and eutrophication problems in Lake Okeechobee as well as violating water quality standards for phosphorus.<sup>190</sup> The fisheries and water resources of Lake Okeechobee that the citizen plaintiffs sought to protect are of vital importance to the Tribe. In the second case, commenced in 2000, *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, several trout fishing-oriented environmental organizations brought a citizen enforcement action against the City of New York based on the City's transfer of highly turbid water from a reservoir in one Catskill Mountain watershed through a tunnel that passed under a mountain and discharged into the Esopus Creek, a clear, fabled and beloved trout stream on the other side.<sup>191</sup> This water transfer muddied the Esopus Creek, interfered with trout breeding, and made fly fishing the Esopus all but impossible

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189. *Id.* at 1299.

190. *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 721 So.2d 389 (Fla. Dist. Ct. App. 1998).

191. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 484–85 (2d Cir. 2001).

due to limited visibility. The water transfer also caused violations of water quality standards in the Esopus Creek for turbidity and for temperature.

In the *Miccosukee* case, the district court granted plaintiff's motion for summary judgment, relying on *DuBois* to reject the "singular entity" theory and find that the transfer of polluted water from the flood control canal to Lake Okeechobee was indeed a pollutant "discharge" that triggered the NPDES permitting requirement. In the *Catskill Mountains* case, the district court granted the defendant's motion to dismiss, relying on *Gorsuch* and *Consumers Power* to hold that pollutants already in water could not be subject to permitting simply because the water was being transferred. The Catskill Mountains district court specifically relied on deference to EPA's guidance reflected in the *Gorsuch* and *Consumers Power* decisions.<sup>192</sup>

Both cases were appealed. In the *Catskill Mountains* appeal, the Second Circuit reversed the district court's dismissal of the complaint.<sup>193</sup> It noted that the district court had inappropriately applied *Chevron*-style deference to EPA's decades-old interpretive documents exempting dams from the NPDES program—a level of deference that was no longer appropriate in light of the Supreme Court's decision in *Mead*. It distinguished *Consumers Power* and *Gorsuch*, holding that those cases involved the movement of water within a single water body; while the Esopus Creek was a distinct water body from the Schoharie Reservoir. The Second Circuit used a "soup ladle" metaphor to explain the distinction:

The *Gorsuch* and *Consumers Power* decisions comport with the plain meaning of "addition," assuming that the water from which the discharges came is the same as that to which they go. If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not "added" soup or anything else to the pot (beyond, perhaps, a de minimis quantity of airborne dust that fell into the ladle). In requiring a permit for such a "discharge," the EPA might as easily require a permit for Niagara Falls. The present case, however, strains past the breaking point the assumption of "sameness" made by the *Gorsuch* and *Consumers Power* courts. Here, water is artificially diverted from its natural course and travels several miles from the Reservoir through Shandaken Tunnel to Esopus Creek, a body of water utterly unrelated in any relevant sense to the Schoharie Reservoir and its watershed. No one can reasonably argue that the water in the Reservoir and the Esopus are in any sense the "same," such that "addition" of one to the other is a logical impossibility.

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192. *Id.* at 489–90.

193. *Catskill Mountains Chapter*, 273 F.3d 481.

When the water and the suspended sediment therein passes from the Tunnel into the Creek, an “addition” of a “pollutant” from a “point source” has been made to a “navigable water,” and the terms of the statute are satisfied.<sup>194</sup>

The Eleventh Circuit likewise upheld the citizen plaintiffs’ interpretation of the CWA permitting requirements in the *Miccosukee* appeal.<sup>195</sup> Like the Second Circuit, the Eleventh Circuit found that pollutants were logically being “added” to Lake Okeechobee when they were introduced from another water body from which they would not naturally flow. Like the Second Circuit, the Eleventh Circuit rejected deference to EPA’s dam interpretation, finding it inapplicable to water transfers in any event. The court concluded:

When a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water into which it would not have otherwise flowed, that point source is the cause-in-fact of the discharge of pollutants. And, because the pollutants would not have entered the second body of water but for the change in flow caused by the point source, an addition of pollutants from a point source occurs.<sup>196</sup>

The court noted the consistency of this resolution with both the Second Circuit decision in *Catskill Mountains*, and the First Circuit decision in *DuBois*.

The Supreme Court granted certiorari in the *Miccosukee* case, on the question whether a point source need be the origin of the pollutants discharged in order to invoke the permitting requirements of the NPDES program. The solicitor general, on behalf EPA, submitted a brief arguing the so-called “unitary waters” theory, a restatement of the “singular entity” theory rejected by the *DuBois*, *Catskill Mountains*, and *Miccosukee* courts. The Supreme Court<sup>197</sup> declined to resolve the water transfers issue, limiting its holding to deciding that the flood management district could be subject to NPDES permitting even though the pollutants in question originated with various nonpoint sources for which the district was not responsible. The Court nevertheless vacated the decision of the Eleventh Circuit, holding that summary judgment for plaintiffs was inappropriate, and remanded the case for a trial on the question whether Lake Okeechobee was sufficiently distinct from the

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194. *Id.* at 492.

195. *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364 (11th Cir. 2002), *vacated and remanded by*, 541 U.S. 95 (2004).

196. *Id.* at 1368–69.

197. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004).



storm water canal to constitute an “addition” of pollutants under the CWA, specifically citing the Second Circuit’s “soup ladle” analogy.

The Court specifically declined to reject the “unitary waters” theory, and suggested that the Eleventh Circuit was free to consider the argument on remand. However, the fact that the Court remanded for a trial on the question whether the waters were meaningfully distinct as well as its dicta in discussing the unitary waters theory, seems to suggest the Supreme Court’s acceptance of the “different water bodies” distinction adopted by the First, Second, and Eleventh Circuits. In discussing the unitary waters theory and the United States’ reliance on Section 304(f) of the CWA, the Court noted:

We note, however that § 1314(f)(2)(F) does not explicitly exempt nonpoint pollution sources from the NPDES program if they also fall within the “point source” definition. And several NPDES provisions might be read to suggest a view contrary to the unitary waters approach. For example, under the Act, a State may set individualized ambient water quality standards by taking into consideration “the designated uses of the navigable waters involved.” 33 U.S.C. § 1313(c)(2)(A). Those water quality standards, in turn, directly affect local NPDES permits; if standard permit conditions fail to achieve the water quality goals for a given water body, the State must determine the total pollutant load that the water body can sustain and then allocate that load among the permit-holders who discharge to the water body. § 1313(d). This approach suggests that the Act protects individual water bodies as well as the “waters of the United States” as a whole.<sup>198</sup>

The Supreme Court thus left undisturbed the holdings of the First, Second, and Eleventh Circuits requiring NPDES permits for water transfers. In response, EPA pressed its alliance with the water interests and sought to enshrine the very unitary waters approach the Supreme Court had declined to endorse in *Miccousukee*. First, in August, 2005, EPA issued an interpretive memorandum opining that Congress did not anticipate that water transfers were to be subject to NPDES permitting “based on the statute as a whole,” and based on EPA’s longstanding practice of not requiring permits for such transfers. EPA’s interpretive memorandum concluded, in essence, that the First, Second, and Eleventh Circuits had mistakenly interpreted the CWA.<sup>199</sup> Based on this interpretive memorandum, defendants in the *Catskill Mountains* case argued to the Second Circuit in a post-trial appeal that that appellate

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198. *Id.* at 106–07.

199. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 82 (2d Cir. 2006).

court should reject its earlier interpretation of the CWA to require such permits. The Second Circuit rejected this gambit, noting that EPA's interpretive memorandum contradicted the plain meaning of the CWA, was not entitled to deference as it was not subject to notice and comment rule making, and did not constitute the sort of change in the law that would permit one panel of the Second Circuit to ignore the stare decisis effect of a prior ruling by the Second Circuit.<sup>200</sup>

Just days before the Second Circuit rejected application of EPA's interpretive guidance, EPA issued a notice of proposed rule making that would enshrine its water transfers interpretation into a regulatory exemption in the NPDES permitting regulations.<sup>201</sup> The Second Circuit declined to reconsider its decision on the basis of a proposed rule making,<sup>202</sup> and the Supreme Court denied certiorari on the question.<sup>203</sup>

On June 13, 2008, EPA issued the final Water Transfers Rule, adopting an explicit exemption from the NPDES permitting program for water transfers.<sup>204</sup> Like the Pesticide Rule, the Water Transfers Rule added a provision to 40 C.F.R. § 122.3 that exempted these discharges from the NPDES permitting program:

§ 122.3 Exclusions.

The following discharges do not require NPDES permits: . . .

(i) Discharges from a water transfer. Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred.<sup>205</sup>

As with EPA's pesticide rule, the Water Transfers Rule sought to reverse a series of Court of Appeals decisions in citizen suits that had interpreted the NPDES permit program expansively in favor of environmental protection. The preamble to the final rule explicitly relied on the holding in *Brand X*, that an agency interpretation contrary to prior judicial interpretation was nonetheless entitled to *Chevron*-style

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200. *Id.* at 83 n.5.

201. NPDES Water Transfers Proposed Rule, 71 Fed. Reg. 32,887 (June 7, 2006).

202. *Catskill Mountains Chapter*, 451 F.3d at 80–87.

203. *City of New York v. Catskill Mountains Chapter of Trout Unlimited, Inc.*, *cert. denied*, 549 U.S. 1252 (2007).

204. NPDES Water Transfers Rule, 73 Fed. Reg. 33,697, 33,700 (June 13, 2008).

205. 40 C.F.R. § 122.3 (2013).

deference.<sup>206</sup> The court rejected the Second Circuit's reasoning that pollutants are added whenever they come from a source outside the particular receiving water body, "[r]ather, EPA believes that an addition of a pollutant under the [CWA] occurs when pollutants are introduced from outside the waters being transferred."<sup>207</sup> EPA also claimed to interpret the term "addition" restrictively based on its reading of the overall statutory structure of the CWA, particularly its balance between federally mandated control of point sources of pollutants and state control over issues of water allocation and quantity.

The Water Transfers Rule was immediately tested in another South Florida Water Management District storm water pumping case, *Friends of the Everglades v. South Florida Water Management District*.<sup>208</sup> The district court in *Friends of the Everglades* held, after a trial, that the pump stations were transferring pollutants to a distinct water body, and required the Water Management District to obtain a permit. The final Water Transfers Rule was issued during the pendency of the appeal from this ruling, and the case became a test of the validity of the Water Transfers Rule. The Eleventh Circuit upheld the Water Transfers Rule,<sup>209</sup> finding ambiguity in the CWA term "any addition of any pollutant" despite its earlier holding that the term embraced water transfers. The court countered the Second Circuit's soup ladle analogy with a bucket analogy:

Consider the issue this way: Two buckets sit side by side, one with four marbles in it and the other with none. There is a rule prohibiting "any addition of any marbles to buckets by any person." A person comes along, picks up two marbles from the first bucket, and drops them into the second bucket. Has the marble-mover "add[ed] any marbles to buckets"? On one hand, as the *Friends of the Everglades* might argue, there are now two marbles in a bucket where there were none before, so an addition of marbles has occurred. On the other hand, as the Water District might argue and as the EPA would decide, there were four marbles in buckets before, and there are still four marbles in buckets, so no addition of marbles has occurred. Whatever

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206. NPDES Water Transfers Rule, 73 Fed. Reg. at 33,700 ("Courts are required to accept an agency's reasonable interpretation of a statute, even if this interpretation differs from what the court believes is the 'best' statutory interpretation" (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X*, 545 U.S. 967, 980 (2005)).

207. *Id.* at 33,701.

208. *Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist.*, 02-80309 CIV, 2006 WL 3635465 (S.D. Fla. Dec. 11, 2006), *rev'd in part, appeal dismissed in part sub nom.* *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009).

209. *Friends of the Everglades*, 570 F.3d at 1228.

position we might take if we had to pick one side or the other of the issue, we cannot say that either side is unreasonable.<sup>210</sup>

Finding ambiguity and finding EPA's interpretation to be "permissible," the court proceeded to uphold the Water Transfers Rule under *Chevron* step two.<sup>211</sup>

Although the Supreme Court denied certiorari in the *Friends of the Everglades* case, the final verse of the water transfers saga has not quite been written. Several petitions challenging the Water Transfer Rule were filed, some in district courts and some in Circuit Courts. The Circuit Court challenges were all consolidated and transferred to the Eleventh Circuit by lottery pursuant to 28 U.S.C. § 2210. Because the Water Transfers Rule does not fall within any of the categories for which direct Circuit Court review is provided by the CWA Section 509(b)(1), the petitioners moved to dismiss the Eleventh Circuit challenges for lack of jurisdiction, in favor of proceeding in the district court cases. On October 26, 2012, the Eleventh Circuit dismissed the pending rule challenge petitions on the grounds that it lacked jurisdiction to hear them under Section 509 of the CWA.<sup>212</sup> Rule challenge plaintiffs are thus free to pursue their challenge to the Water Transfers Rule in district court pursuant to Administrative Procedure Act Section 706, and their challenge is pending in the Southern District of New York.<sup>213</sup>

Citizen suits thus drove the development of the law governing the application of NPDES permitting requirements to water transfers. As in the case of gun clubs, CAFO manure landspreading, and pesticide application, citizen enforcement in a field of pollutant discharges abandoned by EPA met with initial success in the courts, thereby expanding the remedial scope of the CWA. Unlike EPA's reaction in the case of gun clubs and landspreading, EPA chose to resist the citizen plaintiffs' success in expanding the CWA's environmental protection like it did in reaction to citizen success on regulation of pesticide discharges.

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210. *Id.*

211. The validity of the Eleventh Circuit's review of the Water Transfers Rule in a citizen suit (as opposed to a rule challenge petition) may itself be subject to question. The Supreme Court has granted certiorari on the question whether the validity of a rule may be challenged in the context of a citizen suit in *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326 (2012).

212. See *Friends of the Everglades v. EPA*, 699 F.3d 1280 (11th Cir. 2012).

213. *Catskill Mountains Chapter, Trout Unlimited, Inc. v. EPA*, 630 F. Supp. 2d 295 (S.D.N.Y. 2009).

## V. ASSESSMENT OF CITIZEN SUIT IMPACT ON THE CLEAN WATER ACT REGULATORY PROGRAM

These four case studies illustrate the profound impact that citizen enforcement provisions have had on the CWA regulatory program. In three of the four cases, at least, the availability of the citizen enforcement suit has brought environmentally harmful activities into the scope of the NPDES regulatory program, with its strict technology- and water quality-based limits on water pollution. In two of the four cases (gun clubs and CAFO manure landspreading), a reluctant EPA accommodated the citizen regulatory initiatives into its own regulatory program. In the other two cases, EPA unsuccessfully resisted the regulatory expansion sought by the citizens regarding pesticides, while its resistance to citizen expansion of the NPDES permitting regarding interbasin water transfers is still undergoing judicial review. What conclusions can be drawn from this forty-year experience with citizen-regulators taking enforcement matters into their own hands? For one, the availability of the citizen enforcement suit has, by disrupting the bilateral regulatory model, resulted in fuller implementation of the CWA's goals to restore and protect the integrity of the nation's waters. Also, the citizen enforcement tool has given citizens a role in setting the regulatory agenda, by forcing EPA to take regulatory action on matters it would otherwise have ignored (or addressed without engaging in rule making.). Finally, even where the citizen regulatory initiatives are ultimately unsuccessful, they have forced EPA and congressional actors to expend political capital where these political actors have supported regulations or statutory amendments seeking to roll back citizens' hard-won victories in court.

### *A. Disruption of the Bilateral Model Leading to Expanded Water Protection*

In each of these four cases studies, citizens sought enforcement of CWA permitting requirements against activities that were within the literal prohibition of the CWA Section 301, but which were effectively exempted from regulation by a pattern of EPA and state nonenforcement. EPA's nonenforcement practices against gun clubs, CAFOs, pesticide applications, and water transfers can be seen as a direct result of agency capture by regulated entities under a bilateral regulatory model in which the regulatory program is a result of political bargaining between the regulatory agency and the regulated entities. It is no accident that these four instances of agency underenforcement involve actors with strong lobbies and favored political status.

The availability of a citizen enforcement remedy that is outside the bi-lateral regulatory model and immune to political influence thus brought these four activities, which are clearly within the ambit and statutory purpose of CWA regulation, within the regulatory program. Inclusion of these activities in the NPDES program can only help furthering the statutory goal of restoring and protecting the chemical, ecological, and biological integrity of the nation's waters. The citizen enforcement suit has performed exactly as intended in this way—fostering more-complete achievement of congressional goals and insuring, in the immortal words of Judge Wright, that “important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.”<sup>214</sup>

### *B. Driving the Agenda*

If the successful litigations in each of these citizen initiatives were the last word on the subject of regulating gun clubs, CAFOs, pesticide applications, and water transfers, then the citizen suit could be declared an unalloyed success for the achievement of the 1972 Congress's lofty clean water goals. But in fact, each of these cases served as a springboard for further regulatory and/or congressional action either to implement (in the case of gun clubs and CAFOs) or to thwart the citizen victories (in the case of pesticides and water transfers).

The regulatory and potential congressional responses to these citizen initiatives may cast some doubt on the ultimate success of citizen enforcement action in achieving clean water goals. After all, in the cases of pesticide application and water transfers, the citizen suit successes may yet be undone by some combination of rule making and congressional response. EPA has limited resources, and the result of the citizen pesticides enforcement initiatives was to prompt EPA to expend its regulatory resources first to engage in a rule making to adopt its pesticides exemption, and then to expend resources to issue a general permit for pesticide application after the Pesticides Rule was struck down by the Sixth Circuit. Resources EPA spent responding to citizen initiatives might otherwise have been spent on better implementation of other parts of the CWA regulatory program.

Despite this diversion of regulatory resources, the citizen enforcement initiatives in these cases at least had the benefit of forcing EPA to engage in a public, adversarial rule-making process that it would have foregone under the pure bilateral regulatory model. In this way,

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214. *Calvert Cliffs' Coordinating Comm., Inc. v. U. S. Atomic Energy Comm'n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971)

citizen suits were a much more effective way to force EPA regulatory action on the subjects of CAFO land spreading, pesticide applications, and water transfers than petitions for rule making, addressed to agency discretion, ever would have been in the absence of the citizen enforcement remedy. In the case of CAFO land spreading, pesticide applications, and water transfers, the citizen enforcement initiatives prompted rule making on issues EPA might have preferred to ignore. Three of the four of these citizen enforcement initiatives were at least successful in prompting agency rule making, a much better record of success than equivalent citizen petitions for agency rule making.<sup>215</sup>

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215. No cases could be located in which a citizen suit successfully forced EPA to promulgate or amend regulations in the absence of a binding statutory deadline. However, NGO citizen suits against nongovernmental organizations have spurred more modest agency actions in a limited number of cases. For example, in 2008, EPA granted part of a petition from the Bluewater Network requesting a comprehensive assessment of the water quality impacts of various wastes from cruise ships. *See* Letter from Benjamin H. Grumbles, Assistant Administrator, EPA, to Russell Long, Program Advisor, and Teri Shore, Clean Vessels Campaign Director, Bluewater Network (Jan. 31, 2008), *available at* [http://water.epa.gov/polwaste/vwd/upload/2008\\_03\\_03\\_oceans\\_cruise\\_ships\\_Bluewater\\_Network\\_Petition\\_Response\\_20\\_31\\_08.pdf](http://water.epa.gov/polwaste/vwd/upload/2008_03_03_oceans_cruise_ships_Bluewater_Network_Petition_Response_20_31_08.pdf). This led to the publication by EPA of a Cruise Ship Discharge Assessment Report in the Federal Register, but no associated regulatory action has yet been taken in direct response to the Bluewater Network's petition. *See* Draft Cruise Ship Discharge Assessment Report, 72 Fed. Reg. 72,353 (Dec. 20, 2007). Additionally, in 2009, EPA responded favorably to a petition from the Center on Biological Diversity ("CBD") requesting that EPA "publish revised water quality criteria and information taking into account new scientific information about ocean acidification" and "publish information pursuant to [S]ection 304(a)(2) providing guidance on ocean acidification to provide much needed information to the states and serve as the basis for a comprehensive and uniform approach to ocean acidification." EPA's response does not specifically grant or deny the petition, but states that a Notice of Data Availability and a guidance document would be released in response to the petition, and that public comments were being requested concerning the potential promulgation of ocean acidification criteria. This response seems to have been negotiated between EPA and CBD, as the last paragraph reads: "We understand, based on our discussions with CBD, that these actions will address the concerns outlined in the two submissions identified above and that no further response is necessary. EPA would like CBD to commit to refrain from a lawsuit now and then agree to withdraw its petition and Notice of Intent effective on the release date of the NODA in the Federal Register." *See* Letter from Benjamin H. Grumbles, Assistant Administrator, EPA, to Miyoko Sakashita, Attorney, CBD (Jan. 16, 2009), *available at* [http://www.biologicaldiversity.org/campaigns/ocean\\_acidification/pdfs/EPA\\_Response\\_to\\_CBD\\_Ocean\\_Acidification\\_Petition.pdf](http://www.biologicaldiversity.org/campaigns/ocean_acidification/pdfs/EPA_Response_to_CBD_Ocean_Acidification_Petition.pdf).

### *C. Effect on Judicial Review*

As the pesticide and water transfers examples illustrate, EPA's regulatory efforts to roll back citizen enforcement victories have to date had mixed success. The Pesticide Rule was struck down by the Sixth Circuit, while the Water Transfers Rule has been endorsed by the Eleventh Circuit (even though the actual petition for review of the rule remains pending in district court within the Second Circuit). In both cases reviewing EPA responses to citizen enforcement successes, the courts, following *Brand X*, purported to apply the same deferential standard of review under *Chevron*, despite the existence of prior judicial decisions contrary to EPA interpretation. It is thus impossible to draw any firm conclusions about the effect that citizen enforcement initiatives have on ultimate judicial deference to a subsequent agency interpretation. Nevertheless, the existence of prior judicial decisions holding the activities in question to be within the scope of the NPDES program cannot help but form a backdrop favorable to the citizens' interpretation. At a minimum, the existence of successful citizen prosecutions negates the possibility of the court relying on a tradition of nonregulation of an activity as grounds for concluding the activity was never within the scope of the NPDES program.<sup>216</sup> Prior judicial interpretations also form a persuasive counterpoint to EPA for a court seeking to determine whether Congress had a specific intent to cover a particular activity in the NPDES permitting program.<sup>217</sup>

### *D. Agency and Congressional Political Capital*

As these case histories demonstrate, the implementation of a complex statutory regulatory program like the CWA is not a simple matter of Congress enacting a law and EPA enforcing it. Rather, statutory implementation is a complex, pluralistic process involving a continuing interaction between Congress, citizens, regulated entities, the agency, and the courts. One might ask whether the citizen enforcement suits did much to advance the CWA regulatory agenda, when two of the four citizen litigation victories were the subject of EPA regulatory negotiation and possible congressional negotiation as well.

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216. Compare with *Am. Mining Cong. v. U.S. Army Corps of Eng'rs*, 951 F.Supp. 267 (D.D.C. 1997), where the court relied on congressional acquiescence in a pattern of nonenforcement by EPA and Corps of Engineers to conclude that Clean Water Act permitting requirements did not apply to incidental fallback from dredging activities in wetlands.

217. See *Nat'l Cotton Council of Am. v. EPA*, 533 F.3d 927 (6th Cir. 2009).



Nonetheless, even unsuccessful citizen regulatory initiatives may advance environmental protection. When the agency with “environmental protection” in its name initiates rule making to reduce water quality protection, as EPA did with both the pesticides rule and the Water Transfers Rule, it does so at the expense of its political capital and credibility with organized environmental interests. While these interests may not be as politically powerful as the agricultural lobby, they carry some weight in the pluralistic administrative and political process that the CWA’s structure helps to establish. Likewise, when congressional representatives or a particular political party becomes associated with efforts to roll back environmental protections won in the courts, they do so at some political cost. In the absence of the citizen enforcement suit, the same environmentally unproductive result would have been achieved through a silent policy of agency nonenforcement, without these political costs. Citizen enforcement may or may not ultimately be successfully in requiring NPDES permits for pesticide applications and water transfers, but it has certainly been successful in forcing EPA to show its true colors when agricultural and municipal interests seek to evade environmental regulation.

## VI. CONCLUSION

The citizen enforcement suit provision of the CWA has proven to be the ultimate upset of the traditional bilateral regulatory state. By providing citizens with a direct enforcement remedy, Congress not only provided for full enforcement of the CWA’s remedial provisions, but it also deprived the regulatory agency of its most potent interpretive tool—interpretation by unreviewable nonenforcement. At the same time it provided citizens with a tool to drive the regulatory agenda, forcing agency attention on regulating otherwise politically-favored groups. This profound disruption to the former bilateral model of the regulatory state is illustrated by four citizen enforcement initiatives that drove EPA’s regulatory agenda—gun club discharges, pesticide discharges, landspreading of CAFO manure, and water transfers. In each case, citizen enforcement forced EPA to react to judicial developments in the scope of the CWA regulatory program. While EPA’s reaction has varied from incorporating the environmental initiatives into its own regulatory program (as with landspreading of manure) to fiercely resisting the citizen innovations (as in the case of pesticide applications and water transfers), citizen enforcement has had a profound effect on implementation and interpretation of the CWA regulatory program in each case.