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Control of Nonpoint Pollution Through Citizen Enforcement of Unpermitted Stormwater Discharges: A Proposal for Bottom-Up Litigation

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This Article investigates the murky regulatory world of stormwater pollution. Nonpoint source pollution has been described as the most significant water quality problem facing the United States.[1] It is generally not subject to the primary enforcement mechanisms of the Clean Water Act (CWA).[2] Stormwater is where the CWA's primary enforcement mechanisms, usually reserved for point sources, intersect with nonpoint pollution. Effective regulation of stormwater could go far toward controlling nonpoint sources of water pollution. However, the U.S. Environmental Protection Agency's (EPA's) approach to stormwater regulation has stopped short of effectiveness, reaching only a narrow albeit significant segment of industrial stormwater dischargers, while attempting to leave the overwhelming majority of dischargers discretionarily exempt from the CWA. The bulk or balance of stormwater discharges that EPA has chosen not to regulate are the focus of this Article.

If EPA's determination not to regulate these sources of stormwater is allowed to stand, it will, for the first time, allow the Agency to exempt categories of point sources from liability under the CWA. Far from providing effective regulation for the improvement of water quality, EPA's stormwater regulations will allow a significant number of point sources, which have been recognized as a threat to water quality, to discharge pollutants with immunity from both national pollutant discharge elimination system (NPDES) permit requirements and the strict prohibition against unpermitted discharges found in §301(a) of the Act.[3]

Several challenges to EPA's Phase II stormwater regulations have already been decided. The most recent, *Environmental Defense Center, Inc. (EDC) v. U.S. Environmental Protection Agency*,[4] reaches many important issues surrounding EPA's Phase II stormwater rules. The *EDC* decision upheld EPA's decision to not designate additional

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1. U.S. Environmental Protection Agency (EPA), Nonpoint Source Pollution: The Nation's Largest Water Quality Problem (2003) (EPA 841-F-96-004A), *available at* http://www.epa.gov/OWOW/nps/facts/point1.htm (last modified Aug. 18, 2003).
2. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
3. *Id*. §1311(a), ELR Stat. FWPCA §301(a).
4. 319 F.3d 398, 33 ELR 20139 (9th Cir. 2003). The court affirmed all but three provisions of EPA's CWA stormwater discharge rule known as the Phase II rule. The U.S. Court of Appeals for the Ninth Circuit held that in requiring permits for small municipal separate storm sewer systems (small MS4s), EPA reasonably interpreted the CWA §402(p) statutory directive to include regulation of stormwater discharges from MS4s. Although permits are not included in the §402(p) list of elements that EPA may include in a small MS4 regulatory program, EPA is not prohibited from using permits in its small MS4 program.

   In addition, the court declared that the Phase II rule also does not compel small MS4s to regulate third parties in contravention of the Tenth Amendment of the U.S. Constitution. Although municipalities may be required to regulate third parties in order to meet the rule's permit requirements, the rule does not amount to unconstitutional coercion because municipalities have the option of not discharging or seeking an alternative permit. Further, EPA's adoption of minimum measures for the Phase II rule's general permit requirement does not violate the Agency's statutory authority under CWA §402. Moreover, the Phase II rule's public education and outreach requirements do not compel municipalities to deliver EPA's political message in violation of the First Amendment of the Constitution.

   The court further found that EPA did not violate the Administrative Procedure Act's notice-and-comment requirements when it adopted the Phase II rule's alternative permit option. The alternative permit option as a whole was not addressed in the proposed rule, but because all of the elements of the option were included in the proposed rule, the public had a sufficient opportunity to comment on the option.

   Moreover, EPA's failure to designate serious sources of stormwater pollution—known as Group A sources—for regulation under the Phase II rule was not arbitrary and capricious. Sufficient evidence supported EPA's decision not to designate the Group A sources on a nationwide basis and instead to establish a local and regional designation authority to address these sources. Similarly, EPA did not act arbitrarily and capriciously by failing to regulate forest roads in the Phase II rule. The U.S. Congress authorized the Phase II program under the CWA section for municipal and industrial stormwater discharges. Thus, the rule was not intended to address stormwater pollution from agriculture.

   Furthermore, the court ruled EPA satisfied its CWA §402(p)(5) duty to consult with states on the Phase II rule. EPA also was not required to base the Phase II rule solely on the CWA §402(p)(5) studies. The CWA unambiguously required EPA to base the rule both on the §402(p)(5) studies and on consultation with state and local officials. EPA's designation of small MS4s for Phase II regulation based on pollution density and the Agency's decision to regulate all construction sites between one and five acres under the Phase II rule was not arbitrary and capricious.

   Likewise, EPA properly retained authority to designate future sources of stormwater pollution for Phase II regulation as needed to protect federal waters. CWA §402(p) authorizes case-by-case designation of certain polluters and categories of polluters, including those dischargers that will be identified at a later time under the retained authority as polluting local waters. Further, pursuant to the Regulatory Flexibility Act, EPA reasonably certified that the Phase II rule would not have a significant economic impact.

   However, the court did conclude that the Phase II general permit option violated the CWA's requirements that permits for discharges require controls to reduce the discharges of pollutants to the maximum extent practicable because the Phase II rule does not provide for review of notices of intent. The rule required small MS4 applicants for a general permit to submit a notice of intent addressing the six minimum measures identified in the rule for controlling water quality, but it failed to provide for any EPA review of the notices of intent to evaluate whether they are sufficient, reasonable, or offered in good faith. Likewise, the Phase II rule violates the CWA by not making notices of intent available to the public. Similarly, the Phase II rule general permit option violates the CWA because it does not contain express requirements for public participation for the notices of intent in the NPDES permitting process for small MS4s.

stormwater sources for regulation under CWA §402(p).[5] In the wake of this ruling it appears that any further systemic challenge to EPA's Phase II stormwater regulations is simply a nonstarter. Even if such a challenge were timely, top-down litigation against EPA to force more effective regulation of stormwater would be cumbersome and likely ineffective or even counterproductive.

Citizen suits brought against EPA to enforce other specific obligations under the Act have often resulted in ineffective remedies compelling the Agency to perform mandatory actions the specifics of which are discretionary. As seen in the total maximum daily load (TMDL) litigation, citizen suits brought against EPA to enforce neglected responsibilities under the Act have often failed to produce measurable improvements in either EPA's overall regulatory efforts or in actual water quality. This is because, although EPA's TMDL responsibilities have been interpreted by the courts as mandatory, the Act provides EPA with a great deal of discretion in how it executes those responsibilities. Even where successful, citizen suits against EPA have resulted in court orders with lengthy time frames, and significant delays, while leaving dischargers free to pollute during the interim. In the cases in which TMDLs have actually been established they appear ineffective in addressing nonpoint sources of pollutants and stormwater discharges,[6] which are often the reason for water quality impairments triggering the TMDL requirements to begin with.

This Article advocates and discusses a bottom-up stormwater litigation strategy utilizing citizen suits directly against specific stormwater dischargers that are significant sources of pollutants, but which EPA and enforcing states have chosen not to regulate. EPA's stormwater regulations have expressly included the category of "significant contributors of pollutants or contributors to a water quality standards violation" (hereinafter referred to as "significant sources or contributors") within the coverage of the Act.[7] Additionally, both EPA and the courts have interpreted the jurisdictional term "point source" to include stormwater discharges. Accordingly, stormwater dischargers that are significant sources or contributors appear to be covered under the Act in instances in which EPA has not specifically designated them to require NPDES permits.[8] Although EPA has generally chosen not to require such sources to obtain NPDES permits, the Agency has no authority to exempt such sources from liability under §301(a) of the Act, which flatly prohibits the discharge of any pollutant without a permit. Simply put, once EPA or the courts have defined a category of discharger as "point source," that source is covered under §301(a) of the Act unless a specific statutory provision exempts it from coverage. In the case of stormwater discharges that are significant sources or contributors, EPA has defined such sources to be point sources. Under the statutory authority provided in §402(p)(6), EPA retains the discretion to determine when an NPDES permit for such a source may be required. However, even should EPA choose not to require an NPDES permit, stormwater discharges that are significant sources or contributors may still face liability under §301(a) of the Act enforced through citizen suits pursuant to §505.[9]

The litigation strategy is simple: Citizen suits against unpermitted stormwater discharges, not required by EPA to obtain NPDES permits, but for which evidence exists of a significant discharge of pollutants. The theory is that regardless of EPA's discretion over the issuance of NPDES permits to such sources, stormwater dischargers that are point sources as well as significant sources or contributors of pollutants are covered under the Act. Section 301 of the Act makes unpermitted discharges of pollutants per se illegal.[10] Therefore, where an unpermitted stormwater discharger meets the statutory definition of a point source, and is a significant source or contributor of pollutants, that discharger is in violation of §301(a) of the Act. The citizen suit provisions of §505 confer jurisdiction to enforce violations of effluent limitations or standards, defined at §505(f) to include violations of §301(a).

The goal is to put pressure on the regulated community to seek coverage under the NPDES program in order to avoid citizen suit liability, and thereby force EPA to more effectively address stormwater discharges. EPA will be more responsive to regulated interests than it will be to the environmental community. Therefore if the pressure to regulate stormwater dischargers comes from the regulated community itself, it is more likely that EPA will take action. Other advantages to the bottom-up theory of litigation are that it circumvents a substantial amount of EPA discretion, makes polluters immediately liable for discharges not authorized by an NPDES permit, and thereby removes incentives for polluters to delay seeking coverage under the NPDES program. This strategy might also allow citizen advocates to collaterally challenge substantive issues of state or EPA NPDES programs which might not be challengeable through citizen suit litigation against a state or EPA directly.[11]

The Scope of the Problem of Nonpoint Pollution

It is axiomatic to say that the CWA, although a huge success in some aspects, has failed in its expressed goals. Although the quality of some lakes, rivers, and streams has improved, the majority of U.S. waters have seen little improvement or have declined in quality.[12] This is because the CWA does not effectively address "nonpoint" pollution, even as EPA has created regulatory confusion by treating many "point sources" as "nonpoint" sources of pollution. Despite 30

5. EPA declined to extend coverage to these sources under its Phase II regulations, and despite a challenge by environmental organizations, the Ninth Circuit upheld EPA's decision. "We reject the Environmental Petitioners' contention that EPA's failure to designate for Phase II regulation serious sources of stormwater pollution, including certain industrial ('Group A') sources and forest roads, was arbitrary and capricious." *Id*. at 428, 33 ELR at 20139.

6. *See* Linda A. Malone, *The Myths and Truths That Threaten the TMDL Program*, 32 ELR 11133 (Sept. 2002); Oliver A. Houck, *The Clean Water Act TMDL Program V: Aftershock and Prelude*, 32 ELR 10385 (Apr. 2002).

7. *See* 40 C.F.R. §122.26(a)(9)(i).

8. The NPDES program is established pursuant to CWA §402.

9. 33 U.S.C. §1365, ELR STAT. FWPCA §505.

10. "Except as in compliance with this section and [§§]1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. §1311(a), ELR STAT. FWPCA §301(a).

11. *See id*. §1365, ELR STAT. FWPCA §505.

12. *See*, *e.g.*, Houck, *supra* note 6, at 10390, 10395, 10396; U.S. EPA, NATIONAL WATER QUALITY INVENTORY, 2000 REPORT TO CONGRESS (2002) (60% of impaired waters are degraded due to nonpoint pollution sources); Robert W. Adler, *Fresh Water—Toward a Sustainable Future*, 32 ELR 10167 (Feb. 2002).

years of regulatory action, litigation, and court orders implementing the provisions of the CWA, the waters of the United States remain so polluted that in many places where surface water escapes the continent it creates hazardous algal blooms, fish kills, and a host of other problems.

Picture an overhead view of a 6,000-square-mile algal bloom in the Gulf of Mexico, spreading from the coast of Texas, past Louisiana, to the coast of Florida. Picture massive fish kills from the anoxic or anaerobic conditions created in the bloom as decaying algae sucks all or most of the oxygen from the surrounding waters. Or do not picture it in your mind and instead log on to the National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce's website and look at the satellite imagery of the blooms.[13] Each summer from 6,000 to 8,000 square miles in the heart of the Gulf of Mexico, one of this country's most economically productive fisheries, turns into a floating zone of death in which aquatic creatures cannot survive.[14]

As incredible as the Gulf of Mexico "dead zone" may seem, it is not the only event of its kind. An even more bizarre occurrence is the spread of *Pfiesteria piscicida* through eastern U.S. coastal and intercoastal waterways from Maryland to North Carolina.[15] Like something out of a science fiction novel, *Pfiesteria* algal blooms emit a neurotoxic secretion to stun and incapacitate fish and other aquatic creatures that are subsequently consumed by the algae. Many of the once productive fisheries and oyster beds in these areas have been destroyed, or rendered unsafe for human consumption by *Pfiesteria* contamination. *Pfiesteria* also affects humans with its nervous system-attacking properties; fishermen and scientific researchers who have come into contact with *Pfiesteria* blooms have reported a variety of symptoms indicative of nerve agent poisoning.

The economic cost of the destruction of fisheries and ocean resources is hard to determine, but it is high indeed. The algal blooms occurring off the various coasts of the United States are only one small part of a greater picture of epidemic contamination of the nation's lakes, rivers, and streams. This contamination has been allowed to continue unchecked and even increase despite 30 years of regulation under the CWA. The potential solutions to these problems may be found in underutilized or unutilized provisions of the CWA. Specifically, the stormwater discharge provisions of the CWA found in §402(p) could be far more effectively used by EPA.[16]

Nonpoint Pollution

In terms of sheer volume, sediment is probably the single largest pollutant present in the lakes, rivers, and streams of the United States. Stormwater dischargers are a very large contributor of sediments. Sediment leads to siltation, which changes the physical characteristics of a water, raising temperatures and contributing to impairment of flow and habitat. Nonpoint sources are the largest contributor of sediment to U.S. waters.[17]

In terms of detrimental effect on the quality of U.S. waters, "nutrients" is probably the single largest problem. Generally, nutrients originate as fertilizer, animal, or human waste, or decaying organic matter, rich in nitrogen, phosphorous, and/or other compounds essential to healthy plant growth. In the agricultural context, nutrients may originate as fertilizer applied to agricultural fields, washed into nearby rivers because of heavy rain, misapplication or overapplication of fertilizers, poor management of livestock, and/or livestock waste. In the urban context, nutrients may originate from poorly designed or maintained municipal waste treatment systems, septic systems, pet waste, or lawn clippings.[18]

Properly controlled, nutrients can be beneficial. Applied at agronomic rates to crops, nutrients can generate beneficial plant growth and greatly enhance agricultural productivity. Improperly controlled, nutrients cause the wrong plants to grow, often leading to explosive growth of aquatic plants like the algae. In extreme cases, like the dead zone in the Gulf of Mexico, vast algae blooms consume the overabundance of available nutrients and then die, generating decaying organic matter which sucks all available oxygen from surrounding waters as it decomposes.[19] Nonpoint sources of pollution are the leading contributors of nutrient pollution.

The Mississippi watershed is the biggest source of nutrient pollution in the United States.[20] This watershed starts in the northern Midwest and drains 20 of the most intensively agricultural states. Water from the Mississippi River ends up in the Gulf of Mexico. It is the nutrients in the water from the Mississippi River, from the fields and cities of the Midwest, that contribute most significantly to the dead zone.[21] The scope of the problem is massive. Despite the ardor of those who may claim that nonpoint pollution should be dealt with on the state level, no one state alone can impose restrictions sufficient to correct or even begin to address this problem.[22]

One very visible set of contributors to the problem of nonpoint pollution are large-scale, industrial livestock operations which generate waste on a scale far beyond the assimilative capacity of the surrounding natural systems. Hog waste lagoon failures in Missouri, North Carolina, and other states have led to massive fish kills and contamination

13. *See* http://www.noaa.gov/satellites.html.
14. *See* Colin Woodward, Ocean's End: Travels Through Endangered Seas 102 (2000).
15. *See* Elaine Bueschen, Pfiesteria Piscicida*: A Regional Symptom of a National Problem*, 28 ELR 10317 (June 1998).
16. 33 U.S.C. §1342(p), ELR Stat. FWPCA §402(p).
17. U.S. EPA, Nonpoint Source Pollution, *supra* note 1; U.S. EPA, National Water Quality Inventory, 1998 Summary 7 (2000); Robert L. Fischman, *Stumbling to Johannesburg: The United States' Haphazard Progress Toward Sustainable Forestry Law*, 32 ELR 10291, 10300 (Mar. 2002).
18. *See* U.S. Department of the Interior, U.S. Geological Survey, Selected Findings and Current Perspectives on Urban and Agricultural Water Quality by the National Water Quality Assessment Program (USGS Fact Sheet FS-047-01, 2001).
19. *See, e.g.*, Thomas E. Svarney & Patricia Barnes-Svarney, The Handy Ocean Answer Book 444 (2000).
20. *See* National Agricultural Statistics Serv., U.S. Department of Agriculture, 1997 Census of Agriculture (1998), *available at* http://www.nass.usda.gov/census; National Oceanic & Atmospheric Administration, *Hypoxia in the Gulf of Mexico*, *at* http://www.noaa.gov/products/pubs_hypox.html (primary contributors to Gulf of Mexico hypoxia are Illinois, Indiana, Iowa, Minnesota, and Ohio).
21. *See* Donald A. Goolsby et al., Flux and Sources of Nutrients in the Mississippi-Atchafalaya River Basin 14 (1999).
22. *See* Oliver A. Houck, The Clean Water Act TMDL Program: Law, Policy, and Implementation (Envtl. L. Inst. 2d ed. 2002); Environmental Law Inst., Enforceable State Mechanisms for the Control of Nonpoint Source Water Pollution (1997).

of surface and groundwater.[23] The widespread use of fertilizers, especially those containing phosphorous, is a huge contributing factor that creates contamination which may reach receiving streams and rivers in a number of different ways.[24] Fertilizers that are overapplied may be flushed into streams and rivers through rainfall. These fertilizers may also be held in the soils for later release through sedimentation or leaching if those soils reach saturated levels.

The sedimentation and erosion of nutrient laden soils is a problem that may extend for many years and overlap agricultural and urban boundaries and eras. Much of the discharge of phosphorous from urban sources may be traced back to dust from now urban soils which were once fertilized for agriculture. Similarly, land clearing activities which result in erosion or sedimentation or the generation of dust from soils containing nutrients can cause multiple impacts, increasing the sedimentation and temperature of a receiving water at the same time it increases the nutrient loading.

The conversion of land to impervious surfaces is particularly detrimental to the health and cleanliness of waters within a watershed. The creation of impervious surfaces destroys the plants which previously may have either filtered or metabolized nutrients in runoff. Conversion to impervious surface also prevents the absorption of water by the soil, increasing the volume and speed of stormwater flow while decreasing the filtration of nutrients through sorption in the soil, increasing the amount of nutrients reaching a receiving water through runoff during a rainfall event.

Most Nonpoint Pollution Is Driven by Stormwater

What all of the above examples of nonpoint pollution have in common is that they are driven by stormwater. The sources and generation of stormwater pollution are extremely diverse and difficult to determine. However, the discharge of these pollutants is generally driven by natural precipitation or stormwater, and channeled at some point through a "confined and discrete conveyance" that looks remarkably like a "point source." Any regulatory attempt to control the *generation* of stormwater pollution is likely to be extraordinarily complex and difficult to the point of infeasibility. However, the legal mechanism to control the *discharge* of pollutants from stormwater sources may be far simpler, and may already exist. The answer may well be the effective control of stormwater discharges, falling within the statutory and regulatory definition of "point sources" of pollution, that the CWA already seems to require.

The Primary Enforcement Mechanisms of the CWA

As amended in 1972, the CWA imposed a dual system for addressing water pollution. First were the technological requirements of §301 of the Act. The Act required any entity that discharged pollutants into jurisdictional waters to seek an NPDES permit pursuant to §402(a), which incorporated what were known as best available technology (BAT) standards as defined at §301(b). These standards imposed limitations on the quantity of a pollutant that a source could discharge through incorporation of those limitations in an NPDES permit. The permit requirements as originally conceived applied to industrial point sources. These sources could be defined as industrial operations that discharged pollutants to jurisdictional waters through a point source regardless of whether there was precipitation in the area. Such sources that discharged without a permit would violate §301(a) and render the discharger liable to civil penalties and enforcement actions by the government or liability under the citizen suit provisions of §505. Although the U.S. Congress enacted §505 in 1972 to drive compliance with the permitting requirements of §402, it did not make §505 immediately effective; instead, it imposed a two-year grace period to allow sources to come into compliance prior to exposing those sources to citizen suit liability.

The Act required states to establish state water quality standards, which were state determinations of what level of quality was desired for each water in the state. The requirements for the establishment of water quality standards are found in §303 of the CWA.[25] Section 303 also required that states list any waters that failed to meet state water quality standards after all discharges had been brought into compliance with BAT technological requirements. This list is known as the §303(d) list. Once waters were placed on the §303(d) list, the §303 requirements for establishing TMDLs were triggered. Every water placed on the §303(d) list was supposed to have a TMDL prepared by June 6, 1979.[26] Each TMDL was to make a numerical assessment of the amount of a pollutant that a waterway could receive and still meet its designated uses under state water quality standards. Once this assessment had been made EPA or the state as the case might be was to determine the number of sources contributing the pollutant of concern and allocate to each source a specified amount of pollution that it could contribute. This allocation is known as either a waste load allocation if the source of the pollutant is a point source, or a load allocation if the pollutant is from a nonpoint source.

This brings us to the first of many practical problems with the coverage of nonpoint and stormwater sources under the primary enforcement mechanisms of the Act. Aside from the fact that virtually no TMDLs were actually established pursuant to the Act's mandate, there is the issue that the numerical effluent limitations established by a TMDL are not directly applicable to nonpoint sources. The numerical effluent limitations established by the TMDL process are designed to be implemented and enforced through additional restrictions in an NPDES permit. Nonpoint sources of pollution are not required to obtain NPDES permits. Assuming that all identified point sources in an impaired water have been permitted and brought into compliance with BAT standards, it is likely that the major contributors of pollutants still impairing that water are nonpoint and not covered by NPDES permits. At this point, federal law requires TMDLs to be established for an impaired water even if that water is impaired solely by nonpoint sources of pollution.[27] Thus after spending an estimated $1 million to prepare a TMDL for one pollutant in one impaired water quality-limited seg-

23. *See generally* J.B. Ruhl, *The Environmental Law of Farms: 30 Years of Making a Mole Hill Out of a Mountain*, 31 ELR 10203 (Feb. 2001).

24. Office of Pollution Prevention & Toxics, U.S. EPA, Background Report on Fertilizer Use, Contaminants, and Regulations (1999).

25. 33 U.S.C. §1313, ELR Stat. FWPCA §303.

26. *See* Houck, *supra* note 22, at 59-60 ("submission due within six months of EPA's identification of the applicable pollutants, or June 6, 1979").

27. Pronsolino v. Nastri, 291 F.3d 1123, 32 ELR 20689 (9th Cir. 2002).

ment, EPA or a state may find itself in the same position it started from. That is, the water is still polluted and further ratcheting down on point sources through TMDL-derived numerical effluent limitations in NPDES permits will likely not resolve the problem. It is not difficult to understand why states would drag their heels in performing TMDLs given that the process is unlikely to result in any enforceable restrictions on those nonpoint sources of pollution that are likely to be the major contributors to the problem. The TMDL process may be valuable in providing EPA or a performing state with information that could be used to regulate nonpoint sources under state law, or through the voluntary nonpoint provisions of the CWA.[28] However, such TMDLs will generally not result in action-forcing, NPDES permit numerical effluent limitations for nonpoint sources.

NPDES permit requirements, §505 citizen suit jurisdiction, technology-based effluent limitations, and TMDL-derived numerical effluent limitations apply to point sources. These driving elements do not apply to nonpoint sources. Many of the "nonpoint" sources that EPA has chosen not to regulate discharge the bulk of their pollutants via stormwater runoff and through point sources. Bringing stormwater discharges of polluted runoff more fully into the purview of the primary enforcement mechanisms of the Act may be one way to focus more effectively on nonpoint pollution.

The Definition of a Point Source

In enacting the CWA, Congress chose to use the primary mechanisms of the Act to address "point sources." A "point source" is subject to technology-based effluent limitations and permitting requirements, and may not lawfully discharge at all without a permit. Any discharge from a point source is illegal, and a violation of the Act is subject to state or EPA enforcement and parallel citizen suit liability. "Nonpoint" sources of pollution are subject to none of these restrictions, but rather a handful of voluntary programs like §319 of the CWA and virtually no enforcement.

The term "point source" is defined by the Act as

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.[29]

The definition of "point source" seems rather broad and could easily be read to apply to most stormwater discharges. Nearly all stormwater, regardless as to its original source, winds up channeled through some type of pipe, ditch, channel, discrete fissure, or other conduit. The definition of a "point source" has been frequently visited and fleshed out by the courts. The current "legal" definition is quite broad and may also appropriately be interpreted to encompass stormwater discharges.

An early case construing the definition of a point source in the context of a stormwater discharge was *O'Leary v. Moyer's Landfill, Inc.*[30] The court held that discharges from a failed leachate collection system constituted discharges from a point source. In construing the statutory definition of a point source, the court found that

> [t]he essence of a point source discharge is that it be from a "discernible, confined, and discrete conveyance." Contrary to defendants' assertions, this has nothing to do with the intent of the operators or the reasonableness of the existing collection system. Notwithstanding that it may result from such natural phenomena as rainfall and gravity, the surface run-off of contaminated waters, once channeled or collected, constitutes discharge by a point source.[31]

In the earlier *Sierra Club v. Abston Construction Co.*[32] case, the U.S. Court of Appeals for the Fifth Circuit reviewed a decision that stormwater discharges of pollutants from a mining operation were not covered under the CWA. The court found:

> The ultimate question is whether pollutants were discharged from "discernible, confined, and discrete conveyance[s]" either by gravitational or nongravitational means. Nothing in the Act relieves miners from liability simply because the operators did not actually construct those conveyances, so long as they are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water. Conveyances of pollution formed either as a result of natural erosion or by material means, and which constitute a component of a mine drainage system, may fit the statutory definition and thereby subject the operators to liability under the Act.[33]

More recently, the term "point source" has been interpreted by reviewing courts to include a discharge from a stormwater drainage ditch comprised of seepage or stormwater runoff from a landfill leachate collection system.[34] In *Concerned Area Residents for the Environment v. Southview Farm*,[35] the U.S. Court of Appeals for the Second Circuit construed the definition of a point source in the context of a dairy operation discharging animal waste from a drain tile in a wall.

> We believe that the swale coupled with the pipe under the stonewall leading into the ditch that leads into the stream was in and of itself a point source. As this court has previously noted, the definition of a point source is to be broadly interpreted. *Dague v. City of Burlington*, 935 F.2d 1343, 1354 [21 ELR 21133] (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 557 [22 ELR 21099] (1992); *see also Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45-46 (5th Cir. 1980) (defendants were engaged in strip mining operations and placed their overburden in highly erodible piles which were then carried away by rain water through naturally created ditches); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 [9 ELR 20542] (10th Cir. 1979) (discharge from a large capacity reserve sump serving a gold extraction process could be a point source even though "the source of the excess liquid is rainfall or snow melt"). In *Sierra Club*, the Fifth Circuit held that a defendant is not relieved from liability simply because it does not actually construct the conveyances

28. 33 U.S.C. §1329, ELR STAT. FWPCA §319.
29. *Id*. §1362(14), ELR STAT. FWPCA §502(14).
30. 523 F. Supp. 642 (E.D. Pa. 1981).
31. *Id*. at 655.
32. 620 F.2d 41, 10 ELR 20552 (5th Cir. 1980).
33. *Id*. at 45, 10 ELR at 20553.
34. Hudson River Fishermen's Ass'n v. County of Westchester, 686 F. Supp. 1044, 18 ELR 21451 (S.D.N.Y. 1988).
35. 34 F.3d 114, 24 ELR 21480 (2d Cir. 1994).

> "so long as they are reasonably likely to be the means by which the pollutants are ultimately deposited into a navigable body of water." *Sierra Club*, 620 F.2d at 45; *see also United States v. Oxford Royal Mushroom Prods., Inc.*, 487 F. Supp. 852, 854 [10 ELR 20549] (E.D. Pa.1980) (discharge resulting from spraying overabundance of water onto surface of an irrigation field which, in turn, ran off into a nearby stream through a break in a berm around the field may constitute discharge from a point source). Here, the liquid manure was collected and channelized through the ditch or depression in the swale of field 104 and thence into the ditch leading to the stream on the boundary of the Southview property as it adjoins Letchworth State Park.[36]

In *Washington Wilderness Coalition v. Hecla Mining Co.*,[37] the U.S. Court for the Eastern District of Washington determined that a point source could be as large as a 38-acre pond. The court stated:

> Initially, it is clear that the size of the pond is not relevant to determining whether or not it is a point source. As plaintiffs explain, it would be irrational to conclude that the bigger the source of pollution, the less likely it is to be a "source" under the CWA. Cases cited by defendants support the conclusion that man-made ponds, designed to receive tailings, are "conveyances" or "containers" under the definitions in the [CWA]. *See United States v. Earth Sciences, Inc.*, 599 F.2d 368, 370 [9 ELR 20542] (10th Cir. 1979) (system of sump pumps, ditches, and hoses is "point sources"); *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 [6 ELR 20732] (4th Cir. 1976) (distinguishing point sources from "unchanneled and uncollected surface waters"); *Consolidated Coal Co. v. Costle*, 604 F.2d 239, 249 [9 ELR 20511] (4th Cir. 1979) (point sources include slurry ponds, drainage ponds, and coal refuse piles); *Trustees for Alaska v. EPA*, 749 F.2d 549, 557-58 [15 ELR 20146] (9th Cir. 1984) (adopting *Earth Sciences* interpretation of point source to apply to placer mine). To similar effect is *Abston Constr.*, where the Fifth Circuit noted: "Gravity flow [from rain or runoff water] may be part of a point source discharge if the miner at least initially collected or channeled the water and other materials."). *Sierra Club v. Abston Const. Co.*, 620 F.2d 41 [10 ELR 20552] (5th Cir. 1980); *see also Committee to Save the Mokelumne River v. East Bay Mun. Util.* [*Dist.*], 13 F.3d 305, 308 [24 ELR 20225] (9th Cir. 1993) (holding that an NPDES permit is required for "surface runoff that is collected or channelled" into a Mine Run Dam Reservoir).

These decisions make clear that the touchstone for finding a point source is the ability to identify a discrete facility from which pollutants have escaped.[38]

In *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*,[39] the Second Circuit revisited the definition of a point source in the context of an inter basin transfer of water. The court reversed the district court and found that the discharge from the Shandakan Tunnel into the Esopus Creek was an addition of pollutants and, as such, was a "discharge of a pollutant" subject to the §301(a) prohibition of unpermitted discharges. In dismissing one of New York City's arguments, the Second Circuit reasoned:

> The City also argues that "addition" draws meaning from its association with the phrase "from a point source." This view misunderstands the import of the term "point source," which does not necessarily refer to the place where the pollutant was created but rather refers only [to] the proximate source from which the pollutant is directly introduced to the destination water body. A pipe from a factory draining effluent into a navigable water is a point source, but the factory itself is not. This is clear from the text of the Act, which defines "point source," in relevant part, as
>
> > any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.
>
> 33 U.S.C. §1362(14). Under most circumstances, a "pipe, ditch, channel, tunnel, [or] conduit" is unlikely to have created the pollutants that it releases, but rather transports them from their original source to the destination water body.[40]

The court's interpretation that the term "point source" applies to the conveyance of a pollutant as opposed to the generation or source of the pollutant is an important distinction in the realm of stormwater discharges. EPA's regulations draw numerous distinctions based on the type of facility producing pollutants, rather than on the characteristics of the conveyance, as the determining factor of when a stormwater discharge may be jurisdictional. Here the Second Circuit seems to say that the existence of a point source is determined by the manner of discharge, rather than the type of facility that generates the pollutants.

The above-cited precedent establishes two important trends in the evolving definition of a point source that are relevant to stormwater dischargers. The first is simply that stormwater discharges have been widely held to be point source by the courts if they meet the statutory definition of a "confined and discrete conveyance." In the area of stormwater litigation, the term "point source" has been liberally defined by the courts. The second point is that although EPA's designations of what is or is not a covered source under the Act often turn on the method of generation, the courts seem to apply a simpler test, consistent with the statutory scheme of the CWA, that defines point sources based on the method of conveyance and finds point sources to be covered under the Act.

Stormwater Is Generally Point Source

What Congress was focused on in the 1972 Amendments of the CWA was, to grossly oversimplify, pipes to the river. Congress was not attempting to regulate various types of industrial and commercial entities, but rather to clean up the water. In implementing its mandate, EPA initially focused on industrial dischargers. In establishing regulations for those dischargers, EPA distinguished between types of industrial activities in establishing effluent limitations and encouraged industry to comply with BAT standards. Under EPA's regulations, the product and method of production determined the standards. Different types of industry would have different sets of standards which focused on the man-

36. *Id*. at 118-19, 24 ELR at 21483.

37. 870 F. Supp. 983, 25 ELR 20661 (E.D. Wash. 1994).

38. *Id*. at 988, 25 ELR at 20663.

39. 273 F.3d 481, 32 ELR 20229 (2d Cir. 2001).

40. *Id*. at 493, 32 ELR at 20232.

ner of the generation of the pollutants rather than release of the pollutants into the environment. In the case of industrial discharges, this distinction is largely academic. Industrial point sources tend to be fairly discrete and easily identifiable. In the case of stormwater dischargers, however, the distinction between a regulatory program focused on the generation of pollutants and a program focused on the release of pollutants becomes very significant. A regulatory program that focuses on the generation of pollutants is poorly suited to dealing with stormwater discharges given that such an approach would be tantamount to regulating natural precipitation, or the rain itself. One common factor of stormwater pollution, however, is that most pollutant-containing runoff generated by stormwater winds up channeled through a ditch, gully, storm drain, culvert, or other confined and discrete conveyance, before reaching jurisdictional waters. Thus, regardless as to the method of generation, the discharge of most stormwater is point source. This brings most stormwater discharges squarely into §301(a) jurisdiction.

Stormwater is where point and nonpoint pollution intersect. The CWA's §402(p) stormwater permit provisions have the potential to be one of the most far reaching solutions to the nonpoint pollution problem. The reason is simple; rain, snow, and other forms of precipitation are what cause the emission of "nonpoint" pollution. Think of the gentle sound of falling rain as the flushing of a toilet and you have a fairly accurate analogy for what occurs. Pollution accumulated on impermeable surfaces such as roads, parking lots, driveways, and sidewalks gets flushed by rainwater into the nearest culvert, into the nearest storm sewer, and into the nearest stream. Agricultural pollution, from animal waste, fertilizer, land clearing, or timbering activities, is flushed by rainwater overland or through channels into the nearest stream.

The effective control of stormwater would go far toward controlling the overall problem of "nonpoint" pollution. The problem with EPA's regulation of stormwater is that the Agency appears to have ignored both its statutory mandate to identify and regulate stormwater discharges that pose a threat to water quality as well as the statutory definition of a "point source," and has treated many significant stormwater point sources as nonpoint. In the area of stormwater discharges, EPA regulations focus on the source rather than the conveyance of stormwater discharges. Stormwater discharges are regulated under the NPDES program if the generation of the discharge falls within one of a few, specifically enumerated Standard Industrial Code (SIC) categories. As EPA itself stated: "Relying on SIC codes, a classification system created to identify industries rather than environmental impacts from these discharges, some types of stormwater discharges that might otherwise be covered were not included in the existing NPDES stormwater program."[41]

As will be discussed in more detail shortly, EPA has interpreted its CWA §402(p) authority to apply only to certain narrowly defined industrial generators of stormwater. EPA has also chosen to regulate based on similarities in the generation of pollutants as opposed to the environmental effects and manner of discharge. Although EPA's Phase II stormwater regulations have expanded the scope of the program to include some "industrial look-alike" discharges, the bulk of discharges not involving the direct exposure of rainwater to industrial processes are still uncovered. The statutory mandate of §402(p)(5) and (6) has been interpreted by EPA to give the Agency authority to regulate, or more often not regulate, many stormwater point sources as noncovered sources of pollution.

EPA, thus, treats industrial operations discharging pollutants through a pipe differently from industrial operations discharging pollutants through stormwater discharges, differently from agricultural or urban operations discharging pollutants through stormwater discharges, even though all discharges may contain similar pollutants. In the realm of stormwater discharges, EPA maintains the distinction between industrial operations discharging stormwater and other types of stormwater discharges even though the pollutants discharged by both categories of polluters are often similar if not identical.

It makes little logical sense to treat an "industrial" stormwater discharge containing metals, polynuclear aromatic hydrocarbons, and fecal coliform differently from a discharge from a parking lot storm culvert containing metals, polynuclear aromatic hydrocarbons, fecal coliform, sediment, and phosphorus, but that is the case under EPA's logic. The industrial stormwater discharger must apply for the Industrial NPDES Stormwater Discharge Permit and must, at minimum, adhere to best management practices (BMPs) and strict monitoring and reporting requirements. Under current EPA regulations, the large parking lot probably does not need a permit of any kind, may find no permits available should it even apply for one and is subject to no monitoring or oversight of any kind, unless state law establishes these requirements independently of the CWA. Yet both the "industrial" discharger and nonindustrial large parking lot may discharge equally harmful and often similar pollutants.

Large parking lots serve as a touchstone of the effectiveness of EPA's stormwater regulations. They are stormwater dischargers that have been determined to be a significant threat to water quality and fall into the significant source or contributor category of 40 C.F.R. §122.26(a)(9)(i), yet EPA treats them as noncovered stormwater point sources. Although they are both point and significant sources or contributors, their discharges are generally and presumptively exempt from the requirements of the Act under EPA's current regulatory scheme. The types and quantities of pollutants discharged from parking lots are also similar to discharges from other categories of covered and noncovered stormwater point sources.

EPA May Not Exempt Point Sources From Coverage Under the Primary Enforcement Mechanisms of the Act

Pertinent to any discussion of EPA's authority to exempt point sources from coverage under the CWA is the *Concerned Area Residents for the Environment* court's treatment of the defendant's assertion that it fell under the agricultural exemption of the Act, and was therefore not a point source and not covered. The court stated:

> [W]hen Congress enacted the 1972 Amendments, it considered and chose to exempt agricultural activities under the [§]208 nonpoint source provisions "*except in the case of [confined animal feeding operations (CAFOs)]*."

41. 64 Fed. Reg. 68771, 68779 (Dec. 8, 1999).

> Brief of Farm Bureau Amici at 7 ((emphasis added) (citing Pub.L. No. 92-500, §208(b)(2)(F), 86 Stat. 816, 841 (1972), *codified as amended,* 33 U.S.C. §1288(b)(2)(F); S. Rep. 414, *reprinted in* 1972 U.S.C.C.A.N. at 3759) (supplemental views of Sen. Dole)).
>
> It is understood that the 1972 framework remains in place and that the revision made in 1977 to the point source definition excluded "return flows from irrigated agriculture," 33 U.S.C. §1362(14), thereby overriding, in part, *Natural Resources Defense Counsel,* [sic] *Inc. v. Train*, 396 F. Supp. 1393, 1402 [5 ELR 20401] (D.D.C. 1975) (holding that the Federal Water Pollution Control Act Amendments of 1972 do not authorize the exclusion of point sources in the agriculture, storm sewer, and silviculture categories from the permit requirements of the NPDES), *aff'd sub nom. Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1382 [8 ELR 20028] (D.C. Cir. 1977) (holding that [ ] EPA has no discretion to limit regulation of point sources to those it deems most significant). The Congress is said to have made its intent clear in the legislative history which states that the "effect" of the newly created [§]402 is to amend [§]208(b)(2)(F) and to "exempt irrigation return flows from all permit requirements under [§]402 . . . and assure that area wide waste treatment management plans under [§]208 include consideration of irrigated agriculture."[42]

The part of this analysis that is applicable to a stormwater discharge from a parking lot facility (or other undetermined stormwater discharge) is the discussion of the effect of the agricultural exemption. Congress created this exemption as well as the exclusion of confined animal feeding operations (CAFOs) from the exemption. The partial overturning of the 1975 *Natural Resources Defense Council, Inc. v. Train*[43] decision referred to by the *Concerned Area Residents for the Environment* court was merely a recognition of the fact that Congress does have the authority to exempt certain point sources from coverage under the Act. Where Congress makes a specific exemption from the provisions of the CWA, it will be upheld by the courts. What the CWA regulates is point sources and Congress may authorize the exclusion of point sources from the Act. The holding of *Natural Resources Defense Council, Inc. v. Costle*,[44] reaffirmed in the *Concerned Area Residents for the Environment* ruling, establishes that EPA has no independent authority to exclude point sources from coverage under the Act. Any authority to exclude point sources must derive from the plain language of the Act itself. Such authority may not be delegated through broad discretion to the Agency, but rather through the express provisions of the Act or through legislative amendment of the Act.

Thus, EPA may not exclude stormwater point sources of pollution from coverage under the Act unless it is expressly granted the authority to exclude such sources by Congress.

Statutory Structure of the CWA Stormwater Provisions

The primary enforcement mechanisms of the Act apply to point sources. The language of §301(a) of the CWA, expanded out to include judicial interpretations from numerous cases defining the legal meaning of its various terms, states that it is unlawful for anyone to discharge a measurable and detectable quantity of pollutants, from the outside world, through a point source, into a navigable water, without an NPDES permit. Many capable authors and courts have defined each of these terms, but what is important is that the statute creates a blanket prohibition against the unpermitted discharge of pollutants from a point source. Many stormwater discharges which are currently treated by EPA as noncovered actually fit the statutory, regulatory, and case law definitions of point sources. In continuing to treat many stormwater discharges as noncovered sources, EPA and the states have focused on the manner in which discharged pollutants are generated as opposed to the type of pollutants and manner in which those pollutants are discharged. Nothing in §301(a) of the CWA distinguishes pollutants based on the manner of generation. Section 301(a) instead focuses solely on the conveyance of the pollutant to its point of discharge into a navigable water. If the conveyance of the pollutant is via a "point source," as that term is defined, it is covered by the CWA. Given the broad definition of "point source," most stormwater discharges fall under this category; however, EPA continues to treat most stormwater discharges as noncovered sources.

The Structure of Federal Stormwater Law and Regulation Prior to 1987

Prior to the enactment of CWA §402(p) on February 4, 1987, any and all stormwater discharges that met the statutory definition of a point source were covered under the blanket prohibition of §301(a). Further, prior to the adoption of §402(p), all permits issued to any source, including stormwater dischargers, were issued pursuant to §402(a). §402(a)(1) provides:

> Except as provided in [§§]1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding [§]1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under [§§]1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.[45]

Case law discussing the provisions of §402 interpreted this permissive language as giving the EPA Administrator a choice between covering a particular discharge under the NPDES permit program, or leaving the discharge subject to §505 liability under the blanket proscription of discharges in §301(a).[46] The fact that EPA did not require a discharger to receive an NPDES permit would not exempt a discharger from liability under §301. In the *Costle* case, the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit held that "the EPA Administrator does not have the authority to exempt categories of point sources from the permit requirements of §402. Courts may not manufacture for an agency revisory power inconsistent with the clear intent of the relevant statute."[47] Even though EPA's responsibility for issuing

42. 34 F.3d at 122, 24 ELR at 21485.
43. 396 F. Supp. 1393, 5 ELR 20401 (D.D.C. 1975).
44. 568 F.2d 1369, 8 ELR 20028 (D.C. Cir. 1977).
45. 33 U.S.C. §1342(a)(1), ELR STAT. FWPCA §402(a)(1).
46. *See* Natural Resources Defense Council v. Costle, 568 F.2d 1369, 8 ELR 20028 (D.C. Cir. 1977).
47. *Id*. at 1377, 8 ELR at 20031.

permits pursuant to §402 is permissive inasmuch as the language states that the Administrator *may* issue permits, the *Costle* court interpreted this language to mean "only that the Administrator has discretion either to issue a permit or to leave the discharger subject to the total proscription of §301. This is the natural reading, and the one that retains the fundamental logic of the statute."[48]

This reading of EPA's authority under §402(a) has been consistently upheld and remains good law today. In 1996, the Fifth Circuit, in *Sierra Club v. Cedar Point Oil Co.*,[49] stated that

> "unless the Administrator issues an NPDES permit, 'the discharge of any pollutant by any person [is] unlawful [under §1311(a)].'" *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 [13 ELR 20015] (D.C. Cir. 1982); *see also Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1375 [8 ELR 20028] (D.C. Cir. 1977) ("[T]he Administrator has discretion either to issue a permit or to leave the discharger subject to the total proscription of [§1311]."). As stated previously, the CWA explicitly provides that a citizen may sue persons allegedly committing unlawful acts under §1311(a). 33 U.S.C. §1365(f)(1). Therefore, a citizen may bring an action against a person allegedly discharging a pollutant without a permit, even if the discharger's illegal behavior results from EPA's failure or refusal to issue the necessary permit.[50]

Thus, prior to the 1987 adoption of §402(p), the unpermitted discharge of stormwater containing measurable and detectable quantities of pollutants reaching a navigable water via a point source, was a violation of §301(a), enforceable under the citizen suit provisions of §505 even where EPA failed or refused to issue or even require a permit.

The 1987 Statutory Changes

It quickly became apparent that Congress had not done enough in the area of stormwater discharges. In the mid-1970s, EPA attempted to entirely exempt discharges of "uncontaminated" stormwater from coverage under the Act. This effort resulted in the *Costle* decision, in which the court held that EPA could not exclude categories of point sources from coverage under the Act.

In 1987, Congress changed the playing field for stormwater discharges by enacting the provisions of §402(p).[51] The provisions of §402(p) established a negative inclusion scheme under which no stormwater discharge would be required to receive an NPDES permit *unless* it fell into a category of discharger specifically delineated by Congress under §402(p)(2).

Section 402(p)(1) provides that "[p]rior to October 1, 1994, the administrator or the state (in the case of a permit program approved under [§]1342 of this title) shall not require a permit under this section for discharges composed entirely of stormwater."[52] Section 402(p)(2) required discharges in the following categories to be the subject of NPDES permits: (1) those for which a permit had been issued before February 4, 1987; (2) discharges associated with an industrial activity; (3) discharges from a municipal separate storm sewer system serving a population of 250,000 or more; (4) discharges from a municipal separate storm sewer serving a population of 100,000 or more but less than 250,000; and (5) a discharge for which the administrator or the state, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.[53]

As the U.S. Court of Appeals for the Ninth Circuit pointed out in *Defenders of Wildlife v. Browner*,[54] "[u]nder the Water Quality Act, from 1987 until 1994, most entities discharging stormwater did not need to obtain a permit."[55]

The §401(p) Exclusion of Stormwater Discharges

According to §402(p)(1), any discharger of stormwater which did not fall into one of the §402(p)(2) categories would be excluded from NPDES permitting requirements until October 1, 1994. Once the express negative inclusion scheme of §402(p) was adopted by Congress in February 1987, no discharges other than those specifically listed in the legislation would be required to seek an NPDES permit. This congressional exclusion also meant that any stormwater discharger not falling into one of the specifically delineated categories of dischargers would not be liable in a citizen suit proceeding pursuant to CWA §505. Discharges from the "significant source or contributor" category, such as a large parking lot, might fall into the §402(p)(2)(E) category, or "[a] discharge for which the administrator or the state, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States."[56] However, the triggering factor under the 1987 Amendments for the "significant source or contributor" category was the determination by the EPA Administrator or the state that a discharge is contributing to a water quality standards violation or is a significant contributor of pollutants. This determination had to be communicated to the discharger and in writing before the requirement for a permit was established.[57]

Since the §402(p)(1) exclusion from permit coverage was enacted by Congress through an express statutory provision, the *Costle* limitation on NPDES permit exemptions would not apply. Although *Costle* held that EPA did not have the authority to exempt broad categories of discharges contrary to the expressed purposes of the Act, Congress, of course, has the authority to change the express purposes of the Act, and hence, also has the authority to exempt categories of dischargers from coverage under the Act. The congressional exemption of these discharges had the effect of changing the Act itself to exclude those sources, immunizing them from citizen enforcement pursuant to §505. Thus, prior to the October 1994 termination date of the §402(p) exemption, the large parking lot discharger of stormwater would not be cov-

48. *Id*. at 1375, 8 ELR at 20030.

49. 73 F.3d 546, 26 ELR 20522 (5th Cir. 1996).

50. *Id*. at 560-61, 26 ELR at 20527-28.

51. 33 U.S.C. §1342(p), ELR STAT. FWPCA §402(p).

52. *Id*. §1342(p)(1), ELR STAT. FWPCA §402(p)(1).

53. *Id*. §1342(p)(2)(A)-(E), ELR STAT. FWPCA §402(p)(2)(A)-(E).

54. 191 F.3d 1159, 30 ELR 20116 (9th Cir. 1999).

55. *Id*. at 1163, 30 ELR at 20117 (internal footnote omitted).

56. 33 U.S.C. §1342(p)(2)(E), ELR STAT. FWPCA §402(p)(2)(E).

57. 40 C.F.R. §124.52.

ered under the NPDES program unless a determination had been made pursuant to §402(p)(2)(E).

Congress Delegated the Authority to EPA to Establish Comprehensive Regulations for Stormwater Dischargers

Congress recognized that the permit scheme adopted by §402(p) was incomplete and that it did not encompass every stormwater discharge potentially threatening water quality. Congress did not intend §402(p)(2) to be the final word on stormwater discharges covered under the CWA; rather, it sought to enact the provisions of §402(p) to provide clear statutory authority to EPA to regulate certain limited categories of stormwater discharges while exempting the unspecified bulk of such discharges from coverage until October 1992, a date Congress later extended until October 1, 1994. This grace period providing an exemption from NPDES permit requirements and §505 citizen suit liability to stormwater discharges not falling into one of the specific categories of discharges covered under §402(p)(2)(A)-(E), was intended to last until EPA came up with comprehensive regulations covering the whole universe of stormwater discharges which threaten water quality.

Simultaneous with the enactment of the provisions of §402(p)(1) and (2), specifically limiting the coverage of stormwater discharges under the NPDES permit program, Congress, in §402(p)(5) gave EPA the authority and responsibility to conduct studies identifying classes of stormwater discharges to be included in the NPDES permit program, but for which permits were not to be required under the language of §402(p).[58] Once these studies were conducted, but not later than October 1, 1993, §402(p)(6) required EPA to issue regulations which designated stormwater discharges not already covered under §402(p)(1) and (2) that should be regulated to protect water quality, and to develop a comprehensive program for regulating those discharges.[59]

On October 1, 1994, the statutory exemption from NPDES permit coverage for the bulk of stormwater discharges expired. On this date, all stormwater discharges previously exempted from NPDES permit coverage by Congress under the 1987 §402(p) provisions became valid targets for NPDES permit actions and for §505 citizen suits. The expiration of the §402(p) statutory exception to NPDES permit requirements once again brought stormwater discharges that fell outside the previously determinative §402(p)(2)(A)-(E) categories[60] into the broad §301(a) prohibition of unpermitted point source discharges. The citizen suit provisions of §505 allow citizens to enforce such violations of §301. Therefore, previously excluded stormwater sources discharging a measurable and detectable quantity of pollutants which fit the statutory definition of a point source are again valid targets for citizen enforcement actions pursuant to §505.

However, §505 jurisdiction over otherwise jurisdictional stormwater discharges may be preempted if either EPA has defined those sources as "nonpoint," or the statutory grant of authority to EPA somehow includes the authority to exempt such stormwater point sources from coverage under the CWA. Thus, after the 1994 expiration of the §402(p)(1) statutory moratorium for Phase II stormwater discharges a large parking lot discharging stormwater no longer enjoys a statutory exemption from citizen suit liability for its violations of §301. The next question is whether EPA has either determined such sources to be "nonpoint" or whether EPA regulations validly exempt such point sources from coverage.

EPA Regulation of Stormwater

EPA regulations governing stormwater discharges were to be implemented in two phases, the Phase I and Phase II Stormwater Regulations. EPA regulations promulgated pursuant to the authority of §402(p)(6) can be found at 40 C.F.R. §122.26(a)(9). These regulations provide:

> (i) On and after October 1, 1994, for discharges composed entirely of stormwater, that are not required by paragraph (a)(1) [ed: which mirrors CWA §402(p)(1)&(2)] of this section to obtain a permit, operators shall be required to obtain a[n] NPDES permit only if:
>
> (A) The discharge is from a small MS4 required to be regulated pursuant to §122.32.
> (B) The discharge is a stormwater discharge associated with small construction activity pursuant to paragraph (b)(15) of this section.
> (C) The Director, or in states with approved NPDES programs, either the Director or the EPA Regional Administrator, determines that stormwater controls are needed for the discharge based on wasteload allocations that are part of [TMDLs] that address the pollutant(s) of concern; or
> (D) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that the discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.[61]

Although EPA's regulations were intended to cover only those discharges not already covered pursuant to §402(p)(2), or the Phase II stormwater discharges, the Agency expressly included the significant source or contributor category in its regulations, a category that was already expressly covered by §402(p)(2)(E). The large parking lot stormwater discharge would have been covered under the 1987 Amendments pursuant to §409(p)(2)(E) only following the requisite "determination" by the Administrator. Under EPA's Phase II regulations, the large parking lot stormwater discharger appears to be covered under the strikingly similar provision, which retains the requirement of a "determination" prior to requiring such a discharger to require a permit.

EPA Discretion re the Timing of Permit Requirements for Significant Sources or Contributors

In the *Federal Register* notice of the adoption of its stormwater regulations, EPA stated: "EPA is adding 40 C.F.R. §122.26(a)(9) to bring into the NPDES program, as of October 1, 1994, discharges composed entirely of stormwater that are not already required by the Phase I regulations to obtain a permit."[62] Further, EPA stated that it preserved its permitting discretion over the §402(p)(2)(E) significant

58. *See* 33 U.S.C. §1342(p)(5), ELR STAT. FWPCA §402(p)(5).

59. *See id.* §1342(p)(6), ELR STAT. FWPCA §402(p)(6).

60. The Phase II stormwater discharges.

61. 40 C.F.R. §122.26(a)(9)(i).

62. 60 Fed. Reg. 17953 (Apr. 7, 1995).

sources or contributors category of discharges so that it could address those discharges more rapidly than the bulk of Phase II discharges:

> Today, EPA is promulgating changes to its NPDES stormwater permit application regulations to establish a sequential application process for all phase II stormwater discharges. Application deadlines are in two tiers. To obtain real environmental results earlier, the highest priority is being assigned to those phase II dischargers that the NPDES permitting authority (either a State/Indian Tribe or EPA) determines are contributing to a water quality impairment or are a significant contributor of pollutants. These dischargers will be required to apply for a permit within 180 days of receipt of notice from the permitting authority, unless permission for a later date is granted. All other phase II facilities will be required to apply to the permitting authority no later than six years from the effective date of this regulation if the phase II regulatory program in place at that time requires such applications.[63]

Far from attempting to exempt discharges that "are contributing to a water quality impairment or are a significant contributor of pollutants" (significant source or contributor) from coverage under the Act, EPA singled out this category for more rapid permitting. The Agency's stated purpose in maintaining discretion over this category was to accelerate the coverage of such discharges under the NPDES program. EPA has thus not defined such sources as nonpoint, nor have they been excluded from coverage under the Act by Congress. Discharges from significant sources or contributors are expressly covered under EPA's regulations. What EPA has reserved is the discretion to determine when a permit for such a source may be required. This reserved discretion appears very similar to the broad authority provided EPA under §402(a)(1)—"the administrator may, after the opportunity for public hearing, issue a permit for the discharge of any pollutant." Again, EPA's discretion under §402(a)(1) has been interpreted by the courts as not permitting EPA to exempt categories of "point sources" from coverage under the Act, but rather to provide the Agency the discretion to either require a permit or leave the discharger subject to the otherwise absolute prohibition of §301(a).

EPA Has Not Defined Stormwater Discharges in the 40 C.F.R. §122.26(a)(9)(i) Category (Significant Source or Contributor) to Be Nonpoint

One alternative way in which EPA could exempt categories of stormwater dischargers from coverage under the CWA would be to define those categories as nonpoint sources. EPA has the authority to determine what constitutes a point source.[64] However, in order to exempt a source from the definition of a point source, EPA must expressly determine the source to be nonpoint. This EPA has not done. To the contrary, EPA has stated that in the context of stormwater discharges it is defining point source broadly.[65]

The Lack of an EPA Determination That a Significant Source or Contributor Requires an NPDES Permit Creates a Rebuttable Presumption

What is the legal status under the Act of a stormwater discharge that is a significant source or contributor and meets the statutory definition of a point source, but for which no determination pursuant to EPA's regulations has been made? It seems clear that no NPDES permit is required until a "determination" has been made pursuant to EPA's regulations, but it also appears that the discharge from this facility is a violation of §301(a) of the Act in as much as it is a discharge of pollutants from a point source without a permit.

EPA has adopted the position that, for unspecified categories of stormwater discharges, no enforcement jurisdiction exists pursuant to §309 or §505 in absence of the "determination, " but the Agency has not clearly or expressly stated its rationale. Rather, in the preamble to the 1999 adoption of the final Phase II stormwater regulations, EPA stated:

> EPA anticipates that NPDES permitting authorities may yet determine that individual unregulated point sources of stormwater discharges may require regulation on a case-by-case basis. . . . [T]o the extent that [§]402(p)(6) requires the designation of a "category" of sources, EPA would designate such (as yet unidentified) sources as a category that should be regulated to protect water quality. . . .
>
> EPA also believes that sources regulated pursuant to a State designation would be part of (and regulated under) a Federally approved State NPDES program, and thus subject to enforcement under CWA [§§]309 and 505.[66]

Thus, it appears that EPA has designated currently unregulated significant sources or contributors as a category of "as yet unidentified" sources of stormwater pollution to be regulated under the NPDES program. The triggering factor for regulation under the NPDES program remains the determination, but what about the status of such sources under the other provisions of the Act?

The most accurate reading of EPA's regulations at this point seems to be that EPA has included significant sources or contributors like large parking lot stormwater discharges as a discharge covered under the Act, but not subject to the NPDES permit requirements unless the discharge is determined to be significant by the Administrator or the state. In a recent Ninth Circuit case, EPA itself defended its regulatory inclusion of this category within the coverage of the Act against an industry challenger. In rejecting a claim that "this 'residual' designation authority, which would allow a[n] NPDES permitting authority to require at any future time a permit from any stormwater discharge not already regulated, [was] *ultra vires*," the court stated that "[i]n allowing continuing designation authority, EPA permissibly designated a third category of dischargers subject to Phase II regulation—those established locally as polluting U.S. waters—following all required studies and consultation with state and local officials.[67]

The large parking lot stormwater discharger has not been specifically excluded by Congress from the NPDES program or coverage under the Act. It has also not been determined to be nonpoint by EPA. Rather it is a point source if it

63. *Id.*

64. *See, e.g.*, National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 13 ELR 20736 (D.C. Cir. 1982).

65. EPA stated its intent "to embrace the broadest possible definition of point source consistent with the legislative intent of the CWA." 55 Fed. Reg. 47990, 47997 (Nov. 16, 1990) (preamble to adoption of Phase I Stormwater Regulations).

66. 63 Fed. Reg. 1585, 1589-90 (Jan. 9, 1998).

67. Environmental Defense Ctr. v. EPA, 319 F.3d 398, 446, 33 ELR 20139 (9th Cir. 2003).

meets the statutory and regulatory definition, and thus is covered under the CWA. EPA, however, has retained the discretion of when to require a permit pursuant to the NPDES permit program through its "determination" process. This status does not appear to foreclose the availability of a citizen suit. Citizen suit jurisdiction against dischargers may be divided broadly into three categories. First are actions against an unpermitted discharger based on its failure to obtain an NPDES permit that is required pursuant to §402. Next, there are actions against an unpermitted discharger pursuant to §301(a) based on an illegal discharge. Finally, there are actions against dischargers holding NPDES permits alleging violation of the terms of the permit. In the case of the large parking lot stormwater discharger, there is generally no NPDES permit, so the third type of action is not applicable. Moreover, since EPA has retained discretion to determine whether to require an NPDES permit, there is no action against a discharger for failure to obtain a permit pursuant to §402. However, an action against an illegal discharger pursuant to §301(a) still appears to be available in the case of large stormwater dischargers that are point sources and significant sources or contributors, such as large parking lots.

Comparison With EPA's Discretion in Establishing Effluent Limitations for Industrial Point Source Dischargers

EPA's statutory grant of authority over industrial sources included the authority to determine which pollutants would be covered under the CWA, and the authority to establish effluent limitations for categories of industries discharging those pollutants. These limitations were to be incorporated into NPDES permits, which would then be issued to corresponding categories of industrial dischargers. A frequently litigated issue concerned the fate of a citizen suit or enforcement action pursued against a discharger in a class for which no effluent limitation had been prepared. Without the issuance of an effluent limitation by EPA, such sources would have no NPDES permits available should they choose to apply for one, yet the sources found themselves facing citizen suits for the discharge of pollutants without permits. In *Cedar Point Oil Co.*,[68] the Fifth Circuit held that EPA's failure to establish an effluent limitation for the discharge of produced waste water did not exempt a discharger from liability in a §505 citizen suit.[69]

The §301(b) statutory grant of authority to EPA required it to define pollutants, establish effluent limitations for categories and classes of point sources, and then enforce those limitations through best available or best practicable technology requirements through NPDES permits. In the case of Cedar Point, no applicable effluent limitation had been established. Cedar Point argued that because EPA had not established an applicable effluent limitation, it was not required to obtain an NPDES permit. Because Cedar Point was not required to obtain a permit, it contended, no citizen suit jurisdiction existed because no violation of the CAA existed. The Fifth Circuit, however, made clear that despite the absence of an applicable effluent limitation established pursuant to §301(b), a discharger may violate §301(a) by discharging pollutants without a permit.

In the case of stormwater dischargers, EPA's statutory grant of authority requires it to designate categories of stormwater dischargers. A discharger that has not been specifically designated as a covered source may have an argument similar to Cedar Point's, but the result should be the same—despite the fact that a specific category of stormwater discharges has not been "designated" as covered by EPA, and even if no applicable NPDES permit is available to the discharger, it is still in violation of §301(a). Additionally, where a stormwater discharger is a significant source or contributor, it has been specifically included by EPA as a covered source under the CWA even if it is not yet required to obtain an NPDES permit. EPA or the states must make a "determination" that the source is a significant source or contributor before it may be required to obtain an NPDES permit; however, the courts are authorized to make a determination as to whether the source is in violation of §301(a).

If, as discussed above, EPA has not determined that a stormwater discharger requires a permit, this means that there is no legal presumption that a permit is required, and no ground for action under the Act's provisions for failure to obtain an NPDES permit. However, there might still be liability for a discharge of pollutants in violation of §301(a) of the Act if a factual analysis determines that such a source is in fact discharging measurable and detectable quantities of pollutants. Such a determination would arise in the context of litigation brought under the citizen suit provisions of the CWA, and would be made by a federal judge.

The Competence of the Courts and the Doctrines of Exhaustion and Primary Jurisdiction

Although the action contemplated herein would be against a private party, it is likely that EPA or the appropriate state agency might intervene, due to the possible repercussions of such litigation. If private stormwater dischargers believe that there is a strong likelihood of

68. 73 F.3d at 546, 26 ELR at 20522.

69. The statutory grant of authority to EPA for the establishment of categorical effluent limitations and the subsequent issuance of NPDES permits, CWA §301(b), states:

> In order to carry out the objective of this chapter there shall be achieved—
>
> (1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of best practicable control technology currently available as defined by the Administrator pursuant to §1314(b) of this title . . . and
>
> (2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants as determined in accordance with regulations issued by the Administrator . . . .

33 U.S.C. §1311(b), ELR STAT. FWPCA §301(b). Arguably, the produced water at issue in *Cedar Point* would have fallen into subparagraph (F) of §301(b)(2), which states:

> (F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

Id. §1311(b)(2)(F), ELR STAT. FWPCA §301(b)(2)(F).

falling victim to citizen suit litigation, they may begin to seek coverage under the NPDES permit program in order to escape liability. Indeed, this is the purpose of a litigation strategy. The administrative burdens that this would place on EPA are such that the Agency would have a vested interest in preventing the litigation.

Two of the most likely defenses to an action are thus administrative defenses that would not generally be available to a private discharger absent EPA or state agency intervention. The first is the doctrine of primary jurisdiction, which would inquire whether the factual analysis necessary to determine if a violation of §301(a) is within the competence of the courts or rather belongs to the exclusive purview of EPA. The second is the doctrine of exhaustion of administrative remedies—must a citizen first petition EPA for a "determination," pursuant to 40 C.F.R. §124.52, that a stormwater discharger is a significant source or contributor prior to bringing a citizen suit pursuant to §505 of the Act? These concepts provide interrelated administrative defenses. The doctrine of primary jurisdiction requires the court to defer to the administrative agency as the sole authority competent to make some finding of fact, while the exhaustion principle requires the court to delay hearing an issue until an administrative agency has had the opportunity to address an issue. Often these defenses are asserted together.

In *National Wildlife Federation v. Consumers Power Co.*,[70] the district court addressed the issues of the application of primary jurisdiction and exhaustion of administrative remedies in a CWA citizen suit case. The court stated:

> [T]he Court concludes that plaintiff's case presents issues that it is competent to decide, and with respect to which it sees no basis for deferring to the MWRC or the EPA. Whether the CWA covers the discharge at issue here is a question of statutory interpretation that does not necessarily fall within the special competence of these agencies. *See Legal Environmental Assistance Foundation, Inc. v. Hodel*, 586 F. Supp. 1163, 1169 [14 ELR 20425] (E.D. Tenn. 1984); *O'Leary v. Moyer's Landfill, Inc.*, 523 F. Supp. 642, 647 (E.D. Pa. 1981); *see also Student Public Interest Research Group of New Jersey, Inc. v. Fritzsche, Dodge & Olcott, Inc.*, 579 F. Supp. 1528, 1537 [14 ELR 20450] (D.N.J. 1984) (noting the argument that "the doctrine of primary jurisdiction should be invoked sparingly where it would serve to preempt a citizen's suit"), *aff'd*, 759 F.2d 1131 [15 ELR 20427] (3d Cir. 1985).[71]

The court likewise found that the doctrine of administrative remedies was inapplicable to citizen suits because in §505 Congress expressly authorized private parties to file suit subject only to the restrictions set forth in the statute itself.[72]

In *Hudson River Fishermen's Association v. County of Westchester*,[73] the plaintiffs sued to enjoin a discharge from a stormwater drainage ditch that was comprised of runoff from a landfill leachate collection system. The discharge was unpermitted and there were no established effluent standards or limitations. The court found that the ditch constituted a point source and that no permit had been applied for or received:

> Thus, defendants argue, since no administratively established effluent levels have been set, plaintiffs are barred from bringing a citizen suit. We think such a conclusion suffers from an unwarranted and "hypertechnical" reading of [§]505 of the CWA, 33 U.S.C. §1365(a)(1). As noted *supra*, that section authorizes citizen suits to enforce "an effluent standard or limitation." Paragraph (f) of that section defines the term "effluent standard or limitation" to include any violation under [§]301 of the CWA, 33 U.S.C. §1311(a). Consistent with the statutory scheme, it is a violation of [§]301 for a polluter to discharge a pollutant without first obtaining a permit. *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 & n.14 [6 ELR 20668] (1976).[74]

Similarly, in *Public Interest Research Group of New Jersey v. Witco Chemical Corp.*,[75] the U.S. District Court of New Jersey dismissed a primary jurisdiction challenge in a CWA citizen suit proceeding, noting:

> Defendant moves to stay the proceedings in this court during the pendency of the administrative proceedings based on the doctrine of primary jurisdiction. This doctrine "is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 63 (1956). It applies "whenever the enforcement of the claim will require the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body. . . ." *Id*. Defendant alleges that exercising jurisdiction disrupts the state's effort to establish a coherent pollution control program. This court, following other decisions of this district, concludes that permitting plaintiff to enforce the Act does not in any way encroach on DEP. *SPIRG v. Fritzsche*, 579 F. Supp. 1528, 1537 [14 ELR 20450] (D.N.J. 1984), *affirmed*, 759 F.2d 1131 [15 ELR 20427] (3d Cir. 1985); *O'Leary v. Moyer's Landfill, Inc.*, 523 F. Supp. 642, 647 [12 ELR 20239] (E.D. Pa. 1981). *See also SPIRG v. Monsanto Co.*, [15 ELR 20297] (D.N.J. 1985) (finding doctrine inapplicable because agency's expertise applies to setting effluent limit, not to enforcing it). The issues that this court must resolve in this motion are legal questions that do not rely on the special expertise of DEP.[76]

The court then summarily dismissed an exhaustion argument, noting that "plaintiff need not exhaust the administrative process when the Act permits plaintiff to file the action in the first instance in federal court."[77]

Whether or not a particular stormwater discharger may be in violation of the Act is thus a factual determination that is within the competence of the courts. Despite the fact that EPA regulations provide for the "designation" of a stormwater discharger as a "significant source or contributor" prior to requiring permits for such sources, the courts maintain independent jurisdiction to decide whether the clear statutory provisions of §301(a) have been violated. Furthermore, the fact that such a determination procedure exists does not appear to provide an administrative remedy that petitioner must comply with prior to seeking relief under §505 of the Act.

70. 657 F. Supp. 989, 17 ELR 20801 (W.D. Mich. 1987).
71. *Id*. at 1001, 17 ELR at 20806-07.
72. *Id*. at 1000, 17 ELR at 20806.
73. 686 F. Supp. 1044, 18 ELR 21451 (S.D.N.Y. 1988).
74. *Id*. at 1050, 18 ELR at 21454.
75. 21 ELR 20820 (D.N.J. 1990).
76. *Id*. at 20822-23.
77. *Id*. at 20823.

EPA Has Impermissibly Attempted to Remove the Threat of Citizen Suit Liability From Significant Sources or Contributors for Which It Has Made No Determination

EPA has sought in 40 C.F.R. §122.26(a)(9)(i) to eliminate the threat of citizen suit liability for a category of discharges ("significant sources or contributors" for which no determination has been made) that the Agency has expressly recognized as a significant threat to water quality. Congress had two rationales for enacting the citizen suit provisions of the CWA. First, it sought to engage and employ the public in the enforcement of NPDES permits. Second, it intended to provide a significant latent threat of liability that would push dischargers into voluntary compliance with the NPDES permit program in order to shield themselves from liability. EPA, through its stormwater regulations, has attempted to remove the latent threat of citizen suits that might compel dischargers to seek permits. The reason for this is simple: if every stormwater discharger that falls into this category were to seek a permit, EPA and the states might be overwhelmed. Additionally, since many of these dischargers would be discharging to waters already listed as impaired, EPA and the states might not be able to lawfully issue the requested permits without first preparing TMDLs for such waters.

EPA's statutory grant of authority over stormwater extended only to designating stormwater discharges, other than those already covered, to be regulated to protect water quality, and to establish a comprehensive program to regulate such designated sources.[78] It seems a far stretch for EPA to use this statutory authority to exempt discharges, which it has expressly stated pose a substantial threat to water quality, from liability under CWA §301(a).

To give effect to EPA's regulatory scheme excluding significant sources or contributors from §301(a) liability, a court would have to reach the conclusion that a category of discharger that both EPA and Congress have expressly included within the scope of CWA jurisdiction (point source and significant threat to water quality) may discharge measurable and detectable quantities of pollutants from a point source to a navigable water without an NPDES permit and with complete immunity so long as EPA has yet to make an express determination, in writing, that the source is required to have a permit. This, however, appears to be precisely what EPA is arguing, apparently on the basis of administrative infeasibility. If stormwater dischargers feel that citizen suit enforcement for §301(a) violations is a real possibility, such dischargers will apply for permits. Given the number of such dischargers, the massive influx of permit applications might swamp EPA or state permit authorities. EPA appears to be using its regulatory structure, which gives the Agency exclusive discretion to determine whether categories of stormwater discharges require permits, to defer regulation of these sources under the CWA at all because of the belief that it (EPA) lacks the resources or institutional capability to tackle the problem. This approach has, however, been flatly rejected by the courts.

In *Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency*,[79] the Ninth Circuit considered a number of objections the petitioner raised against EPA's Phase II stormwater regulations. Most pertinent to this discussion is the Ninth Circuit's treatment of EPA's attempt to exclude light industrial activities and construction activities encompassing greater than one acre but less than five from permit requirements. EPA had attempted to modify the statutory scheme regarding industrial activities by drawing a distinction between light and heavy industrial activities and considering actual exposure to industrial materials. The Agency's definition excluded certain industries it considered more comparable to retail, commercial, or service industries. Under EPA's regulations, these types of facilities did not need to apply for permits unless certain work areas or actual materials were exposed to stormwater.

The Ninth Circuit found this scheme impermissible because it required actual exposure to processes or materials for light industry where such a consideration was not required for "heavy" industrial activities. According to the court, such a consideration impermissibly altered the statutory scheme by shifting the burden in the permitting scheme such that "[l]ight industries will be relieved from applying for permits unless actual exposure occurs."[80] The specific concern of the court was that

> [t]he permitting scheme then will work only if these facilities self-report, or the EPA searches out the sources and shows that exposure is occurring. We do not know the likelihood of either self-reporting or EPA inspection and monitoring of light industries, and the regulations appear to contemplate neither for these industries. For this reason, the proposed regulation is also arbitrary and capricious.[81]

Far from drawing any lesson from the Ninth Circuit's rejection of its permit scheme, it appears that EPA has again attempted to place the burden for requiring permits exclusively on either industry self-reporting or further Agency searches for stormwater discharges of pollutants.

EPA's attempt to exempt these sources from coverage is very subtle. EPA has not explicitly declared that the sources are not covered; rather, it has said that such sources are covered, depending on EPA's own case-by-case determination. Case-by-case determinations, of course, have rarely happened. In one of the few instances that EPA has actually used its authority to make a determination that a stormwater discharger was a significant source or contributor, the Agency did so in order to avoid conducting Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[82] remediation at an abandoned mine site, choosing instead to regulate the source under the CWA under the lax stormwater discharge provisions of §402(p).[83] In sum, EPA is merely attempting to do through its stormwater regulations what it has sought to do with certain other regulatory responsibilities in the past—drag its heels until a court forces it to act. Faced with an administrative infeasibility argument in *Costle*, the D.C. Circuit stated:

> The appellants argue that §402 not only gives the administrator the discretion to grant or refuse a permit, but also gives him the authority to exempt classes of point

78. 33 U.S.C. §1342(p)(6), ELR STAT. FWPCA §402(p)(6).

79. 966 F.2d 1292, 22 ELR 20950 (9th Cir. 1992).

80. *Id*. at 1305, 22 ELR at 20956.

81. *Id*.

82. 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405.

83. In re Phelps Dodge Corp. Verde Valley Ranch Dev., 2002 EPA App. LEXIS 8 (EAB 2002).

> sources from the permit requirements entirely. They argue that this interpretation is supported by the legislative history of §402 and the fact that unavailability of this exemption power would place unmanageable administrative burdens on EPA.[84]

The court responded to this argument of unmanageable administrative burden by stating flatly: "We find a plain Congressional intent to require permits in any situation of pollution from point sources."[85] And according to the Ninth Circuit:

> Following the enactment of the CWA in 1972, EPA promulgated NPDES permit regulations exempting a number of classes of point sources, including uncontaminated storm water discharge, on the basis of "administrative infeasibility," i.e., the extraordinary administrative burden imposed on EPA should it have to issue permits for possibly millions of point sources of runoff. *Natural Resources Defense Council v. Costle*, 568 F.2d 1369, 1372 & n.5, 1377 [8 ELR 20028] (D.C. Cir. 1977). NRDC challenged the exemptions. Relying on the language of the statute, its legislative history and precedent, the D.C. Circuit held that the EPA Administrator did not have the authority to create categorical exemptions from regulation.[86]

From the above-cited precedent, it appears as though the courts are not generally impressed by EPA's heel dragging invocations of the doctrine of administrative infeasibility. However, some caution should be maintained in the scope of stormwater dischargers considered for litigation. The significant sources or contributors category is appealing in this regard because it limits the court's focus to stormwater dischargers that pose a substantial threat to water quality, as opposed to allowing the court to focus on the entire universe of stormwater dischargers. It is unlikely that a court will have much sympathy for an administrative infeasibility argument in a case concerning a significant source or contributor in light of a clear statutory mandate for EPA to designate and regulate categories of stormwater discharges that pose a threat to water quality. However, courts may be far more sympathetic to such an argument if the petitioner appears to ask the court to enforce the act against every stormwater discharger.

Time and time again, courts have decided that EPA does not have the authority to exempt categories of dischargers from liability under §301 of the CWA. The Agency does, however, have the authority to determine which dischargers must have a permit. If a discharge is omitted from or not covered under EPA regulations, there is no legal presumption that a permit is required and hence no action for a violation of §402. However, such an omitted source may still be covered pursuant to a court's litigation-driven factual analysis. This factual analysis would have to establish that the discharge is from a point source and contains a measurable and detectable quantity of pollutants. For discharges that fall into the gap, those discharges not covered specifically by EPA regulation, there is no legal presumption in favor of the requirement of a permit. However, if a factual determination reveals that the source is discharging in violation of §301(a), then regardless of whether EPA regulations *require* a permit, the discharger should seek a permit, or else be subject to the strict prohibition of un permitted discharges found in §301. This reading appears entirely consistent with the language of the CWA as well as the policy granting EPA jurisdiction over the stormwater permit program.

Although Congress may have the authority to carve certain categories of point source discharges out of CWA coverage, as it did with §402(p)(1) and (2), EPA does not enjoy such authority. What EPA has the ability to do is to require a discharger to either apply for a permit or become liable for a violation of §402 for failing to seek a permit. Such a failure to seek a permit would leave a discharger liable under the CWA citizen suit provisions regardless of whether the discharger would otherwise be liable for an unpermitted discharge pursuant to §301. Potentially, two types of liability would attach to a discharger who fails to seek a required permit, for failure to seek a required permit prior to a certain deadline and for an unpermitted discharge. Dischargers not required to seek a permit under EPA regulations may still be liable for illegal discharges.

The results of EPA's Phase I and Phase II stormwater regulations emphasize the difficulty of controlling stormwater through focus on the method of generation. Whereas EPA acknowledges more than a million potential significant sources of stormwater pollution that are not currently covered by Agency regulations, it has failed to propose regulations for these sources.[87] The reason for this failure to act has been EPA's inability to identify a regulatory common denominator among these sources that would make them conducive to efficient regulation. Many point out this problem as an argument for allowing the states to deal with stormwater regulation[88]; however, if EPA cannot figure out how to regulate these sources, what is the likelihood that the states can? Repeatedly, the argument has been made that EPA does not have any statutory authority over "nonpoint" sources of pollution and that the states should be given more power to deal with this issue. However, if EPA truly has no authority over "nonpoint" pollution, then the states have had the authority all along. As with industrial pollution prior to the 1972 CWA, the states have simply not used their latent existing authority to effectively reign in "nonpoint" pollution.

The citizen suit provisions of CWA §505 authorize any affected person to sue a polluter for the violation of an effluent limitation and provide a dual enforcement mechanism for the CWA.[89] Section 505 authorizes citizen suits for any violation of an effluent standard or limitation including a violation of §301(a) of the Act. Citizen suits have often provided the driving force in encouraging EPA to act to fulfill its obligations under the CWA.[90]

84. 568 F.2d at 1374, 8 ELR at 20030.

85. *Id*. at 1383, 8 ELR at 20035.

86. 966 F.2d at 1296, 22 ELR at 20951.

87. *See* Proposed Phase II Stormwater Rules, 63 Fed. Reg. 1356-401 (Jan. 9, 1998) (The "Group A" or industrial look-alike category has approximately 100,000 facilities; the "Group B" or other currently unregulated significant pollution threats has approximately one million facilities. Neither category is currently regulated.).

88. *See* Robin Kundis Craig, *Local or National? The Increasing Federalization of Nonpoint Source Pollution Regulation*, J. Envtl L. & Litig., Fall 2000, at 179.

89. 33 U.S.C. §1365, ELR Stat. FWPCA §505.

90. *See* James R. May, *Now More Than Ever: Environmental Citizen Suit Trends*, 33 ELR 10704 (Sept. 2003) (describing trends in citizen suit litigation).

The Failure of "Top-Down" Litigation and a Different Approach

Where states have been delegated NPDES permit authority, TMDL litigation, if successful, generally ends up with a federal court ordering EPA to require the state to set TMDLs. This results in several practical weaknesses. First, the only real leverage EPA has over the state is the revocation of the state's authority to administer the NPDES program. This is a powerful threat that could potentially withhold millions of dollars of grant money available from EPA for administration of the program, deprive the state of its autonomy to address water pollution, and diminish the prestige that comes with the state delegation. However, this sanction is not a realistic one, and the states know it. For the most part, EPA lacks the resources, the manpower, and the political will to take over a state's NPDES program for any but the most flagrant violations of the delegation agreement. In addition to the lack of a realistic possibility of losing its program, many states forced to take action by TMDL litigation have an easier route. The TMDLs a state may be forced to prepare are for waters identified by the state as impaired and listed by the state on its §305(b) report, which are then placed on the §303(d) list. Some states have taken the novel approach of simply delisting the waters for which they have been ordered to prepare TMDLs. The delisting may be illegal, but challenging the determination would require yet another round of litigation.

Another great shortcoming of the top-down litigation approach is that while all of this litigation is occurring, dischargers are free to continue polluting with immunity from liability under the Act. Indeed, this type of litigation may actually provide a disincentive for polluters to come into compliance. The failure of citizen suit TMDL litigation is endemic to "top-down" citizen suits brought against EPA to force it, or force it to force the states, to take more effective action in implementing the CWA. Citizen suits have essentially forced EPA to take action, but the end result of that action has been rather unhelpful to the goal of cleaning up the nation's waters.

A Different Approach

To avoid the problem of EPA discretion, attenuation of response from EPA to states, length of response, and the freedom of polluters to continue business as usual during the pendency of lengthy top-down litigation, this Article proposes a different solution. The proposal is for bottom-up litigation under the citizen suit provisions of CWA §505, directly targeting stormwater dischargers. The class of dischargers to be targeted are stormwater dischargers with facilities characteristic of point sources, not required by EPA regulations to attain NPDES permits, and without current or administratively extended federal NPDES or state permits, that nonetheless discharge significant quantities of pollutants to jurisdictional waters. The theory of liability for these stormwater dischargers is violation of an effluent limitation as defined at §505(f) to include any violation of §301(a).[91] The violation of §301(a) is the discharge of pollutants from a point source to a jurisdictional water without an NPDES permit.

As simple as this theory is, it may run into several significant challenges and defenses that seem formidable, but which have been addressed and rejected by federal courts in the context of similar cases. The first of these defenses are the doctrines of primary jurisdiction and exhaustion of administrative remedies, which have been discussed; other defenses are discussed below.

The Prima Facie Case: Target Selection

As a preliminary matter, the type of stormwater discharger targeted should meet several criteria. The first criteria is that the target should have site characteristics indicative of a point source. Whether the discharger utilizes storm culverts, pipes, ditches, gullies or other methods for channeling and disposing of storm runoff, a viable target will have some "confined and discrete conveyance" for collecting and channeling stormwater prior to discharge to a jurisdictional water. It is also important that there be an easily traceable and direct path of the stormwater discharge to a jurisdictional water. Direct physical evidence of these two criteria is important, such as pictures, expert testimony or statements establishing the hydrologic connection between the source and a jurisdictional water.

A related matter is the quality of the receiving water. If the water receiving the discharge from a stormwater source is listed as impaired, then according to EPA regulation, no new permits may be granted to discharges that would contribute to the violation through discharge of pollutants of concern unless a TMDL has been prepared.[92] Since one of the expected defenses to stormwater discharge citizen suit litigation is a mootness defense based on the issuance of an NPDES permit after the filing of the 60-day notice period, finding a target that discharges to a CWA §303(d) listed impaired water might foreclose this defense. It may, however, also pose an equitable problem that might arouse a judge's sympathy for the discharger. If a judge perceives that the law has placed the discharger in the position that regardless as to what course of action it pursues, it cannot possibly comply, the judge may well attempt to mitigate the perceived harsh application of the law in a way that might establish negative precedent.

This is precisely what happened in *Hughey v. JMS Development Corp.*[93] There, the plaintiff sued a developer under the citizen suit provisions of the CWA for an unpermitted stormwater discharge. The district court found the developer liable for an unlawful discharge pursuant to §301. The developer had sought a permit for its stormwater discharge, but found that there were none available. EPA had not yet established effluent limitations or a general permit for such discharges. The state permit authority was waiting for EPA.

91. 33 U.S.C. §1365(a), ELR STAT. FWPCA §505(a), provides:

> Except as provided in subsection (b) of this section, and [§]1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—
>
> (1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter . . . .

33 U.S.C. §1365(f), ELR STAT. FWPCA §505(f), defines effluent limitation as:

> [(1)] effective July 1, 1973, an unlawful act under subsection (a) of [§]1311 of this title . . . .

92. 40 C.F.R. §122.4(i).

93. 78 F.3d 1523, 26 ELR 20924 (11th Cir. 1996).

Finding no permit available, the developer coordinated with the county to develop stormwater controls that exceeded what eventually would be required when a permit became available. The developer reduced the discharge of pollutants to a negligible amount. Yet despite all of these efforts, the law of the CWA was clear—no discharge of pollutants from a point source to a jurisdictional water without a permit, period—and the district court held the developer in violation. On appeal, the U.S. Court of Appeals for the Eleventh Circuit reversed the decision, expressing sympathy with the plight of the developer, and carved an exception into the Act for such limited circumstances. In *Driscoll v. Adams*,[94] a later case construing the *Hughey* exception, the court stated:

> In order to determine whether JMS had violated the [CWA], we began our analysis with the text of the Act, concluding that "[t]he amended CWA absolutely prohibits the discharge of any pollutant by any person, *unless* the discharge is made according to the terms of [an NPDES] permit." But our commitment to the plain language of the Act was tempered by the well-established canon that "Congress is presumed not to have intended absurd (impossible) results." In an effort to strike a balance, we established a narrow exception to the general rule of liability for discharges without an NPDES permit where: (1) compliance with the zero-discharge standard was factually impossible because there would always be some stormwater runoff from an area of development; (2) there was no NPDES permit available to cover such discharge; (3) the discharger was in good-faith compliance with local pollution control requirements, which substantially mirrored the proposed NPDES discharge standards; and (4) the discharges were minimal. Thus, while acknowledging the CWA's zero-discharge standard, the *Hughey* decision, in light of the material facts of that case, recognizes a narrow exception to that standard for any minimal discharge that occurs despite a developer's best efforts to reduce the amount of it and comply with applicable law.[95]

Two important aspects of CWA jurisprudence are illuminated by the *Driscoll* holding. First, even in the realm of stormwater discharges, "[t]he amended CWA absolutely prohibits the discharge of any pollutant by any person, *unless* the discharge is made according to the terms of [an NPDES] permit."[96] It is no excuse that a permit is not available, even in the realm of stormwater discharges. Second, in the realm of stormwater discharges, the courts may be sympathetic to the plight of a hapless discharger. It is possible to select virtually any owner of land for a citizen suit based on an unpermitted stormwater discharge, however, great care should be taken to select a target that the courts are unlikely to sympathize with. Care should also be taken in arguing the case not to cast arguments regarding the potential liability of stormwater dischargers too widely, for the same reasons.

It is important that the discharger not have a current NPDES or state-issued stormwater discharge permit. A record search with EPA or the state permit authority is important. If a discharger has an expired stormwater discharge permit, it may be administratively extended due to a timely reapplication and hence still be legally effective.[97] If a source has ever had a permit of any type, there may be an administrative record for the facility including an assessment of the stormwater characteristics, estimates of pollutant loadings, or projected pollutant contribution from the facility. To the extent that evidence about a stormwater discharger can be developed from an administrative proceeding within agency files, the citizen plaintiff's burden of developing evidence becomes easier.

A good target should also have either no or insufficient treatment facilities for removing pollutants from stormwater prior to discharge. It will be hard to win a case against a stormwater discharger that has already constructed sufficient treatment facilities to meet or exceed what would actually be required if the discharger were issued a permit. Determination of what may constitute a "treatment facility" may not be entirely intuitive. Treatment may include such things as a pond or a grass-lined ditch or swale through which stormwater passes through, a berm or silt fence that prevents direct runoff. Careful inspection of the potential target is important to determine whether any man-made or natural features of the site my act to filter the runoff.

Finally, the stormwater discharger should be a significant source of pollutants. This can be established through modeling prepared by an expert, direct monitoring, or an agency prepared watershed assessment. As interpreted in *Arkansas v. Oklahoma*,[98] in order for a discharge to be jurisdictional it must contribute a "measurable and detectable" quantity of pollutants to a jurisdictional water.

Good targets falling into the significant source or contributor category may include businesses with large parking lots or other impermeable surfaces, such as shopping malls, strip malls, big-box mega stores, roads or highways, racetracks, logging operations or other, unpermitted large scale developments. It is also quite possible to find examples of "industrial dischargers" which are already required to have NPDES permits by law but which are yet unpermitted. The legal strategy for pursuing these is far easier and more straightforward. The strategy discussed here is for the non-industrial "significant sources or contributors" which EPA has not required to obtain a permit.

Federal Jurisdiction

CWA §505(a) provides that "[t]he district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties."[99] The provision implicates some important federalism issues. States are immune from suits brought by citizens in the federal courts.[100] Although delegation of the NPDES program, and participation in the Act's programs, does provide a waiver of sovereign immunity for some causes of action, it has not been interpreted as a general waiver. The effect is that the Act does not authorize an action by a citizen against a state, unless the suit is expressly authorized, is based on a state's failure to perform a mandatory action expressly required by the Act, or is against a §301(a) illegal discharge from a state-owned or

94. 181 F.3d 1285, 29 ELR 21387 (11th Cir. 1999).

95. *Id*. at 1288-89, 29 ELR at 21388.

96. *Id*. at 1289, 29 ELR at 21388 (citing *Hughey*).

97. 40 C.F.R. §122.26(e)(6) (existing stormwater discharger permits remain in effect so long as a discharger makes a timely and valid new application for a permit within 180 days of the expiration of the existing permit).

98. 503 U.S. 91, 22 ELR 20552 (1992).

99. 33 U.S.C. §1365(a), ELR STAT. FWPCA §505(a).

100. The Eleventh Amendment of the U.S. Constitution provides "sovereign immunity" to the states against claims by citizens in the federal courts.

state-controlled facility. Since the action contemplated here is against a private stormwater discharger, the Eleventh Amendment should not be a concern.

Avoiding the sovereign immunity of the state is another advantage of bottom-up litigation. Given the high likelihood that the state permitting agency might intervene in such an action (assuming that the action is brought in a delegated state) such an intervention might actually bring parts of a state program into litigation that might otherwise be barred from review in federal court by the Eleventh Amendment.

As in any lawsuit brought under the citizen suit provisions of §505, a suit brought against a stormwater discharger must comply with the basic jurisdictional requirements of that section. The first, most basic jurisdictional issue is whether a §505 suit is available at all. If EPA is the permitting authority and retains NPDES jurisdiction in a state, §505 may always be applicable. However, the federal courts are split as to whether federal CWA citizen suits are available in states with delegated NPDES programs. The reason for this is that, according to 33 U.S.C. §1342, delegated programs are required to be administered under state law that is substantially similar to, but preempts, federal law. The citizen suit provisions of §505 are federal law, and hence are not applicable in states that administer the NPDES program under state law in lieu of federal law, or so the argument goes. This issue was addressed squarely by the Eastern District of Washington in *Hecla Mining*. The court reasoned that

> [t]he courts addressing whether citizens suits are available in a state with its own permit process are divided on the issue. Some hold that private suits are not authorized, on the theory that federal enforcement is suspended entirely by a state permit program. *E.g.*, *City of Heath, Ohio v. Ashland Oil, Inc.*, 834 F. Supp. 971 [24 ELR 20439] (D. Ohio 1993) (no citizen suit under similar RCRA state permit program) (citing *Dague v. City of Burlington*, 935 F.2d 1343, 1353 [21 ELR 21133] (2d Cir. 1991)); *Thompson v. Thomas*, 680 F. Supp. 1 [18 ELR 20802] (D.D.C. 1987). These cases treat federal and state programs as separate universes, and conclude that citizens suits are authorized only under a state provision.
>
> Other courts emphasize the unity of purpose behind state and federal CWA programs, and hold that citizens may enforce effluent limitations regardless of whether EPA or a state agency issues the NPDES permits. *E.g.*, *Lutz v. Chromatex, Inc.*, 725 F. Supp. 258, 261 [20 ELR 20345] (M.D. Pa. 1989); *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968 [14 ELR 20875] (2d Cir. 1984); *McClellan Ecological Seepage Situation ("MESS") v. Weinberger*, 707 F. Supp. 1182, 1190-91 [19 ELR 20124] (E.D. Cal. 1988). This conclusion is suggested by the definition of "effluent limitation" in [§]1362(11), which includes "any restriction established by a state or the [EPA] Administrator."[101]

The *Hecla Mining* court found §505 citizen suits to be authorized despite state delegation of the NPDES program, holding that

> [n]othing in the language or structure of the CWA suggests that citizens suits are incompatible with state administration of the NPDES permit program. Indeed, it would be bad policy to remove a key component of private enforcement from the CWA simply because EPA has approved a state permit program in lieu of the federal bureaucracy. Accordingly, the court is persuaded by the line of authority holding that citizens suits may proceed in states administering their own NPDES permit program.[102]

Thus the first jurisdictional hurdle to be addressed in bringing a §505 citizen suit is whether there has been a state delegation of the NPDES program, and if so, whether the jurisdiction recognizes the authority of citizens to bring suit under §505. Once it has been determined that either there has been no delegation and EPA retains authority, or that the NPDES program has been delegated and the jurisdiction recognizes the authority of citizens to bring suit under §505, the next issues to be addressed lie in the language of 33 U.S.C. §1365 (CWA §505).

The 60-Day Notice Requirement

CWA §505 provides:

> (b) Notice
> No action may be commenced—
>
> (1) under subsection (a)(1) of this section—
> (A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or
> (B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.
> (2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator.[103]

This provision generally requires that a citizen petitioner give at least 60-days' notice prior to filing a citizen suit. There has been a substantial amount of litigation over the sufficiency of notice provided. The simplest issue concerns the length of time. One must wait 60 days from the day notice is provided. This seems easy enough, but many cases get dismissed because they are brought a day or two early. Part of the problem may be in the definition of the term "given notice." The Act provides that no action may be commenced "prior to [60] days after the plaintiff has given notice of the alleged violation." Given the number of different parties that must be given notice, mailing the notice, return receipt requested, is probably the surest way to know when all parties have been given notice of the intent to sue. The parties that must be given notice are: the EPA Administrator; the state in which the alleged violation occurs; and

101. 870 F. Supp. at 986-87, 25 ELR at 20662. Although cited as an example of a jurisdiction not allowing federal citizen suits following a state delegation, the Second Circuit in Dague v. City of Burlington, 935 F.2d 1343, 21 ELR 21133 (2d Cir. 1991), expressly found that CWA citizen suits were available despite state delegation. Its holding regarding Resource Conservation and Recovery Act (RCRA) citizen suits was based on the specific language of RCRA and the specific nature of the state program implementing the requirements of RCRA.

102. 870 F. Supp. at 987, 25 ELR at 20662.

103. 33 U.S.C. §1365(b), ELR STAT. FWPCA §505(b).

the alleged violator. Providing notice to the state is a vague requirement, but sending such notice to both the state attorney general and the state NPDES program authority (if any) should suffice. It is also a good idea to provide notice to the regional EPA Administrator.

Of course, the most important part of the notice is its content. The purpose of the notice is to allow EPA or the state NPDES permitting authority sufficient time to step in and take action to remedy the problem before a citizen suit is filed. The notice therefore must be specific enough to identify each particular violation. Because the case described herein will not allege a §402 violation for failure to attain a permit, a broad allegation such as "has been operating since 19__ without a permit" will not be enough. There are two broad types of citizen suits brought against individual dischargers: suits based on a failure to obtain a permit and claims based on an actual discharge without a permit. For a suit based on a failure to obtain a permit to succeed, it must first be shown that the discharger was required to obtain a permit. Regarding the targets of "bottom-up" litigation, stormwater dischargers falling into the §402(p)(2)(E) 40 C.F.R. §122.26(a)(9)(i) category, the requirement for a permit is triggered solely by an EPA or state Administrator determination that the discharge is significant source or contributor. Unless this determination has been made in writing and communicated to the discharger, the discharger is not required to seek a permit, and there is, accordingly, no action for failure to obtain a permit. Instead, the action must be based on a violation of §301(a), or an actual discharge of a measurable quantity of pollutants without a permit.

An action based on the actual discharge of a measurable quantity of pollutants without a permit will require evidence of several things that should be alleged in the notice. It is essential that the discharging entity have facilities characteristic of a point source. This will require a site assessment to determine the manner in which stormwater is channeled from the site and into a jurisdictional water. A man-made conveyance, such as a storm culvert, pipe, or ditch, would be ideal, but a gulley or other eroded natural conveyance should also be sufficient if it is used to channel or collect stormwater. Proof of an actual discharge can be established by eyewitness or expert witness observations of actual discharge events, or by stormwater flow modeling data coupled with actual rainfall reports for the area over a certain time period. Specific discharges should be alleged in the notice; general averments of discharges will probably not be sufficient to sustain a citizen suit later against a motion to dismiss for insufficient notice.

Next is an allegation that the discharges alleged were significant source or contributors of measurable and detectable quantities of pollutants. Again, this may be established by either direct monitoring during stormwater discharge events, or through stormwater modeling. This data does not need to be fully developed in the notice, but the discharge of pollutants needs to be alleged including the types and quantity of pollutants discharged as well as the specific points of discharge.

The notice needs to contain allegations and some evidence that the violation is continuous and ongoing. Citizen suits cannot be brought for wholly past violations of the Act.[104]

104. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 18 ELR 20142 (1987).

The Waiting Game and the Seeds of Defenses

After the notice has been filed, watch for action by the defendant discharger, the state NPDES permit authority, and/or EPA. If the threat of a suit is perceived as real several different steps may be taken by one or more of the notified parties. The discharger may take steps to modify the discharging facility such that stormwater is brought under control or treated to reduce pollutants. More cynical dischargers may act to remove or fill in anything resembling point sources. The discharger may also attempt to apply for a permit from the NPDES permit authority, or voluntarily request some administrative enforcement action such as a nominal fine and a compliance schedule. The NPDES permit authority, either the state or EPA, may commence a permit proceeding or enforcement action. CWA §505(b)(1)(B) provides that no §505 action may be commenced:

> If the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.[105]

Thus, enforcement actions may provide either a jurisdictional bar to filing a citizen suit petition, or provide the discharger with a post-petition defense as will be discussed below.

If the state does intervene following the filing of the 60-days' notice, it may provide an opportunity for the petitioners to launch a collateral challenge against the sufficiency of the state's program in a way that would not otherwise be permitted in a citizen suit. In general, if a state's NPDES program is insufficient or suffers from some deficiency, citizens have no cause of action under the citizen suit provisions. Generally, the only recourse would be petitioning EPA to revoke the state's NPDES program authority pursuant to EPA's regulations.[106] Revocation of a state's NPDES authority, however, is something EPA understandably does with great reticence and almost never as a means of addressing one or a few specific defects.[107] If, however, the state were to intervene in a citizen suit action by commencing some form of enforcement against a discharger after the 60-days' notice has been given of a pending citizen suit against that discharger, it may provide a means of challenging the state's enforcement program. If the state were to commence a permit action for the stormwater discharge during the 60-day notice period, it may put the states permit program in play in the litigation—especially in states that administer stormwater permit programs under state law rather than through the NPDES program.

During the 60-day notice period, the citizen plaintiff should be active in monitoring the discharger both for continued discharges and for any efforts by the discharger to remedy the problem. If the discharger takes steps to remedy the problem on the ground, an honest assessment should be made of the sufficiency of the remedial action. If the discharger has made an effective and good-faith effort to re-

105. 33 U.S.C. §1365(b)(1)(B), ELR Stat. FWPCA §505(b)(1)(B).

106. 40 C.F.R. §122.63(a).

107. *See* William H. Rodgers Jr., Environmental Law 367-68 (2d ed. 1994).

duce the flow and/or treat the stormwater effluent in a way that reduces pollutant discharge from the site to a nominal amount, a victory should be declared and the suit dropped with a letter sent to all parties stating the reason for not proceeding to litigation.

The citizen plaintiff also needs to be active in nailing down standing through affidavits attesting to the specific harm done the plaintiff by the defendant's discharge. Many citizen petitioners pay scant attention to the standing requirements, making only general averments of aesthetic enjoyment and future use of an area. However, since standing can be raised as an issue by a party or by the court itself, sua sponte, at any stage or level of the litigation, solid affidavits should be prepared prior to filing the petition. These affidavits should attest to specific use of an area affected by defendant's stormwater discharge, and specific injury accruing to the plaintiff by virtue of the defendant's discharge. Standing should be fully established and attested to upon the filing of the petition given the high likelihood of a standing challenge, the high likelihood of an appeal from any successful verdict, and the fact that appellate courts can also revisit the issue of standing at will and may be bound by the record before the lower court.

The citizen plaintiff should also further develop its evidence of stormwater discharges, and of the pollutants contained in those discharges. Since this particular type of case cannot rely on a time period during which a petitioner was in violation of the Act by merely discharging without a permit, specific violations must be established, and notice of each specific violation must be given at least 60 days prior to filing suit. If evidence of new discharges comes to light during the 60-day notice period, the petitioner may wish to consider amending the notice to include those discharges. Evidence of these discharges may be introduced for the first time in the petition to establish the ongoing and continuing nature of the discharge, but they generally cannot be included in the suit as discharges for which a remedy is sought without modification of the 60-days' notice.

Petition

The filing of the petition triggers additional notice requirements. CWA Section 505(c) provides:

> Venue; intervention by Administrator; United States interests protected
>
> (1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.
>
> (2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.
>
> (3) Protection of interests of United States.[108]

Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the U.S. Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.[109]

Thus the petition must be filed in the federal district court for the district in which the violation took place, and the complaint itself must be served on the Attorney General and the EPA Administrator. This section also provides for the intervention of the EPA Administrator in the action. Since EPA has a vested interest in preventing precisely this kind of action forcing citizen suit, Agency intervention and opposition should be expected. EPA should be expected to protect its discretion over when, or the timing, of bringing such dischargers into the coverage of the Act. The reason, of course, is that EPA does not want to be forced to address this problem.

A petition challenging the discharge of pollutants from a significant source or contributor that has not been required to obtain a permit must include specific and fairly detailed allegations. Because of potential jurisdictional challenges, averments as to the discharge of specific pollutants need to be well developed and strongly supported factually. Since, in essence, this petition will ask a court to make a factual determination that EPA desires to maintain solely within its own discretion—the determination that a stormwater source is discharging a measurable and detectable amount of a pollutant to a jurisdictional water—the petition should go well beyond the minimum usually necessary to sustain a petition, and include very specific and well-developed information. A good starting point for such information may be a watershed assessment prepared by either the state or EPA. Such an assessment may be prepared prior to a TMDL, or in conjunction with the preparation of the TMDL. A the very least, the state-prepared list of impaired waters (the §303(d) list) may provide a good starting point for identifying waters impaired from stormwater runoff. Eyewitness testimony describing discharges from the facility during precipitation-driven events will also be useful if not necessary. This information should be supplemented by some form of expert testimony, included with the petition via affidavits, concerning the pollutants contained within the discharge.

This evidence will go toward establishing the elements that have already been discussed. Namely, that there is a discharge (eyewitness or expert testimony); that the discharge is from a point source (witness, expert, and/or photographs); that the discharge reaches a jurisdictional water (witness or expert); that the discharge contains a measurable and detectable amount of pollutants (expert through modeling or sampling); and that the discharge has no permit. It is also important that the relief sought in the petition be fairly specific. The proposed litigation is a §301(a) citizen suit to enjoin an unpermitted discharge. The petition itself should be pretty straightforward, however, it is likely that a number of defenses will be raised. The seeds of these defenses will probably become apparent during the 60-day notice period.

Defenses

Diligent Prosecution of Enforcement Action

One frequently asked and litigated question has been the proper role of citizen suits in the enforcement of the Act. Some courts maintain that the role of citizen suits was intended by Congress to be supplemental to federal or state enforcement. These courts are far more willing to allow an enforcement action to preempt a citizen suit. Other courts hold that Congress intended citizen suits to play a central

108. 33 U.S.C. §1365(c), ELR STAT. FWPCA §505(c).

109. *Id.*

role in driving compliance with the provisions of the Act independent of enforcement. These courts are more reticent to hold a citizen suit preempted by an enforcement action. The contrasting approaches of the courts in interpreting the role of citizen suits has lead to a rich area of litigation surrounding the definition of "diligent prosecution" as that term is used in §505(b) and §309(g)(6).

The way a diligent prosecution defense is likely to evolve is that once notice has been served the discharger might well seek some type of enforcement action from the appropriate permit authority. In some cases, dischargers threatened with citizen suits have turned to either EPA or state authorities, and have proposed that the agency initiate enforcement actions including compliance schedules and nominal fines. The goal of the discharger using this defense is to avoid the greater liability that might flow through the citizen suit in favor of either a nominal fine, or a practically nonenforceable compliance schedule. This particular type of defense is more likely to arise in the case of a citizen suit alleging NPDES permit noncompliance. A discharger without a permit has a much easier avenue for avoiding liability by simply applying for an NPDES permit. However, it is also likely to arise in the case of an unpermitted stormwater discharger falling into the significant source or contributor category due to the unavailability of an applicable NPDES permit.

The diligent prosecution defense derives primarily from the language of the citizen suit provisions. CWA §505(b)(1)(B) provides:

> (B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.[110]

Section 505(b)(1)(B), which was enacted as part of the 1972 Amendments to the Act, acts as a flat prohibition of any citizen suit filed after an enforcement action has been initiated. This proved problematic where an enforcement action was initiated after a citizen plaintiff filed its requisite 60-days' notice. If notice is given and the citizen suit filed without the initiation of an enforcement action, the diligent prosecution defense is simply unavailable, with one possible exception, namely when the defendant seeks and is granted an NPDES permit that addresses all of the substantive claims raised by the citizen petitioner. This, however, would most likely arise in the context of mootness defense rather than a diligent prosecution defense.

In the event that an enforcement action is commenced after the filing of the 60-days' notice and prior to the initiation of the citizen suit, §309 provides guidance on what type of citizen suits may be barred and what constitutes diligent prosecution. Section 309 was enacted with the 1987 Amendments to the Act and spells out the circumstances in which a citizen suit may proceed where EPA or the state has commenced an enforcement action after a citizen petitioner has given notice. Section 309(g)(6)[111] specifically deals with the question of when an enforcement action may preempt citizen suit jurisdiction.

If a discharger is to use the "diligent prosecution" defense, it should become apparent during the 60-day notice period. CWA §309(g)(6)(B) states that the limitations on action that it provides is not applicable when "a civil action under [§]505(a)(1) of this Act has been filed prior to commencement of an action under this subsection." The limitations of §309 also do not apply to actions initiated after a citizen plaintiff has provided its 60-days' notice pursuant to §505(b)(1)(A), provided the citizen files suit within 120 days of sending notice.

A strict reading of §309(g)(6)(A) reveals that it only applies to bar an action for civil penalties. Thus it is arguable whether §309(g)(6) would apply at all in a case in which a §505 citizen suit seeks injunctive or declaratory relief. The Ninth Circuit has taken a narrow position, finding that an enforcement action must result in the levy of administrative penalties before it may bar a citizen suit.[112] Not all federal circuits have read this provision so restrictively, with the U.S. Court of Appeals for the First Circuit holding that an enforcement action that did not levy administrative penalties could provide a bar to a citizen suit.[113]

CWA §505(b) does not contain a "civil penalty" limitation to its diligent prosecution bar. Accordingly, §505(b)(1)(B) will still bar an action even where the enforcement action does not seek civil penalties. Some courts have adopted a "substantial relief" analysis to determine when a state enforcement action amounts to a diligent prosecution.[114] Under this standard, a reviewing court must look to a number of factors to determine whether an enforcement action such as a compliance schedule or agreed order may constitute dili-

110. *Id*. §1365(b)(1)(B), ELR STAT. FWPCA §505(b)(1)(B).

111. *Id*. §1319, ELR STAT. FWPCA §309. Section 309(g)(6) provides:

> (6) Effect of order.
> (A) Limitation on actions under other sections
> Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this Act; except that any violation—
>
> (i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,
> (ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or
> (iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,
>
> shall not be the subject of a civil penalty action under subsection (d) of this section or [§]311(b) or [§]505 of this Act.
> (B) Applicability of limitation with respect to citizen suits
> The limitations contained in subparagraph (A) on civil penalty actions under [§]505 of this Act shall not apply with respect to any violation for which—
>
> (i) a civil action under [§]505(a)(1) of this Act has been filed prior to commencement of an action under this subsection, or
> (ii) notice of an alleged violation of [§]505(a)(1) of this [Act, 33 U.S.C. §1365(a)(1)] has been given in accordance with [§505(b)(1)(A)] prior to commencement of an action under this subsection and an action under [§505(a)(1)] with respect to such alleged violation is filed before the 120th day after the date on which such notice is given.

Id. §1319(g)(6), ELR STAT. FWPCA §309(g)(6).

112. Washington Pub. Interest Research Group v. Pendleton Woolen Mills, 11 F.3d 883, 24 ELR 20231 (9th Cir. 1993).

113. North & South Rivers Watershed Ass'n v. Town of Scituate, 949 F.2d 552, 22 ELR 20437 (1st Cir. 1991).

114. Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 890 F. Supp. 470, 26 ELR 20457 (D.S.C. 1995).

gent prosecution. Such factors include whether: (1) the order provides for future violations and violations are ongoing; (2) the violator has been deprived of the economic benefit of its noncompliance; (3) all alleged violations have been covered; and (4) the state has actively enforced the schedule or order.[115]

For §309(g)(6) to bar a citizen suit, the enforcement action must also be either federal and commenced under §309, or if by a state, commenced under a state law comparable with §309. Since most CWA enforcement by states, the question of whether a state law is comparable with §309 has been often litigated. Again, the Ninth Circuit has taken a narrow view that to provide a diligent prosecution bar, the state enforcement action must assess an administrative penalty under a provision of state law that is comparable to §309(g)(6).[116] The First Circuit and the U.S. Court of Appeals for the Eighth Circuit have adopted a broader interpretation of the comparability requirement of §309(g), finding that a state's overall regulatory scheme was the point of analysis, and finding state law comparable where it provided citizen petitioners with notice and an opportunity to participate in the enforcement action.[117] The U.S. Court of Appeals for the Sixth Circuit appears to have adopted a narrow interpretation of comparability similar to the Ninth Circuit's.[118]

The comparability requirement of §309(g)(6) might provide an interesting opportunity for the citizen litigant to collaterally challenge provisions of a states program that might not otherwise be subject to judicial review. Should a discharger in a state seek to bar a citizen suit by requesting an enforcement action from a delegated state, or should a state with a delegated program seek to intervene with an enforcement action, the state's program, or at least its enforcement regime, might be put into play. Should the discharger defendant raise the enforcement action as a bar to the citizen suit, the citizen petitioner may make the challenge that the enforcement action is taken pursuant to a program that is not equivalent to the standards of §309. States that do not provide for citizen intervention in an enforcement action, allow for adequate notice, or authorize a right of review are all subject to challenge under the comparability requirement of §309(g)(6)(A)(iii). As discussed above, some courts take a broad view of the comparability requirements, which may well give citizen petitioners the opportunity to challenge elements of a state program not so closely tied with the enforcement provisions.

Voluntary Permit Application

Since the contemplated action will rest on the fact that the defendant discharger is discharging without a permit, it is a valid defense to such a claim that the permittee in fact has the required permit. Thus, when confronted with the 60-day notice letter, it may be quite likely that the discharger will seek coverage under the NPDES permit program by applying for a permit. Courts have ruled that, unlike the enforcement action which must be commenced before the filing of the petition, the granting of a permit may moot out an action at any stage in the litigation. The *Mississippi River Revival, Inc.* litigation provides what appears to be a minority position, but one worth noting. In the first decision in this case, *Mississippi River Revival, Inc. v. Administrator*,[119] Minneapolis and St. Paul were faced with a citizen suit concerning the unpermitted discharge of stormwater into the Mississippi River, which divides the two cities. Prior to the filing of the citizen suit, the city had applied for an NPDES permit for its discharge. After the citizen petitioners filed suit to enjoin the yet unpermitted discharge, the city moved to dismiss the suit on the grounds that it had applied for an NPDES permit. The district court was unconvinced by this tactic, stating:

> St. Paul's argument that Plaintiffs' first claim fails to state a claim upon which relief can be granted is without merit. Section 301(a) of the CWA *absolutely prohibits* the discharge of any pollutant by any person, unless the discharge is made according to the terms of a[n] NPDES permit. 33 U.S.C. §1311(a) ("Except as in compliance with this section and sections . . . 1342 . . . of this title, the discharge of any pollutant by any person is unlawful."). Plaintiffs allege—and St. Paul admits—that it does not have a[n] NPDES MS4 permit, and yet it continues to discharge stormwater through its storm sewers into the Mississippi River. The complaint therefore states a claim for the purposes of Rule 12(b)(6).[120]

This situation changed dramatically when the city again moved the court for dismissal in May of the following year. By this time, the city had received an NPDES permit for the stormwater discharge. In what appears at first blush to be a limited refutation of the mootness standard set out by the U.S. Supreme Court in *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*[121] the district court found that the case had been rendered moot by the subsequent issuance of the NPDES permit despite the fact that the claim was properly asserted at the time the citizen suit was commenced.[122] According to the court, "no relief remaining available under the CWA will deter the cities from discharging stormwater without a permit, which is the violation the Plaintiffs allege in these cases."[123]

Although this view appears to be an extreme minority one, it also appears entirely consistent with the language of the CWA. The limitation of the defense of mootness based on enforcement action to those actions brought prior to the commencement of the citizen suit does not seem to apply to the issuance of a permit. This is because in the case of the issuance of an NPDES permit, the defense does not spring from the action itself, but rather from the definition of an unlawful discharge pursuant to §301(a). Namely, that such a discharge must be without an NPDES permit before it will violate §301. It is likely that stormwater dischargers falling into the significant source or contributor category will seek coverage under the NPDES program if sued under §505.

115. For a more complete analysis, see Emily A. Maples, *Reforming Judicial Interpretation of the Diligent Prosecution Bar: Ensuring an Effective Citizen Role in Achieving the Goals of the Clean Water Act*, 16 Va. Envtl. L.J. 195 (1996).

116. California v. Union Oil Co. of Cal., 83 F.3d 1111, 1117-18 (9th Cir. 1996).

117. *Scituate*, 949 F.2d at 552, 22 ELR at 20437; Arkansas Wildlife Fed'n v. ICI Ams., Inc. 29 F.3d 376, 24 ELR 21573 (8th Cir. 1994).

118. Tandy Jones Gilliland v. City of Lakeland, Tenn., 224 F.3d 520 (6th Cir. 2000).

119. 107 F. Supp. 2d 1008, 31 ELR Digest 20011 (D. Minn. 2000).

120. *Id*. at 1014, 31 ELR Digest at 20011.

121. 528 U.S. 167, 30 ELR 20246 (2000).

122. Mississippi River Revival, Inc. v. City of Minneapolis, Minn., 145 F. Supp. 2d 1062, 31 ELR 20629 (D. Minn. 2001).

123. *Id*. at 1067, 31 ELR at 20630.

The fact that the permit has not issued within the 60-day notice period is not necessarily dispositive of whether a permit action may eventually moot out the suit. However, there are two potential benefits to the citizen suit plaintiff if this defense is used.

How Defenses Open the Door for a Collateral Attack on the Sufficiency of State Programs

The first is that the citizen plaintiff will likely have the right of intervention in the permit action. The benefit here is that if the NPDES permit authority is a delegated state, the permit action raised as a defense to a citizen suit may well place the state permit program "in play," and allow a clever citizen advocate the opportunity to challenge substantive provisions of the state program in a way that would not otherwise be possible. Section §505(f) is very explicit in what may or may not be challenged through a §505 citizen suit, and one of the things that is specifically "off limits" to citizen petitioners is the sufficiency of a delegated state program. The only remedy available to a citizen plaintiff who wishes to challenge the sufficiency of a delegated state program is to petition EPA to revoke the program. As has already been discussed, the remedy of revocation is extraordinary and very seldom ever granted. If, however, an unpermitted discharger sued under §505 seeks and is granted an NPDES permit by a state authority, and attempts to use that permit as a defense, any deficiency in the permit, or any deficiency in the program that might have affected the sufficiency of the permit, may be challenged by the citizen petitioner through a challenge of the legal sufficiency of the permit itself, and hence the availability of a mootness defense based on the permit. Although such a challenge in a citizen suit will not result in any enforceable remedy against the state agency, it may well result in a court opinion that finds unlawful a portion of a state's NPDES permit program.

Thus, under this strategy, the action against the significant source or contributor discharge is only act one. Act two begins when the defendant discharger applies for an NPDES permit in order to avoid liability under §505. The citizen plaintiff should become involved early and intimately with any subsequent permit action, requesting to be notified, participating in any hearings or comments, and even challenging the permit administratively should it contain any defects or reveal any defects of the state program.

Although it is somewhat less likely, a similar opportunity accrues should the defendant discharger seek or become subject to an enforcement action during the 60-day notice period. As already discussed, §505 provides that the citizen plaintiff may intervene in any such enforcement action as a matter of right. Assuming the relevant authority is a state NPDES program, if the enforcement action is raised as a defense to liability under §505, the sufficiency of both the enforcement action and the underlying program may be collaterally challenged in defending against a requested dismissal based on mootness.

EPA Intervention and Conclusion

Given the potential repercussions of a successful action to hold an undetermined significant source or contributor liable in a citizen suit under §301(a) of the Act, it is likely that EPA will intervene in the action. EPA's likely position is that it was given authority by Congress pursuant to §402(p)(6) to establish comprehensive regulations for the control of stormwater discharges. This authority gives EPA the discretion to determine both what is and what is not covered under its stormwater regulations. Thus if EPA says that a source is not covered, that is the final word. EPA's interpretation of the statute will be given great deference by the reviewing court.

In light of the potential for EPA intervention and the great deference the courts will employ in reviewing EPA's interpretation of its statutory duties, care should be taken to present the case on a narrow factual basis. EPA may have the discretion over when or whether to require a significant source or contributor to obtain an NPDES permit, but case law makes clear that the courts are competent to decide whether a source meets the statutory definition of a point source. Likewise, the courts are competent to decide whether a discharge emits a measurable and detectable quantity of pollutants. Add to this background the fact that, if the target is properly chosen and is a significant source or contributor, EPA has already expressly included the category as under the NPDES program. In cases construing other parts of the NPDES program, courts have consistently held that when EPA has maintained the ability to determine when or whether to require a permit, such discretion does not exempt a discharger from liability under other provisions of the Act. The courts are competent to decide whether CWA §301(a) has been violated.

In some ways this strategy is so simple as to be unremarkable. For an unpermitted discharger to be found in violation of §301(a) is certainly nothing novel. However, in other ways it has the potential to send a powerful message to EPA, the states, and the regulated community. The message is that when it comes to stormwater, and by implication nonpoint pollution, inaction is unacceptable. Despite the fact that EPA has put great effort into preventing itself from being forced into regulating stormwater discharges effectively, and from regulating nonpoint pollution at all, "bottom-up" litigation may create a demand for more effective regulation that emanates from the regulated community itself. In the opinion of the author, this is the only way such change will occur.