

Municipal Separate Storm Sewer System (MS4) Regulation Under the Federal Clean Water Act: The Role of Water Quality Standards?

JOHN H. MINAN*

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* Professor of Law, University of San Diego School of Law. Professor Minan is the Chairman of the Water Board, San Diego Region, and he served on the Water Board that adopted the MS4 permit discussed in this article. The views expressed in the article are his own, and do not represent those of the State of California or any of its agencies.

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I. INTRODUCTION

The Supreme Court has recently decided a number of cases involving the Federal Clean Water Act (CWA).¹ In 2000, the Court issued its opinion in *Friends of the Earth, Inc. v. Laidlaw Environmental Services*.² In 2001, it decided *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*.³ In 2002, *Borden Ranch Partnership v. U.S. Army Corps of Engineers* evenly divided the Court, four-to-four with Justice Kennedy not participating.⁴ And in 2004, the Court decided *South Florida Water Management District (SFWMD) v. Miccosukee Tribe of Indians*.⁵ In 2006, the Supreme Court will hear three cases involving the CWA. *Carabell v. U.S. Army Corps of Engineers* and *United States v. Rapanos* are cases from the Sixth Circuit that involve wetlands and the jurisdictional touchstone “navigable waters.”⁶ The *S.D. Warren Co. v. Board of Environmental Protection* is a case from the state of Maine that involves the regulation of a hydroelectric dam and the CWA jurisdictional requirement of “discharge.”⁷ These cases are a reliable barometer of the importance as well as the controversy surrounding the recent application of various aspects of the CWA.

In 1987, Congress amended the CWA for the purpose of expressly bringing industrial and municipal separate storm sewer system discharges within the scope of the National Pollutant Discharge Elimination System

1. Clean Water Act §§ 101-607, 33 U.S.C. §§ 1251-1387 (2000). The CWA is commonly cited to both its original section numbers and the official code.

2. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167 (2000) (interpreting the “citizen suit” provisions of CWA § 505).

3. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (considering the Corps’ CWA § 404 jurisdiction over “isolated wetlands” under the Migratory Bird rule); *see also infra* note 35.

4. *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002) (dealing with CWA section 404 discharges).

5. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (construing the “addition of pollutants” requirement of CWA section 502(12)).

6. *Carabell v. U.S. Army Corps of Eng'rs*, 391 F.3d 704 (6th Cir. 2004) *cert. granted*, 74 U.S.L.W. 3228 (U.S. Oct. 11, 2005) (No. 04-1384); *U.S. v. Rapanos*, 376 F.3d 629 (6th Cir. 2004) *cert. granted*, 74 U.S.L.W. 3228 (U.S. Oct. 11, 2005) (No. 04-1034).

7. *S.D. Warren Co. v. Bd. of Env'tl. Prot.*, 868 A.2d 210 (Me. 2005) *cert. granted in part*, 73 U.S.L.W. 3686 (U.S. Oct. 11, 2005).

(NPDES) permit program.⁸ Although the amendments were adopted almost twenty years ago, the application of the municipal separate storm water law has proven controversial at both the federal⁹ and state levels.¹⁰ The controversy is likely to continue for two reasons: Urban runoff is a leading source of water quality impairment today, and the economic stakes of addressing the problem or failing to address it are significant.¹¹

The term “municipal separate storm sewer system (MS4)”¹² describes a storm water conveyance system from the point of storm water collection through the point of its discharge to the receiving waters.¹³ The term “MS4” is broadly inclusive, and is not simply limited to city owned storm sewer systems.¹⁴ The regulation of MS4s lies at the heart of the water quality controversy considered in this article.

The CWA requires municipal storm water discharge permits to include provisions that control discharges both “into” and “from” the MS4. With respect to discharges “into” the conveyance system, MS4 permits are required to “effectively prohibit” non-storm water discharges.¹⁵

8. Clean Water Act § 402, 33 U.S.C. § 1342 (2000).

9. *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999); *Env'tl. Def. Ctr., Inc. v. EPA*, 344 F.3d 382 (9th Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004); and *City of Abilene v. EPA*, 325 F.3d 657 (5th Cir. 2003).

10. *Bldg. Indus. Ass'n of San Diego County v. State Water Res. Control Bd.*, 22 Cal. Rptr. 3d 128 (Ct. App. 2004), *reh'g denied*, Jan. 4, 2005.

11. See discussion *infra* Part III; see also The National Water Quality Inventory Report to Congress for 1988, 65 Fed. Reg. 43,586, 43,587 (July 13, 2000).

12. The CWA does not define the term “municipal separate storm sewer.” However, it is defined in the storm water regulations at 40 C.F.R. § 122.26(b)(8) (2004):

Municipal separate storm sewer means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

(i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States;

(ii) Designed or used for collecting or conveying storm water;

(iii) Which is not a combined sewer; and

(iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 C.F.R. [§] 122.2.

13. As used in this Article, the term “receiving waters” includes creeks, streams, rivers, lakes, reservoirs, estuaries, bays, and the ocean.

14. See discussion *infra* Part III.

15. Clean Water Act § 402(p)(3)(B)(ii), 33 U.S.C. § 1342(p)(3)(B)(ii) (2000).

With respect to discharges “from” the storm sewer system, MS4 permits are required to reduce pollutants to the “maximum extent practicable” (MEP).¹⁶ They are also required to comply with “such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.”¹⁷

The purpose of this Article is to analyze whether MEP is the exclusive statutory standard under the CWA for discharges “from” an MS4 conveyance system. As discussed below, the issue is relevant because some states are beginning to require compliance with state water quality standards (WQS) independent of MEP.¹⁸ While questions of constitutional law exist with respect to the analysis of MS4 storm water regulation,¹⁹ my inquiry is focused on the role that WQS should play in implementing the provisions of the CWA.

16. Clean Water Act § 402(p)(3)(B)(iii), 33 U.S.C. § 1342(p)(3)(B)(iii) (2000). The EPA has identified the following factors as relevant to the MEP standard: (1) storm water discharge size; (2) climate; (3) implementation schedules; (4) current ability to finance the program; (5) hydrology; (6) capacity to perform operation and maintenance; (7) conditions of receiving waters; and (8) other specific local concerns and aspects included in a comprehensive watershed plan. National Pollution Discharge Elimination System-Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, Part II, 64 Fed. Reg. 68,722, 68,754 (Dec. 8, 1999) [Phase 2 Storm Water Rules].

17. Clean Water Act § 402(p)(3)(iii), 33 U.S.C. § 1342(p)(3)(iii) (2000).

18. Under federal law, the following elements must be included in each state’s WQS submitted to the EPA for review:

- (a) Use designations consistent with the provisions of sections 101(a)(2) and 303(c)(2) of the Clean Water Act; (b) Methods used and analyses conducted to support water quality standards revisions; (c) Water quality criteria sufficient to protect the designated uses; (d) An antidegradation policy consistent with [40 C.F.R.] § 131.12; (e) Certification by the State Attorney General or other appropriate legal authority within the State that the water quality standards were duly adopted pursuant to State law; [and] (f) General information which will aid the Agency in determining the adequacy of the scientific basis of the standards which do not include the uses specified in section 101(a)(2) of the [CWA] as well as information on general policies applicable to State standards which may affect their application and implementation.

40 C.F.R. § 131.6 (2004). The water quality criteria may be expressed in narrative or numeric terms. 40 C.F.R. § 131.3(b) (2004). On the one hand, a typical narrative criterion might be that “all waters shall be maintained free of toxic substances in concentrations that are toxic to, or that produce detrimental physiological responses in human, plant, animal, or aquatic life.” WATER QUALITY CONTROL PLAN, SAN DIEGO BASIN (9), 3-15/16. On the other hand, a typical numeric criterion would be expressed as a quantitative limitation on pollutant concentrations or levels.

WQS are federally required. The formulation of WQS is generally within the province of the states, but the EPA is obligated to promulgate WQS when a state fails to do so or inadequately does so. Clean Water Act § 303 (c)(3)-(4), 33 U.S.C. § 1313 (c)(3)-(4) (2000). Therefore, WQS should be considered part of the federal mandate of the CWA when they are imposed on permittees pursuant to the discretionary authority to control storm water discharges.

19. *City of Abilene v. EPA*, 325 F.3d 657 (5th Cir. 2003) (rejecting plaintiffs’ Tenth and First Amendment claims that the MS4 permit was unconstitutional).

I argue that the U.S. Environmental Protection Agency (EPA), as well as those states authorized to administer the NPDES program, possess the discretionary authority to prohibit MS4 discharges that cause or contribute to a violation of WQS, and that such a prohibition ought to be included in MS4 permits in order to protect a receiving waterbody's water quality. As a result, MEP should not be construed to act as a legal ceiling that prevents regulators from imposing this type of permit prohibition.²⁰ I maintain that this view is consistent with the discretionary grant of power given by Congress to the EPA and to the states.

I also argue that prohibiting MS4 discharges that cause or contribute to a violation of WQS is desirable as a matter of public policy. At a theoretical level, this view is consistent with the traditional role of WQS as an ambient-based reference point for protecting a waterbody's beneficial uses. This view is also desirable at a practical level because WQS give regulators and the regulated community a clearer standard for assessing permit compliance than the more illusive MEP standard. Consequently, using WQS as a reference point to assess permit compliance is apt to be more protective of water quality than using MEP as the sole governing standard.

The proper interpretation of the CWA provisions applicable to MS4 regulation has fomented controversy because the economic²¹

20. The argument that MS4 permits should prohibit discharges that cause or contribute to a violation of WQS is premised on scientific soundness of the WQS itself. To the extent the WQS are not scientifically supported, they should be revised. The procedure for reviewing WQS exists. According to federal law, states are required to review WQS every three years. Clean Water Act § 303(c)(1), 33 U.S.C. § 1313(c)(1) (2000).

21. The preamble to the Phase II regulations has a discussion of the cost-benefit analysis conducted by the EPA for implementing Phase II. The EPA estimates that the total average annual per household cost of the rule is expected to be \$9.16. 64 Fed. Reg. 68,791 (Dec. 8, 1999). In doing the cost-benefit analysis for Phase II, the EPA also looked at the costs incurred by thirty-five Phase I MS4s. The average annual per household cost for Phase I MS4s was found to be \$9.08. 64 Fed. Reg. 68,792 (Dec. 8, 1999).

The Los Angeles Water Quality Control Board considered costs in *Review and Analysis of Budget Data Submitted by the Permittees for Fiscal Years 2000-2003*. It reports that in Los Angeles County,

the average combined household cost, based on the reported budgets is in the range of \$50 to \$63 per year. Using the assumption of segregating the budgets into pre-existing programs and expenditures to implement the storm water program, the average cost per household per year goes down to \$12.50 - \$18 for implementing the new programs required by the municipal permits.

Dan Radulescu & Xavier Swamikannu, *Review and Analysis of Budget Data Submitted by the Permittees for Fiscal Years 2000-2003* 17 (Jan. 13, 2003), available at

and environmental stakes²² are high to the various stakeholders. The operator of the storm water conveyance system, the MS4 permittee, has the primary responsibility for complying with the terms of the permit. As such, the operator is obviously concerned with the cost of regulatory compliance. For most local governments, the cost of compliance must be balanced against the demand for a wide range of competing public services. Moreover, the permit requirements must be met by many local governments at a time of pinched financial resources. The building industry also is an interested stakeholder in the outcome. Its members are less directly affected than MS4 permittees because construction activities are subject to regulation under the industrial storm water permit requirements of the CWA which have a WQS requirement.²³ Nevertheless, the building industry is concerned with the financial impact of MS4 storm water regulation because most completed development projects discharge “into” the storm water conveyance system. Consequently, local government and the building industry have a keen interest in the statutory fit between MEP and WQS. To the extent that the compliance bar is set too high, actions to enforce an MS4 permit may result, including the imposition of significant financial penalties for noncompliance.²⁴

Regulators and environmentalists are equally concerned with whether WQS may be used. As examined more fully below, discharges from an MS4 are an important source of water quality impairment.²⁵

http://www.waterboards.ca.gov/losangeles/html/programs/stormwater/la_ms4_final/03_0114_MS4costjan2003.pdf.

State Board Order No. 2000-11, which addressed the Los Angeles Water Quality Control Board’s Standard Urban Storm Water Mitigation Plan (SUSMP) requirements only, makes limited findings regarding the cost of implementing the SUSMP requirements. It states “the Regional Board found that the cost to include BMPs that will meet the mitigation criteria will be one to two percent of the total development cost. This amount appears to be reasonable” See State Board Order No. 2000-11, available at <http://www.swrcb.ca.gov/resdec/wqorders/2000/wqo2000-011.doc>.

An alternate approach is to consider the economic costs of failing to protect a receiving water’s water quality. This approach is difficult because, among other reasons, the costs are not easily monetized. Nevertheless, one approach might be to consider the estimates for correcting water quality impairment after it occurs. The TMDL program, discussed *infra* in Part VII. E. 5, deals with rectifying water quality impairments. TMDL cost estimates are somewhere in the range of \$25 to \$50 billion over fifteen years. See OLIVER A. HOUCK, THE CLEAN WATER ACT TMDL PROGRAM: LAW, POLICY, AND IMPLEMENTATION 178 (2d ed. 2002).

22. See discussion *infra* Part III.

23. Clean Water Act § 402(p)(3), 33 U.S.C. § 1342(p)(3) (2000); see also 40 C.F.R. § 122.26(b)(14)(x) (2003).

24. The CWA intends to deter conduct and ensure compliance by establishing civil and criminal penalties. Clean Water Act § 309(b)-(c), 33 U.S.C. § 1319(b)-(c) (2000). Civil penalties may be substantial. Under CWA section 309(g)(2)(B), 33 U.S.C. § 1319(g)(2)(B) (2000), they may be up to \$10,000 per day for each violation and for each day during which the violation continues.

25. See discussion *infra* Part III.

Development projects generally tend to create more impervious surface areas, such as roads, driveways, and sidewalks. In doing so, they exacerbate municipal storm water runoff flows, which in turn threaten the water quality of local receiving waters. Few, if any, citizens want to recreate in polluted waters or live near them. Thus, prohibiting discharges that violate WQS tends to be more protective of water quality than MEP.

The federal law governing MS4 regulation is found in section 402(p) of the CWA.²⁶ While this section clearly provides that MS4 permits “shall require” controls to reduce the discharge of pollutants to the MEP, Congress did not define MEP or expressly mention WQS.²⁷ The EPA’s Phase II storm water regulations offer the following explanation for Congress’s failure to define MEP:²⁸ “There is no regulatory definition of MEP in order to allow the permitting authority and regulated MS4s maximum flexibility in their interpretation of it.”²⁹ Unfortunately, this desire to promote flexibility creates a breeding ground for legal disagreement as well as regulatory uncertainty. The dynamics for the “perfect legal storm” are further aided by the potential clash of divergent interests amongst the interested stakeholders—local government, the building industry, environmentalists, and regulators.

II. AN OVERVIEW OF THE CLEAN WATER ACT (CWA)

In order to properly understand and apply section 402(p) to MS4 regulation, one should have a structural understanding of the CWA. As the principal federal statute dealing with the regulation of water

26. Clean Water Act § 402(p), 33 U.S.C. § 1342(p) (2000).

27. *Id.*

28. In 1999, the EPA promulgated a final administrative “Phase II Rule” mandating that discharges from small municipal separate storm sewer systems and from construction sites between one and five acres in size be subject to the permitting requirements of the NPDES program. *See* *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832 (9th Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004) (generally affirming the Phase II rules against statutory, administrative, and constitutional challenges, but remanding the case to correct procedural defects in the general permit program). The “Phase II Rule” was the second stage of EPA’s two-phase storm water rulemaking effort. The “Phase I Rule,” governing larger-scale storm water discharges, was issued in 1990. Amended regulations were issued by the EPA in 1991. *See* John H. Minan, *Municipal Storm Water Permitting in California*, 40 SAN DIEGO L. REV. 245, 246 (2003).

29. EPA, STORM WATER PHASE II COMPLIANCE ASSISTANCE GUIDE § 4.6.1. (March 2000); *see* discussion of *Bldg. Indus. Ass’n of San Diego County infra* Part VII.

pollution in the United States,³⁰ it anticipates a working partnership between the federal government and the states.³¹ The goal of this partnership is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”³² This overarching objective of protecting water quality must be borne in mind as one grapples with the proper application of the storm water provisions.

Additional points are useful to appreciate. Section 301³³ of the CWA prohibits the discharge of pollutants into navigable waters unless the discharge is authorized by a properly issued permit pursuant to section 402³⁴ or 404.³⁵ The guiding principle is that unless authorized by a properly issued permit, the discharge of pollutants to waters of the United States is prohibited.

The CWA contains various regulatory programs. Depending on the particular program involved, its provisions are administered at the federal level either by the U.S. Environmental Protection Agency (EPA) or the Army Corps of Engineers.³⁶ The CWA also authorizes the EPA to allow the National Pollutant Discharge Elimination System (NPDES) permit issuing responsibilities, including those involving the regulation of storm water, to be undertaken by a state providing it has an EPA approved permit program.³⁷ This administrative structure is significant to understand because section 402(p) speaks in terms of action either by the “Administrator”³⁸ or the “State.”³⁹

30. The other dominant federal statute dealing with water quality, the Safe Drinking Water Act, 42 U.S.C. §§ 300f to j-9 (2000), directs the EPA to set primary and secondary maximum levels for contaminants in public drinking water systems.

31. *City of Abilene v. EPA*, 325 F.3d 657, 659 (5th Cir. 2003).

32. Clean Water Act § 101(a), 33 U.S.C. § 1251(a) (2000).

33. Clean Water Act § 301, 33 U.S.C. § 1311 (2000).

34. Clean Water Act § 402, 33 U.S.C. § 1342 (2000) (National Pollutant Discharge Elimination System (NPDES)).

35. Clean Water Act § 404, 33 U.S.C. § 1344 (2000) (permits for dredge or fill material).

36. Section 404 gives the Corps the responsibility for issuing permits for the discharge of dredge or fill materials into navigable waters. Clean Water Act § 404(a), 33 U.S.C. § 1344(a) (2000). The legislative history to the CWA reveals this was done for two reasons. First, the Corps already administered the wetlands regulatory program under the Rivers and Harbors Act. Under this Act, the Corps originally acted to protect only navigation and navigable capacity. In 1968, the Corps expanded its permit review process to include, among other things, environmental concerns related to impacts on fish and wildlife and pollution. *See Zabel v. Tabb*, 430 F.2d 199 n.27 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971); *see also U.S. v. Alaska*, 503 U.S. 569, 580-81, 583 (1992). Second, the Corps did not want its extensive dredging and filling activities to be regulated by another federal agency. *See Jennifer Ruffolo, The U.S. Supreme Court Limits Federal Regulation of Wetlands*, 33 CAL. RESEARCH BUREAU 02-003 (Feb. 2002).

37. Clean Water Act § 402(b), 33 U.S.C. § 1342(b) (2000). The CWA also authorizes state administration of section 404 permitting. Clean Water Act § 404(g), 33 U.S.C. § 1344(g) (2000).

38. Clean Water Act § 101(d), 33 U.S.C. § 1251(d) (2000).

Most states have approved NPDES program authority, which is subject to continuing administrative oversight by the EPA.⁴⁰ This delegation, which allows a state to preserve its autonomy and to avoid direct regulation by the federal government,⁴¹ means that those states administering the storm water provisions of the CWA are likely to be at the forefront of the regulatory effort.

The trigger to the NPDES permit requirements is the “discharge of a pollutant,” which is broadly defined by the CWA as “any addition of any pollutant to navigable waters from any point source.”⁴² The dominant water quality strategy of the NPDES permit program⁴³ is the application of uniform effluent limits to the point of discharge, the so-called “end-of-pipe” discharge, to the navigable waters.⁴⁴ But the NPDES program also employs

39. Clean Water Act § 502, 33 U.S.C. § 1362(3) (2000) (defining the meaning of the term “state”).

40. The following states have approved programs: Alabama; Arizona; Arkansas; California; Colorado; Connecticut; Delaware; Florida; Georgia; Hawaii; Illinois; Indiana; Iowa; Kansas; Kentucky; Louisiana; Maine; Maryland; Michigan; Minnesota; Mississippi; Missouri; Montana; Nebraska; Nevada; New Jersey; New York; North Carolina; North Dakota; Ohio; Oklahoma; Oregon; Pennsylvania; Rhode Island; South Carolina; South Dakota; Tennessee; Texas; Utah; Vermont; Virginia; Washington; West Virginia; Wisconsin; Wyoming. U.S. Env'tl. Protection Agency, *National Pollutant Discharge Elimination System: State Program Status*, available at <http://cfpub2.epa.gov/npdes/statestats.cfm> (last visited Sept. 22, 2004).

41. See, e.g., CAL. WATER CODE § 13370(c) (West 1992).

It is in the interest of the people of the state, in order to avoid direct regulation by the federal government of persons already subject to regulation under state law pursuant to this division, to enact this chapter in order to authorize the state to implement the provisions of the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto, and federal regulations and guidelines issued pursuant thereto, provided, that the state board shall request federal funding under the Federal Water Pollution Control Act for the purpose of carrying out its responsibilities under this program.

See also CAL. WATER CODE § 13399.43 (West 1992 & Supp. 2005) (Storm Water Enforcement Act of 1998).

42. Clean Water Act § 502(12), 33 U.S.C. § 1362(12) (2000). Section 1362(14) (2000) defines the term “point source” to mean “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.” The term “pollutant” is broadly defined in CWA section 502(6), 33 U.S.C. § 1362(6) (2000).

43. Clean Water Act §§ 302, 303, 33 U.S.C. §§ 1312, 1313 (2000). NPDES permits structurally include various components: (1) technology-based effluent limits; (2) water quality-based limits; (3) monitoring and reporting requirements; and (4) standard and special conditions. The principal focus in this article is on WQS (water quality-based limits).

44. The NPDES permit program applies to all pollutant discharges into “navigable

the strategy of ambient WQS,⁴⁵ which are functionally geared to protecting the beneficial uses of the receiving water.

States have the primary responsibility to establish WQS.⁴⁶ WQS are periodically reviewed both by the states and by the EPA to insure that they are kept current. Therefore, WQS are not static, but rather are dynamic in nature.⁴⁷

As a general matter, WQS impose legal requirements that must be implemented through appropriate regulatory action.⁴⁸ As such, WQS

waters,” which are defined to mean “waters of the United States, including the territorial seas.” Clean Water Act § 502(7), 33 U.S.C. § 1362(7) (2000). CWA jurisdiction is based on the authority of Congress under the Commerce Clause, U.S. CONST., art. I, § 8, cl. 3. The precise reach of the CWA pursuant to the Commerce Clause has not been answered by the Supreme Court, although it has given guidance on the Commerce Clause in *United States v. Morrison*, 529 U.S. 598 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995). In *Solid Waste Agencies of N. Cook County (SWANCC) v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001), the Supreme Court refused to address the constitutional reach of the Commerce Clause, holding instead that Congress, as a matter of statutory construction, did not intend the CWA to extend to isolated wetlands that provide habitat for migratory birds. In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Supreme Court held that the CWA applies to wetlands adjacent to navigable waters. The Court reasoned that Congress evidenced its intent to regulate some waters that would not be deemed “navigable” under the classical understanding of the term.

45. Section 402(a)(2) states that the “Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) [section 402(a)(1)].” Clean Water Act § 402(a)(2), 33 U.S.C. 1342(a)(2) (2000). Paragraph (1) requires compliance with provisions of section 301, which contains the WQS requirements. Section 301 directs, among other things, achievement of “any more stringent limitation, including those necessary to meet water quality standards” established by state law. Clean Water Act § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (2000).

46. Clean Water Act § 303(c), 33 U.S.C. § 1313(c) (2000).

47. *Id.* (“at least once each three year period”). States administering the provisions of the CWA are required to have a planning process, called the Triennial Review, to review WQS and to revise them as needed. *See, e.g.*, CAL WATER CODE § 13240. This process of review may or may not result in a formal change to the WQS. To the extent that WQS are considered infeasible or otherwise objectionable, an MS4 permittee or other interested party would have the opportunity to object to its application during the review process. An unfavorable administrative decision to revise the WQS may be subject to judicial review.

48. *See, e.g.*, CAL. WATER CODE § 13263 (West 1992 & Supp. 2005), which requires the implementation of water quality control plans, also known as Basin Plans. CAL. WATER CODE section 13242 (West 1992 & Supp. 2005) requires that a program of implementation for achieving water quality objectives shall include, but not be limited to: (1) a description of the nature of actions which are necessary to achieve the objectives, including recommendations for appropriate action by any entity, public or private; (2) a time schedule for the actions to be taken; and (3) a description of surveillance to be undertaken to determine compliance with objectives. Although adopted regionally by Regional Water Quality Control Boards, Basin Plans are subject to approval by both the State Water Resources Control Board [CAL. WATER CODE § 13245 (West 1992 & Supp. 2005)] and the EPA [§ 1313 (2000)].

Once approved, the WQS are implemented through federal NPDES permits or state Waste Discharge Requirement permits pursuant to CAL. WATER CODE section 13260

perform several policy functions. First, they act as a type of water quality control insurance policy. This is necessary because the predominant strategy, which is control through uniform technology-based effluent limits,⁴⁹ is not always sufficient to protect water quality. The reason is straightforward: Such limits do not consider the ambient impact of the waste discharge to the receiving water. A discharger may meet technology-based effluent limits contained in an NPDES permit, but this does not assure that water quality of the receiving water will not degrade or compromise its beneficial uses. Conceptually, WQS should be seen as acting in tandem with technology-based effluent limits to protect water quality.

In short, WQS act as regulatory platforms⁵⁰ for realizing the broad goals of protecting and maintaining the integrity of the nation's waters.⁵¹ While regulators need not use the full assimilative water quality capacity of their receiving waters,⁵² the CWA must be applied to avoid going beyond their capacity. In this sense, WQS are an important water quality threshold that must be respected.

(West 1992 & Supp. 2005). Permits issued pursuant to the CWA are NPDES permits, whereas permits issued solely under state law are officially called a Waste Discharge Requirement (WDR). Among other reasons, the distinction between NPDES permits and WDR permits is relevant because California law expressly regulates discharges to ground water and other discharges not regulated by federal law. CAL. WATER CODE § 13050(e) (West 1992 & Supp. 2005). In contrast, federal regulation under the CWA is jurisdictionally based on the Commerce Clause and tied to discharges to "navigable waters."

49. Technology-based limits are established in accordance with various technologies, and vary based on the type of pollutant involved, the kind of discharge, and whether the PS is new or already existing. For example, new sources, are governed by the "best available demonstrated control technology." See Clean Water Act § 306(a)(1), 33 U.S.C. § 1316(a)(1) (2000).

50. Water quality also is protected by the antidegradation requirement of the CWA. Clean Water Act § 303(d)(4)(B), 33 U.S.C. § 1313(d)(4)(B) (2000). It provides:

For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

Discharges of storm water are required to comply with the applicable antidegradation policies designed to protect water quality. 40 C.F.R. § 131.12 (2003); see also *infra* note 82.

51. Clean Water Act § 101, 33 U.S.C. § 1251(a) (2000).

52. See, e.g., CAL. WATER CODE § 13263(b) (West 1992 & Supp. 2005).

III. STORM WATER RUNOFF AND THE THREAT TO WATER QUALITY

For much of America's history, the conventional attitude was that "dilution was the solution to pollution."⁵³ Direct discharge of a broad array of wastes to our nation's waters was seen as a convenient and accepted method of disposal. Waterways were treated as the "commons"⁵⁴ for the disposal of all types of unwanted waste, and the assimilative capacity of our waters was taken for granted.

Not surprisingly, this view has changed. The policy of "dilution as the solution," which may have worked well at an earlier time in our nation's history, has recognized physical limits. When the industrial waste in Ohio's Cuyahoga River caught fire in 1969,⁵⁵ Congress was forced to take corrective steps.

Uniform, national standards for water quality were desperately needed. In 1972, Congress finally responded by enacting the CWA.⁵⁶ Point source (PS)⁵⁷ discharges of waste from sewage treatment plants, industrial activities, and other discharging activities were subject to control through federally authorized permitting, monitoring, and reporting requirements.⁵⁸

53. As used in this Article, the term "pollution" is broadly defined to mean "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." Clean Water Act § 502(19), 33 U.S.C. § 1362(19) (2000). The term "pollutant" includes sewage, chemical wastes, biological materials, heat, industrial, municipal and agricultural waste. Clean Water Act § 502(6), 33 U.S.C. § 1362(6) (2000).

54. This phenomenon is an illustration of "the tragedy of the commons" in which short-term individually rational behavior is ultimately detrimental to long-term interests. It happens when individuals waste public goods in the rush to consume them before others do. See generally Garrett Hardin, *The Tragedy of the Commons*, SCIENCE, Dec. 13, 1968, at 1244.

55. See ROBERT W. ADLER ET AL., *THE CLEAN WATER ACT 20 YEARS LATER* 5-6 (1993). In 1969, the Cuyahoga River in Cleveland, Ohio, coated with a slick of industrial waste, caught fire. Congress responded to that dramatic event, and to others like it, by enacting the Clean Water Act. Of course, this event is only one of many instances when the alarm bell has sounded. See, e.g., *Env'tl. Def. Fund v. EPA*, 598 F.2d 62 (D.C. Cir. 1978) (discharging polychlorinated biphenyls (PCBs) to the nation's waters creates a serious risk of death for aquatic organisms and disease, particularly cancer, to humans).

56. The statutory roots of the CWA were the Rivers and Harbors Appropriation Act (commonly known as the Refuse Act), ch. 425, 30 Stat. 1151 (1899) (codified as amended at §§ 403-413 (2000)) and the Federal Water Pollution Act of 1948, ch. 758, 62 Stat. 1155 (1948) (codified as amended at §§ 1251-1387 (2000)). The Refuse Act was designed to free up transport by keeping "navigable waters" free of garbage, whereas the Federal Water Pollution Act placed primitive controls on the discharge of materials into "interstate waters."

57. CWA defines a "point source" (PS) as "any discernible, confined and discrete conveyance," including such physical structures as pipes or ditches. Clean Water Act § 502(14), 33 U.S.C. § 1362(14) (2000).

58. Clean Water Act § 402, 33 U.S.C. § 1342 (2000) (provisions dealing with the issuance of National Pollutant Discharge Elimination System (NPDES) permits).

The regulation of PS discharges has been an important success story.⁵⁹ Industrial pollution has plummeted and municipal waste loadings have dropped by nearly fifty percent, notwithstanding the increase in the number of people being served.⁶⁰ By most standards of measurement—whether it be number of permitted dischargers, pounds of pollution abated, or streams improved—the CWA regulation of PS discharges has made an important contribution to improving the nation’s water quality.⁶¹

But regulating PS discharges is only part of the larger story to controlling water pollution. The struggle to protect water quality demands continuing vigilance. Nonpoint source (NPS) pollution has been recognized as an important part of the story today.⁶² Polluted storm water often begins its journey to the local receiving waters as an unregulated NPS. Once the runoff is collected and deposited in a separate storm water conveyance system, it normally is discharged to the receiving water from a PS, such as an outfall pipe, without the benefit of any pollution control treatment. The discharge “from” the PS to the receiving water is the theoretical basis for MS4 regulation under the NPDES program.

The need for effective storm water regulation is clear. Storm water runoff has been characterized as being “comparable to, if not greater

59. One author recently observed that “available empirical evidence shows significant progress in reducing discharges of pollutants to U.S. waters over the past thirty years.” Robert W. Adler, *The Two Lost Books in the Water Quality Trilogy: The Elusive Objectives of Physical and Biological Integrity*, 33 ENVTL. L. 29, 48 (2003). Another author challenges the perception that the CWA has been a success based on its general failure to accomplish most of its stated goals, including, for example, the zero-discharge of pollutants by 1985. Lawrence S. Bazel, *The Clean Water Act at Thirty: A Failure After All These Years?*, 18 NATURAL RES. & ENV’T 46 (2003).

60. HOUCK, *supra* note 21, at 3.

61. *Id.* at 4.

62. While CWA section 502(14), 33 U.S.C. § 1362(14) (2000) defines the term “point source” (PS), the CWA does not define the term “nonpoint source” (NPS). It is defined by implication. Any source not fitting within the definition of a PS is treated as an NPS. Therefore, for general purposes, the universe of water pollution is defined by the categories PS and NPS. See generally U.S. Env’tl. Protection Agency, *Nonpoint Source Program and Grants Guidance for Fiscal Year 1997 and Future Years*, <http://www.epa.gov/owow/nps/guide.html> (last visited Sept. 15, 2004).

One author has observed: “Although information on the contributions to pollution loadings is skimpy, various estimates suggest ‘that nonpoint sources account for up to 99 percent of suspended solids and usually between 50 to 90 percent of other conventional pollutants.’ Even for toxics, the best estimates assign up to 50 percent of the problem to nonpoint sources.” WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 292-94, (2d ed. 1994). This assessment is generally consistent with government reports that estimate that fifty percent of all water pollution comes from NPS. See HOUCK, *supra* note 21, at 46 n.172.

than, contamination from industrial and sewage sources.”⁶³ Storm sewer conveyance systems carry suspended metals, sediments, algae-promoting nutrients (especially, nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into local receiving waters across the United States. Urban development, industrial and construction sites, and illegal discharges and unauthorized connections to storm water conveyance systems are all potential sources of contamination.

The problem is a matter of pressing national concern. More than a third of the nation’s rivers and almost half of our lakes do not meet WQS.⁶⁴ Along the Mississippi River, for example, contaminated runoff has created a “dead zone” in the Gulf of Mexico, traceable to excess nutrient loading and accompanying decreases in oxygen, from runoff. This “dead zone,” which recently reached the size of the state of New Jersey, has resulted in dissolved oxygen levels below the level needed by fish and invertebrates, and has effectively created a smothering layer of pollution over the sea bottom.⁶⁵

Every state and every major watershed in the United States is under similar assault from unregulated or under-regulated sources of runoff.⁶⁶ In northern Wisconsin the runoff assault is from dairy farms, in North Carolina it is from hogs, and in Oregon it is from clear-cutting of forests.⁶⁷ Housing and urban development also contribute to the runoff problem in many watersheds throughout the nation.⁶⁸ The environmental alarm bell is ringing. California, for example, responded to the wake-up call when it declared that unregulated storm water runoff was a leading cause of contamination of the state’s surface and groundwater.⁶⁹

63. Richard G. Cohn-Lee & Diane M. Cameron, *Urban Stormwater Runoff Contamination of the Chesapeake Bay: Sources and Mitigation*, 14 ENVTL. PROF. 10, 10 (1992); see also John H. Minan, *Municipal Storm Water Permitting in California*, 40 SAN DIEGO L. REV. 245, 252-53 (2003).

64. Adler, *supra* note 59, at 49.

65. Carol Kaesuk Yoon, *A ‘Dead Zone’ Grows in the Gulf of Mexico*, N.Y. TIMES, Jan. 20, 1998, at F1.

66. Basing regulation on watershed principles is complicated by the fact that political boundaries and administrative institutions do not follow watershed ecosystems. In California, for example, the average county includes portions of six different watersheds. John T. Woolley et al., *The California Watershed Movement: Science and the Politics of Place*, 42 NAT. RES. J. 133, 136 (2002).

67. HOUCK, *supra* note 21, at 4.

68. *Id.*

69. Storm Water Enforcement Act § 1, 1998 Cal. Stat. 998 (“The Legislature hereby finds and declares all of the following: (a) Unregulated storm water runoff is a leading cause of contamination of the state’s surface water and groundwater.”); see also State Water Resources Control Board & Regional Water Quality Control Boards, *Strategic Plan* 8 (Nov. 15, 2001), available at http://www.swrcb.ca.gov/strategicplan/01_strategic_plan.pdf.

Coastal waters are also under attack from the pollutants in runoff. The Pew Oceans Commission Report recently confirmed the persistent nature of the runoff problem as a major threat to our oceans.⁷⁰ Runoff from development in our coastal regions is leading to the decline of ocean wildlife and to the collapse of ocean ecosystems. The report cites estimates that the oil running off our streets and driveways and flowing into the oceans is equal to an Exxon Valdez⁷¹ oil spill every eight months.⁷² The Commission also reports that more than 13,000 beaches were closed or under pollution advisories in 2001, an increase of twenty percent from the year 2000.⁷³

Effectively controlling storm water runoff as a regulatory matter is challenging because it is inherently ubiquitous, diffuse,⁷⁴ and dependant on ever changing weather patterns. Storm water runoff cannot be easily captured or controlled at one location.⁷⁵ Another consideration adds to the challenge: Dry-weather flows of runoff also find their way into the MS4 conveyance system.⁷⁶ Economic and technical constraints, such as

70. Pew Oceans Commission, *America's Living Ocean: Charting a Course for Sea Change* (May 2003), available at http://www.pewtrusts.org/pdf/env_pew_oceans_final_report.pdf.

71. In 1989, the grounding of the Exxon Valdez caused the release of over 11 million gallons of oil in Alaska's water and polluted some 1200 miles of shoreline. Largely in response to this event, Congress enacted the Oil Pollution Act of 1990 (OPA), which contains nine separate titles ranging from general provisions regarding oil pollution down to specific requirements. 33 U.S.C. §§ 2701-2761 (2000); see Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990).

72. Pew Oceans Commission, *supra* note 70. The EPA estimates that American households generate 193 million gallons of used oil annually, some of which is improperly disposed of. It estimates that households improperly dump the equivalent of 17 Exxon Valdez oil spills each year. *Runoff: The number one source of water pollution may be a surprise*, SIERRA STAR, July 9, 2003 at 1.

73. Pew Oceans Commission, *supra* note 70.

74. It is frequently maintained that NPS pollution is not subject to direct regulation by the CWA. See, e.g., *Or. Natural Desert Ass'n v. Dombek*, 172 F.3d 1092, 1096 (9th Cir. 1998). The statement is potentially misleading. Storm water may start as an NPS, but once it becomes part of the MS4, it is subject to regulation under CWA section 402(p)(3)(B)(ii)-(iii), 33 U.S.C. § 1342 (p)(3)(B)(ii)-(iii) (2000).

75. In certain instances, dry season "low flow" diversions to a community's sanitary sewer system may be used. These diversion systems tie the storm sewer system to the sanitary conveyance system. They divert untreated "low flows" into the sanitary sewer system where the flow then is treated to CWA standards before being discharged. "Low flows" include flows during dry weather periods and non-treated sanitary sewer overflows that reach the storm sewer system. When "high flows" occur, typically during sustained rain events, the "low flow" diversion systems shut down to avoid the capacity of the sanitary sewer system from being overwhelmed. Thus, "low flow" diversions to the sanitary sewer are not a complete or comprehensive solution to the runoff problem.

76. Dry weather flows from the storm sewer system may occur when sanitary

the limited processing capacity of publicly owned sewage treatment facilities, make comprehensive “end-of-pipe” treatment of these “separate” conveyance systems difficult, if not infeasible, in most areas.⁷⁷

In response to the threats from unregulated storm water, the EPA promulgated storm water regulations in the 1970s and early 1980s.⁷⁸ All point sources,⁷⁹ including storm water discharges, were required to apply for NPDES permits.⁸⁰ Yet little progress was made in actually controlling the pollutants in storm water discharges. In 1985, for example, three-quarters of the states cited urban storm water runoff as a major cause of waterbody impairment, and forty percent reported construction site runoff as a major cause of impairment.⁸¹ The lack of tangible progress, combined with recognition of the importance of the storm water problem, prompted Congress to take action in 1987. It added section 402(p) for the purpose of establishing a comprehensive approach to the regulation of storm water by industrial⁸² and by municipal storm water dischargers.⁸³

IV. WATER QUALITY STANDARDS (WQS)

An analysis of the legal controversy involving MS4 regulation must begin with an understanding of WQS. Both the Water Quality Act of 1965⁸⁴ and the Water Quality Improvement Act of 1970⁸⁵ contemplated that waste discharges to the nation’s waters would not cause or contribute to the violation of WQS. State and local officials, working in cooperation with federal officials, were expected to establish minimum WQS and to create pollution prevention and abatement implementation programs.

sewer malfunctions and excess irrigation water enter the storm sewer system.

77. One article recently estimated the cost of treatment at \$5 to \$10 per person per day. G. Fred Lee & Anne Jones-Lee, *Regulating Water Quality Impacts*, STORMWATER, July/Aug. 2004, available at http://www.stormh2o.com/sw_0407_regulating.html.

78. See 38 Fed. Reg. 13,530 (May 22, 1973); 41 Fed. Reg. 11,303 (Mar. 18, 1976); 44 Fed. Reg. 32,854 (June 7, 1979); and 49 Fed. Reg. 37,998 (Sept. 26, 1984).

79. Clean Water Act § 502(14), 33 U.S.C. § 1362(14) (2000).

80. See 38 Fed. Reg. 13,530 (May 22, 1973); 41 Fed. Reg. 11,303 (Mar. 18, 1976); 44 Fed. Reg. 32,854 (June 7, 1979); and 49 Fed. Reg. 37,998 (Sept. 26, 1984).

81. Regulation for Revision of the Water Pollution Control Program Addressing Storm Water, 64 Fed. Reg. 68,722, 68,724, 68,727 (Dec. 8, 1999) (codified at 40 C.F.R. pts. 9, 122, 123, and 124).

82. Clean Water Act § 402(p)(3)(A), 33 U.S.C. § 1342(p)(3)(A) (2000). Discharges from industrial activities are described in 40 C.F.R. § 122.26(b)(14) (2004).

83. Clean Water Act § 402(p)(3)(B), 33 U.S.C. § 1342(p)(3)(B) (2000).

84. Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (codified in scattered sections of 33 U.S.C.). The 1965 Act relied almost entirely on the states to improve water quality through the formulation of WQS.

85. Water Quality Improvement Act of 1970, 84 Stat. 91.

These early expectations proved largely ineffective for several reasons. Investigators found the WQS approach to be weak, late in being developed and implemented, scientifically questionable, and generally unenforced by regulators.⁸⁶ In general, the problem with WQS was traceable to two principal considerations. First, the WQS often were expressed in generalized terms. Water quality criteria stated in descriptive or narrative terms, such as “swimmable” or “fishable,” are inherently vague. Too much room exists to debate the substantive content of the standard and its meaning. This made enforcement problematic. Second, the ability of regulators to connect an NPS to the WQS impairment made determining accountability, and thus enforcement, difficult. Because everyone arguably was to blame for the NPS pollution, such as pesticide or herbicide runoff or discarded waste in a storm water gutter, no one was held accountable. But these problems did not signal the demise of WQS because ambient, cumulative impacts must be taken into account in order to adequately protect water quality.

Congress continued to employ WQS in the CWA.⁸⁷ Section 303 requires each state to establish WQS for “waters” within the state.⁸⁸ WQS consist of two parts:⁸⁹ (1) an identification and description of the

86. S. REP. No. 92-414 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 3668.

87. Under the CWA, the EPA is obligated to promulgate WQS for states that fail to or inadequately do so. Clean Water Act § 303(c)(3)-(4), 33 U.S.C. § 1313(c)(3)-(4) (2000).

88. Clean Water Act § 303(c), 33 U.S.C. § 1313(c) (2000).

89. 40 C.F.R. § 131.10(a) (2003) provides: “Each State must specify appropriate water uses to be achieved and protected.” 40 C.F.R. § 131.6 (2004) outlines the minimum requirements for WQS submission. The following elements must be included in each state’s WQS submitted to EPA for review:

- (a) Use designations consistent with the provisions of sections 101(a)(2) and 303(c)(2) of the Act.
- (b) Methods used and analyses conducted to support water quality standards revisions.
- (c) Water quality criteria sufficient to protect the designated uses.
- (d) An antidegradation policy consistent with § 131.12.
- (e) Certification by the State Attorney General or other appropriate legal authority within the State that the water quality standards were duly adopted pursuant to State law.
- (f) General information which will aid the Agency in determining the adequacy of the scientific basis of the standards which do not include the uses specified in section 101(a)(2) of the Act as well as information on general policies applicable to State standards which may affect their application and implementation.

Id.

beneficial uses⁹⁰ for the receiving waterbody, and (2) the water quality criteria (WQC) determined necessary to support the beneficial uses for that receiving waterbody.⁹¹ WQC identify the pollutant concentrations or levels above which beneficial uses are compromised.⁹² The receiving waterbody may not contain pollutants in excess of the applicable WQC needed to support the beneficial use. The criteria typically are expressed either in numeric or narrative terms.⁹³ When stated narratively, the vagueness problem identified above still exists.

V. CLEAN WATER ACT SECTION 301: EFFLUENT LIMITS AND WQS

The discharge of pollutants at the PS through the use of effluent amounts or limits is regulated pursuant to section 301.⁹⁴ Effluent limits are prescribed by the EPA using nationally uniform, technology-based terms.⁹⁵ Although effluent limits describe the amount of specific pollutants⁹⁶ that can be legally released by the regulated source, and are set based on technological and economic considerations for particular discharge categories,⁹⁷ the term “effluent limitation” is broadly defined

90. Typical beneficial uses include municipal and domestic supply, agricultural supply, groundwater recharge, contact water recreation, non-contact water recreation, marine habitat, wildlife habitat, and so on. *See, e.g.*, WATER QUALITY CONTROL PLAN, SAN DIEGO BASIN (9), 2-3 and 2-4 (1994).

91. 40 C.F.R. § 131.3(i) (2004). The term “water quality objectives” may be used as a synonym for the federal term “water quality criteria.” *See, e.g.*, CAL. WATER CODE section 13050(h) (West 1992 & Supp. 2005), which provides: “Water quality objectives” are defined as “the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance with a specific area.”

92. The CWA divides pollutants into three categories: toxic (Clean Water Act § 307(a)(1), 33 U.S.C. § 1317(a)(1) (2000)), conventional (Clean Water Act § 304(a)(4), 33 U.S.C. § 1314(a)(4) (2000)), and non-toxic, non-conventional. Any pollutant that is neither toxic nor conventional, fits within the non-toxic, non-conventional category. Clean Water Act section 303(c)(2)(B) requires states to adopt specific numeric criteria for all toxic pollutants on the EPA’s section 307(a)(1) list. Two monitoring approaches in toxic regulation are used: a “chemical-specific” method, which relies on a chemical analysis of the discharge sample, and a “whole-effluent” method, which tests the toxicity of the entire discharge sample. *See generally* WaterKeepers N. Cal. v. Cal. State Water Res. Control Bd., 126 Cal. Rptr. 2d 389 (Ct. App. 2002) (analyzing the California Toxics Rule).

93. 40 C.F.R. § 131.3(b) (2004).

94. Clean Water Act § 301, 33 U.S.C. § 1311 (2000).

95. The EPA is responsible for establishing effluent limits for various types of point sources based on what the available technology could accomplish. This approach avoided the technical difficulty of evaluating individual effluent limits. JAMES SALZMAN & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY 129 (2003).

96. Under the CWA, pollutants are classified in categories as being “conventional,” “toxic” (Clean Water Act §§ 301(b)(2), 307, 502(13)), or “non-conventional” (Clean Water Act § 301(g), 33 U.S.C. § 1311(g) (2000)). *See also supra* note 43.

97. *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977) (holding, among other things, that effluent limitations for existing plant sources for 1977 and 1983 are to

in the regulations. The term encompasses “any restriction . . . on quantities, discharge rates, and concentrations of ‘pollutants’ which are ‘discharged’ from ‘point sources’ into ‘waters of the United States.’”⁹⁸ Consequently, effluent limits may be expressed as either numeric limits, which is traditionally the case, or in some instances as “best management practices” (BMPs).⁹⁹

The second regulatory strategy is based on the use of WQS.¹⁰⁰ Applicable discharge limits are set in terms of the amount of pollutants allowed in a defined receiving waterbody.¹⁰¹ Consideration is given to local conditions, such as the beneficial uses of the receiving water and its assimilative pollutant capacity. The waste discharge meets WQS requirements provided that the limits are not exceeded.

The structure of the CWA reveals that the predominate strategy of Congress was to rely on effluent limits. It did so for a number of reasons.¹⁰² Uniform limits were deemed essential to achieving Congress’s national objectives. They avoided the complex and divisive process of attempting to assess regional and local water impacts and prevented states from adopting weaker discharge limits for the purpose of encouraging the relocation of industry. They also aided regulatory enforcement by tending to avoid complex issues of proof. Unless the pollution treatment was technologically impractical or unachievable, compliance by the regulated dischargers was required regardless of evidence that a harmful effect had actually occurred.

In addition to requiring technology-based limits, NPDES permits are required to include provisions requiring compliance with WQS. Section 301(b)(1)(C) provides:

not later than July 1, 1977, any more stringent limitation, including those necessary to meet *water quality standards*, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or

be set by regulation, and not on an individual basis during the permit issuance process).

98. 40 C.F.R. § 122.2 (2004).

99. BMPs may be used when numeric effluent limits are infeasible (40 C.F.R. § 122.44(k)(3) (2004)) and when authorized under section 402(p) for the control of storm water discharges (40 C.F.R. § 122.44(k)(2) (2004)).

100. See *Arkansas v. Oklahoma*, 503 U.S. 91 (1991) (holding that the EPA’s requirement that NPDES dischargers must comply with downstream states’ WQS was a reasonable exercise of the agency’s statutory discretion pursuant to 33 U.S.C. §§ 1341, 1342).

101. Clean Water Act § 303, 33 U.S.C. § 1313 (2000).

102. See *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978).

required to implement any applicable *water quality standard* established pursuant to this chapter.¹⁰³

This section, as well as the planning process outlined in section 303(e)(3)(a), is designed to insure that NPDES permits protect WQS. EPA regulations prohibit the issuance of an NPDES permit when imposition of conditions cannot insure compliance with the applicable water quality requirements.¹⁰⁴ The regulations also affirmatively require that an NPDES permit contain effluent limits as necessary to protect WQS.¹⁰⁵

These WQS provisions were enacted prior to the adoption of section 402(p) in 1987. Whether they were superseded by the specific provisions dealing with MS4 storm water regulation is part of the continuing legal controversy analyzed below.

VI. CLEAN WATER ACT SECTION 402(P): INDUSTRIAL AND MUNICIPAL STORM WATER STANDARDS

Section 402(p) establishes NPDES permit requirements for two categories of storm water discharge—industrial and municipal. The statutory requirements for the two categories are different. Industrial discharge permits “shall meet all applicable provisions of this section and section 1311 (CWA section 301) of this title.”¹⁰⁶ The two incorporating provisions from section 1311 (technology-based effluent limits¹⁰⁷ and WQS¹⁰⁸) apply to industrial storm water discharges.

In contrast, MS4 discharge permits are governed by the following statutory provisions:¹⁰⁹

103. Clean Water Act § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (2000) (emphasis added).

104. 40 C.F.R. § 122.4(d) (2004).

105. 40 C.F.R. § 122.44(d) (2004). It provides that the NPDES permit “must contain effluent limits” for a particular pollutant “when the permitting authority determines . . . that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the ambient concentration of a state numeric criteria within a State water quality standard for an individual pollutant.” *Id.* § 122.44(d)(1)(iii).

106. Clean Water Act § 402(p)(3)(A), 33 U.S.C. § 1342(p)(3)(A) (2000).

107. Clean Water Act § 301(a), 33 U.S.C. § 1311(a) (2000).

108. Clean Water Act § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (2000).

109. One reason for the different set of standards relates to the wide-reaching nature of MS4 operations and the potential cost of regulating each MS4 point source. The solution to this concern was the availability of system- or jurisdiction-wide NPDES permits. Clean Water Act § 402(p)(3)(B)(i), § 1342 (p)(3)(B)(i) (2000). Congressman Rowland addressed the potential financial impact on municipalities when he observed:

The conference agreement, which includes a provision exempting certain storm water runoff from the NPDES permitting process takes a giant step toward reducing the regulatory burden proposed by the EPA. As a result, the cost to local governments for complying with the act will be restrained. Under

Permits for discharges from municipal storm sewers—

- (i) may be issued on a system- or jurisdiction-wide basis;
- (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
- (iii) shall require¹¹⁰ controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.¹¹¹

While industrial storm water permittees are required to meet WQS and applicable technology-based effluent limitations,¹¹² MS4 permittees generally are required to reduce “the discharge of pollutants to the maximum extent practicable (MEP).”¹¹³ The focus in subpart (iii) is on reducing the discharge at the output side (or PS), whereas the focus in subpart (ii) is on effectively controlling the input into the storm sewer conveyance system. Taken together, these two provisions operate comprehensively and in tandem with one another, the latter dealing with discharges “from” the conveyance system and the former dealing with discharges “into” the conveyance system.

current law, municipalities would be required to obtain permits for each of the millions of storm water discharge points across the country at a cost which would be almost impossible to meet per permit application. It does not take a whiz at math to realize that our cities and towns were facing massive capital outlays; the cost could have easily exceeded \$8.5 billion in expenditures for compliance with proposed EPA regulations for storm water discharge.

132 CONG. REC. 31968 (daily ed. Oct. 15, 1986).

110. The mandatory nature of MEP is not in issue. See *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832 (9th Cir. 2003) (“[W]e note that the plain language of § 402(p) of the Clean Water Act, 33 U.S.C. § 1342(p), expresses unambiguously Congress’s intent that EPA issue no permits to discharge from municipal storm sewers unless those permits ‘require controls to reduce the discharge of pollutants to the maximum extent practicable.’”).

111. Clean Water Act § 402(p)(3)(B) (2000), 33 U.S.C. § 1342(p)(3)(B) (2000).

112. Industrial dischargers are required to meet the provisions of § 1311 dealing with technology-based effluent limitations. Section 1311 also mandates compliance with §§ 1312 (water quality related effluent limitations) and 1313 (water quality standards and implementation plans). The net effect of these incorporating provisions is, among other things, to subject industrial discharges to compliance with both water quality effluent limits for the discharge and WQS. The EPA has stated that BMPs are to be used in connection with water quality effluent limits, and that numeric limits are not required. See 61 Fed. Reg. 57,425-29 (Nov. 6, 1996), 65 Fed. Reg. 64,746-01. (Oct. 30, 2000).

113. Clean Water Act § 402(p)(3)(B)(iii), 33 U.S.C. § 1342(p)(3)(B)(iii) (2000).

The MS4 provisions do not contain any expressed reference to WQS. As a result, the relation, if any, between the MEP standard and WQS is not stated.¹¹⁴ While the relationship may not be stated, it is clear, however, that satisfying or meeting the MEP standard provides no assurance that WQS will in fact be met. An MS4 permittee may satisfy an MEP discharge standard without meeting WQS. As a result, the water quality of the receiving water may continue to degrade or exceed WQS notwithstanding compliance with MEP.

In analyzing whether MS4 permittees may be subject to WQS limitations, one may contend that section 402(p) is clear. MEP is expressed as the sole substantive limit applicable to MS4 permit conditions for discharges. To the extent that WQS have any relevance, it may be argued that MEP trumps any situation when a conflict exists. From the viewpoint of water quality protection, the problem is that MEP may not adequately protect the beneficial uses of the receiving water.

VII. MS4 DISCHARGE STANDARDS: THE LEGAL DEBATE

The correct application of section 402(p) is not simply a technical quibble. It directly affects the role of WQS and the realization of national water quality goals. It also impacts regulatory enforcement practices because noncompliance with the MS4 permit requirements subjects the discharger to potential administrative civil liability and other penalties.¹¹⁵ If the MEP acts as the exclusive standard, proof of the violation requires the regulator or citizen complainant to establish that the MS4 permittee has not met the MEP standard. This requires that additional “practicable” unused controls actually exist.¹¹⁶

In any enforcement proceeding, the litany of claims that additional controls are not “practicable” is apt to be constrained solely by the ingenuity of counsel. One obvious problem is that MEP, standing alone, may simply create a toothless mandate not susceptible of meaningful enforcement. When stated in quantitative terms, WQS have the advantage of providing a more certain standard for protecting water quality. While the compliance benchmark is more certain, determining whether a discharge actually causes or contributes to a violation of WQS necessarily involves accurate monitoring of storm water flows rates, runoff amounts, and considerations of timing as well as ambient conditions.

114. The relation between MEP and effluent limits was also left uncertain. However, this question now has been examined in several administrative and judicial decisions.

115. See Clean Water Act § 309 (b)-(c), 33 U.S.C. § 1319(b), (c), (g).

116. See, e.g., 40 C.F.R. § 122.26(c) (2001).

The relationship between MEP¹¹⁷ and WQS was examined by the California Fourth District Court of Appeal in *Building Industry Ass'n of San Diego County v. State Water Resources Control Board*.¹¹⁸ In this case, the Building Industry Association (BIA) challenged the MS4 permit provision that prohibited storm water discharges that “cause or contribute to a violation of water quality standards.”¹¹⁹ The BIA’s principal theory¹²⁰ was that MEP is the exclusive standard under federal law, and that the Water Board could not require MS4 permittees to comply with state WQS.¹²¹

The Court of Appeal correctly upheld the permit condition prohibiting discharges in violation of WQS. Given Congress’s intentional failure to define MEP for the purpose of granting flexibility to regulators in

117. Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer System (MS4) Draining the Watersheds of the County of San Diego, the Incorporated Cities of San Diego County, and the San Diego Unified Port District, Order No. 2001-01, at D-3 (Feb. 21, 2001), <http://www.waterboards.ca.gov/sandiego/programs/stormwater/sd%20permit/Order%20No.%202001-01%20Final%20with%20attachmentss.pdf>. The following definition of MEP is provided in Appendix D of the MS4 permit:

MEP is the technology-based standard established by Congress in CWA section 402(p)(3)(B)(iii) that municipal dischargers of storm water (MS4s) must meet. Technology-based limits establish the level of pollutant reductions that dischargers must achieve, typically by treatment or by a combination of treatment and best management practices (BMPs). MEP generally emphasizes pollution prevention and source control BMPs primarily (as the first line of defense) *in combination* with treatment methods serving as a backup (additional line of defense). MEP considers economics and is generally, but not necessarily, less stringent than BAT. A definition for MEP is not provided either in the statute or in the regulations. Instead the definition of MEP is dynamic and will be defined by the following process over time: municipalities propose their definition of MEP by way of their Urban Runoff Management Plan. Their total collective and individual activities conducted pursuant to the Urban Runoff Management Plan becomes their proposal for MEP as it applies both to their overall effort, as well as to specific activities (e.g., MEP for street sweeping, or MEP for municipal separate storm sewer system maintenance). In the absence of a proposal acceptable to the SDRWQCB, the SDRWQCB defines MEP.

The appendix also includes an excerpt from a memo dated February 11, 1993, entitled “Definition of Maximum Extent Practicable,” Elizabeth Jennings, Senior Staff Counsel, SWRCB.

118. *Bldg. Indus. Ass'n San Diego County v. State Water Res. Control Bd.*, 22 Cal. Rptr. 3d 128 (Ct. App. 2004).

119. *Id.* at 134-35.

120. In an unpublished portion of the opinion, the court found the BIA’s additional contentions to be without merit. *Id.* at 131.

121. *Id.* at 137.

dealing with the storm water problem,¹²² the principle of judicial deference to the administrative determination is a useful starting point to analyzing the role of WQS. Under certain circumstances, federal courts will defer to a federal agency's interpretation of the statute it administers. In *Chevron v. Natural Resources Defense Council*,¹²³ the Supreme Court set out a two-step judicial test for reviewing federal agency interpretations:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.¹²⁴

The two-step approach stated in *Chevron* has been used frequently by the courts. It has been relied on by the Supreme Court in scores of cases since 1984, and applied by the circuit courts in more than a thousand cases.¹²⁵

The role of *Chevron* and MS4 regulation was examined by the Fifth Circuit in *City of Abilene v. U.S. Environmental Protection Agency*.¹²⁶ In this case, plaintiffs challenged the EPA's authority to condition MS4 permits both on statutory and constitutional grounds. Among other claims, the plaintiffs argued that the EPA's interpretation of its authority under section 402(p) was not entitled to deference under *Chevron*. The Fifth Circuit rejected this argument. It reasoned, "[t]he plain language of § 1342(p) clearly confers broad discretion on the EPA to impose pollution control requirements when issuing NPDES permits. . . . Thus, even if *Chevron* deference is not warranted, the challenged permit

122. See *supra* note 29.

123. *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984) (holding that if Congress has not directly spoken to the precise question at issue, any agency construction must be affirmed as long as it is "reasonable").

124. *Id.* at 842.

125. RICHARD J. PIERCE, SIDNEY A. SHAPIRO, & PAUL R. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 376 (1999). See Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 189 (1986) ("In our system of government the framers of statutes . . . are the superiors of the judges. [They] communicate orders to the judges through legislative texts If the orders are clear, the judge must obey them."); see also *Walton v. U.S. Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986) (Easterbrook, J.) ("Courts should confine their attention to the purposes Congress sought to achieve by the words it used.").

126. *City of Abilene v. EPA*, 325 F.3d 657 (5th Cir. 2003).

conditions are within the EPA's discretion."¹²⁷ The court's point may be simply stated: The statute itself grants the necessary discretion to the EPA.

In the *BIA* case, the parties did not rely on *Chevron* because a state administrative agency, the Water Board, was administering the MS4 permit, not the EPA. The state court turned to principles of deference under state law.¹²⁸ Thus, it gave "appropriate consideration" to the Water Board's statutory interpretation of the CWA that discharges in violation of WQS could be prohibited.

Given the difficulty of determining the meaning of "appropriate consideration," an analysis of the arguments underlying the claim of deference or appropriate consideration is warranted.

A. The Plain Meaning Argument

The starting point to any question of statutory construction is the language of the statute, in this case section 402(p). The first step is to ascertain whether the agency's action is consistent with Congress's intent as expressed in the language used.¹²⁹ If the statutory language is clear, the plain meaning of the statute controls.¹³⁰ This principle is well recognized and beyond cavil.

If the statute has not directly addressed the specific question, or the language is ambiguous or would produce an absurd result,¹³¹ or Congress has left the matter to agency discretion, the inquiry must go further. In this situation, the question is whether the agency's interpretation is based on a "permissible" construction of the statute. In order to be a "permissible" construction, the agency's interpretation of the statute need not be the

127. *Id.* at 660.

128. The Court of Appeal cited *Chevron*, but ultimately relied on *Yamaha Corp. of America v. State Board of Equalization*, 960 P.2d 1031 (Cal. 1998). *Bldg. Indus. Ass'n of San Diego County v. State Water Res. Control Bd.*, 22 Cal. Rptr. 3d 128, 137 (Ct. App. 2004).

129. NORMAN J. SINGER, 2A STATUTES AND STATUTORY CONSTRUCTION § 45.02 (5th ed. 1992). United States Supreme Court Justice Frankfurter explained that the first step in interpretation was: "Read the statute. Read the statute. Read the statute." John M. Kernochan, *Statutory Interpretation: An Outline of Method*, 3 DALHOUSIE L.J. 333, 338 (1976).

130. See Richard A. Posner, *supra* note 125, at 189 (1986).

131. Of course, no one favors an absurd result. "[T]he Supreme Court has subscribed to the idea that judges may deviate from even the clearest statutory text when a given application would otherwise produce 'absurd results.'" John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2388 (2003).

only possible construction: it simply must be reasonable and not arbitrary, capricious, or an abuse of discretion.¹³²

Statutes, even those that are well drafted and seemingly clear, may lead to a variety of argued-for constructions. Language, by its very nature, is a breeding ground for ambiguity. Sometimes the ambiguity is intentional, whereas other times it appears to be recognized by counsel after the fact. What is clear, however, is the fact that the legislative compromises that go into crafting the statutory language may not be stated or otherwise revealed. Thus, it is not remarkable that what at first glance appears clear to one person may not be clear to another person.

The CWA provisions dealing with MS4 regulation make no mention of WQS. Unlike the CWA provisions applicable to industrial storm water discharges that expressly incorporate by reference the WQS provisions of section 301(b)(1)(C), no similar incorporating reference applies to MS4 discharges. Accordingly, one may argue that the plain meaning of the MS4 statutory requirements precludes the use of WQS.

The persuasiveness of the claim necessitates the parsing of section 402(p) as it applies to MS4 regulation. It provides that MS4 permits

shall require controls to reduce the discharge of pollutants to the maximum extent practicable [MEP], *including* management practices, control techniques and system, design and engineering methods, and *such other provisions* as the Administrator or the State determines appropriate for the control of such pollutants.¹³³

This language expressly gives the power to include “such other provisions” in the storm water permit that are determined appropriate for the control of pollutants. While this grant of discretionary power is clearly stated, it still is not clear whether MEP should be construed to act as a substantive brake or limit on the use of WQS in the event that the discretion is exercised by the Administrator or the State.

One might argue that MEP acts as a legal ceiling beyond which regulatory obligations may not be imposed. In brief, the claim is that the “practicability” requirement of the MEP limits the exercise of the discretionary authority. Thus, MS4 permit prohibitions on discharges that exceed WQS are not within the discretion authorized by Congress.

This argument, which was summarily rejected by the Court of Appeal in the *BIA* case,¹³⁴ is based on the claim that everything identified on the

132. JAMES SALZMAN & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY 58 (2003).

133. Clean Water Act § 402(p)(3)(B), 33 U.S.C. § 1342(p)(3)(B)(iii) (2000) (emphases added).

134. Bldg. Indus. Ass’n of San Diego County v. State Water Res. Control Bd., 22 Cal. Rptr. 3d 128, 140 (Ct. App. 2004), (finding “unpersuasive *Building Industry’s* reliance on several statutory interpretation concepts, *ejusdem generis*, *nosctur a sociis*,

statutory “list” following the participle “including” is governed by the MEP requirement.¹³⁵ In other words, the concept of MEP or “practicability” limits the listed categories ((1) management practices, (2) control techniques and system, design, and engineering methods, and (3) such other provisions determined appropriate to control pollutants).¹³⁶

The core question of statutory construction is whether MEP governs the discretion granted in category (3): such other provisions determined appropriate to control pollutants. In other words, does the “such other provisions” category, operate as an independent source of discretionary authority that is not limited by considerations of MEP?

The Court of Appeal in the *BIA* case read the statutory language so that MS4 permits “shall require controls” subject to MEP, but a permit may also “require such other provisions” as deemed appropriate to control pollutants. Notwithstanding the clarity of the court’s view, the claim that the plain meaning rule requires MEP to govern this category deserves closer examination because the decision is by an intermediate court of appeal.¹³⁷ Recognized principles of statutory construction may be consulted to probe the persuasiveness of the argument that MEP is the controlling standard, including *ejusdem generis* (“of the same kind or class”), *noscitur a sociis* (“known by its associates”), and *expressio unius est exclusio alterius* (“the expression of one excludes others”).

The principle of *ejusdem generis* extends or applies to those items in the included class or list.¹³⁸ Under this principle, the general statutory term “controls”—NPDES permits shall require “controls” subject to MEP—governs everything embraced in the class “management practices, control techniques and system, design and engineering methods.”

and *expressio unius est exclusio alterius*, to support its narrower statutory construction”).

135. This view may also support the argument that the use of any application of WQS is inappropriate regardless of whether it is tempered by MEP.

136. For convenience of analysis, I have presented the statutory references in three numbered groups. The statute does not use this numerical system of grouping. See *supra* note 133.

137. In *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1164 (9th Cir. 1999), the Ninth Circuit found that the CWA “unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311 (b)(1)(C).” This finding does not address the issue of the independent discretionary authority granted by section 402(p).

138. *Circuit City Stores v. Adams*, 532 U.S. 105, 114 (2001) (observing *ejusdem generis* provides “[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words”).

Whether it also governs “such other provisions as the Administrator or the State determine appropriate” is not as obvious.

The challenge to correctly applying *ejusdem generis* is defining the scope of the covered class. *Ejusdem generis* does not define the class, thus other traditional constructional techniques may be employed to determine the inclusiveness or scope of the “same kind or class” requirement. The principle *noscitur a sociis* (“known by its associates”) is often used in conjunction with *ejusdem generis* to accomplish this task. Simply put, *noscitur a sociis* provides that the words, in this case the “such other provisions,” are known by their associates or by what surrounds it. Meaning is given to the statutory terms by reference to the characteristics that it shares with the other things of the same kind, class, or nature. While not an inescapable or dogmatic rule of construction, it may be applied when the words are capable of several meanings in order to avoid the giving of unintended breadth to the statutory language.¹³⁹

The statute requires a permit to have “controls” that are subject to the legal standard MEP. The “controls” subject to MEP include “management practices” and “control techniques” and various “methods” identified in the statute. For the purposes of applying the principle of *noscitur a sociis*, these “controls” seem to share a point of commonality in that they all are arguably programmatic in nature.

In contrast, the “such other provisions . . . for the control of such pollutants” is not programmatic. Moreover, it is subject to a different legal standard—what the Administrator or the State “determines appropriate for the control of such pollutants.” The fact that two legal standards (MEP and “determines appropriate for the control”) are identified supports the view that “such other provisions” does not share a point of commonality with the other members of the class.

The “such other provisions” language also is distinguishable for another reason. The “controls” subject to MEP are not discretionary, but are required by the statute: “shall require controls” subject to MEP. In contrast, the permit may include “provisions” that are deemed appropriate to “control such pollutants.” Thus, the application of *ejusdem generis* and *noscitur a sociis* supports the view that MEP ought not to be deemed the exclusive standard based on a plain meaning rationale.

The “other provisions” language is different in kind for another reason. The CWA sets the minimum requirements for water pollution control, leaving the states with authority to impose more stringent requirements under section 510 of the CWA.¹⁴⁰ Section 510 recognizes

139. *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

140. Clean Water Act § 510, 33 U.S.C. § 1370 (2000); *see City of Albuquerque v. Browner*, 865 F. Supp. 733, (D.N.M. 1993).

the power of states to adopt and enforce requirements on the discharge of pollutants that are stricter than those adopted under the federal law.¹⁴¹ The claim that MEP is the exclusive standard conflicts with the grant of this discretionary authority. The CWA authorizes, in fact encourages, states to assume responsibility for protecting receiving waters through the use of WQS. Before divesting states of this authority, prudence as well as the respect for state sovereignty dictates that a clearer statement of congressional intent exist.¹⁴²

The constructional guide “*expressio unius est exclusio alterius*” also may be consulted. Industrial storm water permits are subject to WQS.¹⁴³ Thus, the argument goes, had Congress wanted WQS to apply to MS4 permits, it would have done so, and the failure to do so implies that Congress intended to foreclose this possibility. The difficulty with the argument lies in the fact that the negative implication is unwarranted. The MS4 statutory authority is given as a discretionary grant of power based on the standard of “appropriateness,” whereas the industrial storm water provisions require the use of WQS. In short, implying that Congress intended to foreclose the use of WQS collides with Congress’s expressed grant of discretionary authority.

B. Legislative History

As a general matter, legislative history may be consulted to aid in determining Congress’s intent when the statutory language is susceptible to varying constructions.¹⁴⁴ Unfortunately, the legislative history to

141. *City of Milwaukee v. Illinois*, 451 U.S. 304, 327 (1981).

142. In *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001), the Supreme Court held that the Corps’ expansive regulatory interpretation of “waters of the United States” was not consistent with Congress’s intent as expressed in the CWA. The Court offers the following guidance: “‘Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.’” *Id.* at 173 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

The Court did not decide whether Congress had the power under the Commerce Clause to adopt such an expansive reading of “navigable waters.” Nevertheless, the Court did reaffirm the proposition that Congress’s power under the Commerce Clause is not unlimited. The argument that MEP is the exclusive standard preempting more stringent state standards, based on Congress’s intent, invites the courts to resolve the federal-state balance constitutional question.

143. Clean Water Act § 402(p)(3)(A), 33 U.S.C. § 1342(p)(3)(A) (2000) (this provision incorporates § 1311, which contains the WQS requirement).

144. The use of legislative history has been attacked by textualists, such as Justice Scalia, on the ground of unreliability. *See, e.g., Bank One Chicago v. Midwest Bank and*

section 402(p) is not especially illuminating to resolving the controversy. The legislative history is too brief and ambiguous to build a serious claim that Congress's intent is clearly revealed outside the language actually used in the statute.

The conference report on the Water Quality Act of 1986 contains a few brief generalized statements on the proposed legislation. Senator Chafee observes that "the legislation assures compliance with a strong water quality standards [WQS] program and provides for great controls of toxic, conventional and non-conventional pollutants."¹⁴⁵ In referring to storm water controls, he comments that "[t]hese discharge requirements [contained in the proposed law] are to contain control technology or other techniques to control these [MS4] discharges and should conform to water quality requirements."¹⁴⁶ Whether he had WQS in mind is not entirely clear. But it is a reasonable inference that he thought that conformance with WQS was expected.

Senator Durenberger also provides a statement on storm water runoff proposal, which may tilt in the opposite direction. He states:

Any such [MS4] permit shall include a requirement to prohibit effectively nonstormwater discharges to municipal separate storm sewers. Any such nonstormwater discharges to municipal separate storm sewers are currently illegal under the act [CWA].

In addition, any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years from permit issuance and shall require controls to reduce the discharge of pollutants to the maximum extent practicable. Such controls include management practices, control techniques and systems, design and engineering methods, and such other provisions, as the Administrator determines appropriate for the control of pollutants in the stormwater discharge."¹⁴⁷

To argue that Senator Durenberger intended by his statement to cast MEP as the exclusive standard requires one to seize upon the punctuation separating the last two sentences of his statement. By separating the concepts expressed in the last two sentences, one might suggest that "maximum extent practicable" was intended to control everything grouped in the last sentence. This contention seems implausible. It ignores the fact that he also recognized the importance of the broader goal of protecting water quality. Elsewhere in the conference report, Senator Durenberger also recognizes that toxic and conventional storm water discharges could

Trust Co., 516 U.S. 264, 277 (1995) (Stevens, J., concurring) ("Justice Scalia is quite right that it is unlikely that more than a handful of legislators were aware of the Act's drafting history. He is quite wrong, however, to conclude from that observation that the drafting history is not useful to conscientious and disinterested judges trying to understand the statute's meaning.").

145. 132 CONG. REC. S16, 435 (daily ed. Oct. 16, 1986) (statement of Sen. Chafee).

146. 132 CONG. REC. S16, 436 (daily ed. Oct. 16, 1986) (statement of Sen. Chafee).

147. 132 CONG. REC. S16, 443 (daily ed. Oct. 16, 1986) (statement of Sen. Durenberger).

“adversely affect public health, harm fish and other aquatic species, and prevent or retard water quality improvements even if the best available pollution controls are installed on other point sources.”¹⁴⁸

C. *The EPA’s Position on WQS*

As discussed in connection with *Chevron*,¹⁴⁹ the EPA’s interpretation on the role of WQS is entitled to consideration. In a 1991 memorandum issued by the General Counsel to the EPA, the agency took the position that the MEP standard was intended only to modify the technology-based effluent requirements of section 301, not the WQS requirements of section 301.¹⁵⁰ The rationale was tied to the phase-in permitting schedule required by Congress. Section 402(p)(4) directs compliance within three years after the issuance of the permit.¹⁵¹ The General Counsel explains: “In light of the express language, we believe the Agency may reasonably interpret the three-year compliance provisions in Section 402(p)(4) to apply to all permit conditions, including those imposed under [section] 301(b)(1)(C) [WQS].”¹⁵² Accordingly, the determination that the permit issuer must make at the time of permit issuance is that compliance with WQS will occur within three years.

In 1996, the EPA reaffirmed the 1991 opinion of the General Counsel.¹⁵³ The EPA issued a policy notice outlining an interim approach for incorporating water quality-based effluent limitations¹⁵⁴ into storm water permits in order “to provide for the attainment of water quality standards [WQS].”¹⁵⁵ This approach was expressly intended to apply to both MS4 discharges and industrial discharges.¹⁵⁶

148. *Id.*

149. *See supra* Part VII (discussing *Chevron v. Natural Res. Def. Council*).

150. Randy Hill & David Allnut, “Wet Weather” Regulations: Control of Stormwater and Discharges From Concentrated Animal Feeding Operations and Other Facilities, in *THE CLEAN WATER ACT HANDBOOK* 174 (Mark A. Ryan ed., 2d ed. 2003).

151. Clean Water Act § 402(p)(4)(A), 33 U.S.C. § 1342(p)(4)(A) (2000).

152. *In re Gov’t of the Dist. of Columbia Mun. Separate Storm Sewer System*, 10 N.P.D.E.S. 323, 342 n.22 (2002), available at <http://epa.gov/eab/disk11/dcms4.pdf>.

153. Hill & Allnut, *supra* note 150, at 174.

154. Clean Water Act § 502(11), 33 U.S.C. § 1362(11) (2000) (defining “effluent limitation” in terms of “quantities, rates, and concentrations of chemical, physical, biological or other constituents”).

155. Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, 61 Fed. Reg. 43,761 (Nov. 6, 1996).

156. Questions and Answers Regarding Implementation of an Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, 61 Fed. Reg. 57,425, 57,428 (Aug. 26, 1996).

In the first round of storm water permits, BMPs were recommended, “and expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards.”¹⁵⁷ The role for WQS was further recognized by the EPA in monitoring. Among other things, the storm water permit “should include” a monitoring program “to determine the extent to which the permit provides for the attainment of applicable water quality standards.”¹⁵⁸

In a 1998 letter to the California State Water Resources Control Board dealing with a proposed draft for future California MS4 permits, the EPA (Region 9) reaffirmed the role of WQS:

Our specific concern [with the proposed MS4 permit] is with . . . language which only regulates storm water discharges which ‘cause or substantially (in more than *de minimis* amount) contribute to a continuing or recurring exceedance’ of an applicable water quality standard. We believe that qualifiers ‘substantially (in more than *de minimis* amount)’ and ‘continuing or recurring’ are inconsistent with the Clean Water Act (CWA) and its implementing regulations. NPDES regulations at 40 CFR § 122.44(d)(1)(I) require effluent limitations in permits for ‘all pollutants or pollutant parameters . . . which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard . . .’¹⁵⁹

Finally, delinking MEP from the WQS prohibition is consistent with the EPA’s Phase II regulations.¹⁶⁰ Small MS4s are required to develop, implement, and enforce a storm water management program designed to meet the MEP standard and to “satisfy the appropriate water quality requirements.”¹⁶¹ Allowing regulators the discretion to impose a WQS prohibition on a Phase I MS4 permit is consistent with the Phase II regulations. In contrast, the argument that such discretion for Phase I permittees is foreclosed by the application of MEP is inconsistent with the approach applicable to Phase II permittees.

D. Case Law

*Defenders of Wildlife v. Browner*¹⁶² is the principal federal case dealing with the role of WQS in MS4 permits. In this case, the Ninth Circuit considered whether the CWA requires numeric limits to ensure strict compliance with state-based WQS. The court held that numeric

157. Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, 61 Fed. Reg. 43,761 (Nov. 6, 1996).

158. *Id.*

159. Letter from Alexis Strauss, EPA, Region 9, to Walt Pettit, California State Water Resources Board (Mar. 17, 1998) (on file with author) (emphases added).

160. *See supra* note 28.

161. 40 C.F.R. § 122.34(a) (2003).

162. *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999).

limits were not mandated.¹⁶³ *Defenders of Wildlife* might be read, at least arguably, for the proposition that the section 402(p)(3)(B) provisions dealing with MS4 permits preempt the numeric limitations requirements as well as the WQS requirements found in section 301(b)(1)(C).

The court rejected the claim that the numeric limitation requirements of section 301(b)(1)(C) applied to MS4 permits. In doing so, it relied on the constructional principle that “an expression of one excludes others” (*expressio unius est exclusio alterius*). The court reasoned that only industrial dischargers were expressly required by section 402(p)(3)(A) to comply with state WQS.¹⁶⁴

The court reasoned that Congress knowingly drew the distinction it employed: “[W]e conclude that Congress’ choice to require industrial storm-water discharges to comply with 33 U.S.C. § 1311 [CWA § 301], but not to include the same requirement for municipal discharges, must be given effect.”¹⁶⁵ The court noted that the statutory provisions applicable to MS4 permits *replace* “the requirements of § 1311 [CWA § 301] with the requirement that municipal storm-sewer dischargers ‘reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator . . . determines appropriate for the control of such pollutants.’”¹⁶⁶ It also noted that the exemption from the requirements of § 1311 was not unusual because Congress had provided other specific exemptions in the CWA, such as return flows from agriculture and from oil, gas and mining operations.¹⁶⁷

Some caution in the application of the Ninth Circuit’s reference to “replac[ing]” the requirements of section 301 is warranted. The court seemingly conflates the two distinguishable components of section 301.¹⁶⁸ One component deals with mandatory use of numeric effluent-based limits, which was an issue squarely before the court. The other component deals with WQS, either mandatory or discretionary, which may or may not have been directly at issue.¹⁶⁹ The distinction between

163. *Id.* at 1166.

164. *Id.* at 1165.

165. *Id.*

166. *Id.*

167. *Id.* at 1166 (“Congress’s choice to exempt municipal storm-sewer discharges from strict compliance with § 1311 is not so unusual that we should hesitate to give effect to the statutory text, as written.”).

168. Clean Water Act § 301, 33 U.S.C. § 1311 (2000).

169. *See infra* text and accompanying notes 192-93.

these components is significant because section 301, if it is “replaced,” seems to eliminate the general timetable for the achievement of important objectives, including “any more stringent limitation, including those necessary to meet water quality standards.”¹⁷⁰

The distinction is important for another reason. Even if one accepts the argument that the “replacing” language used by the court in *Defenders of Wildlife* should be read as rejecting the mandatory use of WQS in MS4 permits, the discretionary authority to use WQS is expressly granted. The court finds that “[u]nder that discretionary provision, the EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants.”¹⁷¹

For this reason, the EPA has announced that it will continue to follow the interim permitting approach based on the preservation of its discretionary authority to include WQS within the “other provisions” language of the statute. The EPA announced in the final Phase II regulations that it “disagrees that section 402(p)(3) divests authorities of the tool necessary to issue permits to meet water quality standards.”¹⁷² Thus, the EPA has affirmed its intent to continue issuing permits consistent with the Interim Permitting Policy based on its reading of its discretionary authority.

This view on Congress’s grant of discretionary authority was recently endorsed by the California Fourth District Court of Appeal. In *Building Industry Association of San Diego County v. State Water Resources Control Board*, the court held that the Water Board may require compliance with state WQS.¹⁷³ The issue was squarely presented because the contested MS4 permit prohibits discharges “which cause or contribute to exceedances of receiving water quality objectives . . .” or that “*cause or contribute to the violation of water quality standards . . .*”¹⁷⁴ The court found that the Water Board was not limited by MEP considerations from prohibiting discharges that cause or contribute to the receiving waterbody exceeding applicable WQS.

The challenged MS4 permit before the court triggers an “iterative” procedure for dealing with WQS violations.¹⁷⁵ If a permittee discharges in violation of WQS, the permittee is required to prepare a report documenting the violation and describing a process for improvement and

170. Clean Water Act § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (2000).

171. *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166 (9th Cir. 1999).

172. 64 Fed. Reg. 68,722, 68,787-88 (Dec. 8, 1999).

173. *Bldg. Indus. Ass’n of San Diego County v. State Water Res. Control Bd.*, 22 Cal. Rptr. 3d 128 (Ct. App. 2004).

174. *Id.* at 135 (emphasis added).

175. The full permit is available at http://www.swrcb.ca.gov/rwqcb9/programs/sd_stormwater.html.

the prevention of further violations.¹⁷⁶ But no “safe harbor” refuge exists as the permittee goes through the iterative process.¹⁷⁷ An enforcement action for noncompliance with WQS is possible pursuant to the following permit provision: “Nothing in the section shall prevent the [Water Board] from enforcing any provision of this Order while the [permittee] prepares and implements the above report.”¹⁷⁸

Should a WQS violation occur, the absence of a “safe harbor” provision creates some uncertainty for the permittee because the Water Board retains the discretion to take appropriate enforcement during the preparation and implementation of the report by the permittee.¹⁷⁹ In the event of an enforcement action by the Water Board, several defenses would be available to the imposition of liability, including the degree of culpability, the susceptibility of abatement, and “other matters that justice may require,” which arguably would include the good faith actions taken during the iterative process.¹⁸⁰ In addition, the Water Board could be asked to revise the applicable WQS, and its decision would be subject to normal administrative and judicial review.¹⁸¹

In upholding the prohibition on discharges that violate WQS, the California Fourth District Court of Appeal examined the relevant statutory language of section 402(p) and found that:

As a matter of grammar and word choice, respondents [California] have the stronger position. The second part of [the] Building Industry’s proposed interpretation—“control techniques and system, design, and engineering methods”—without a comma after the word “techniques” does not logically serve as a parallel construct with the “and such other provisions” clause.

176. *Bldg. Indus. Ass’n*, 22 Cal. Rptr. at 135.

177. *See supra* note 113 (permit conditions C.2. and C.3).

178. *Bldg. Indus. Ass’n*, 22 Cal. Rptr. at 135.

179. Some uncertainty exists due to the fact that a third party might bring an action under the federal citizen suit provisions of the CWA to enforce the WQS requirement should there be a “cause or contribute” violation. Clean Water Act § 505, 33 U.S.C. § 1365 (2000). The state could choose to grant an offending permittee additional time to comply with the WQS requirement should the permittee be operating in good faith. In such a case, the additional time granted to comply should be legally effective to foreclose the citizen suit until the expiration of the added time. If the WQS requirement is imposed based on the exercise of discretionary authority, arguably the time for compliance might be extended on the same basis. *See Citizens for a Better Env’t v. Union Oil Co. of Cal.*, 83 F.3d 1111, 1119 (9th Cir. 1996) (finding that a water board’s cease-and-desist order, issued under Water Code section 13301, providing a deferred compliance schedule for selenium discharges, was an exercise of state’s prosecutorial discretion).

180. CAL. WATER CODE § 13385(e) (West 1992).

181. CAL. WATER CODE §§ 13320, 13330 (West 1992).

Moreover, we disagree that the “and such other provisions” clause cannot be a direct object to the word “require.” (§ 1342(p)(3)(B)(iii).) Although it is not the clearest way of articulating the concept, the language of section 1342(p)(3)(B)(iii) does communicate the basic principle that the EPA (and/or a state approved to issue the NPDES permit) retains the discretion to impose “appropriate” water pollution controls in addition to those that come within the definition of “maximum extent practicable.” (See *Defenders of Wildlife, supra*, 191 F.3d at pp. 1165-1167.) We find unpersuasive Building Industry’s reliance on several statutory interpretation concepts, *eiusdem generis*, *noscitur a sociis*, and *expressio unius est exclusio alterius*, to support its narrower statutory construction.¹⁸²

E. The Constructional Principle In Pari Materia

The constructional principle *in pari materia* (part of the same material) counsels that legislation should be interpreted by the courts so that the respective parts of the law being construed are internally consistent.¹⁸³ In the context of MS4 regulation, its application is based on the normative view that Congress was cognizant of the existing provisions of the CWA when it added section 402(p) in 1987.¹⁸⁴ In deciding whether the “other provisions” language provides the discretionary authority to impose WQS independent of MEP, it is useful to consider whether such an interpretation is consistent with the general structure of the CWA.

1. Other Parts of Section 402(p)

In focusing on the standards applicable to industrial and MS4 regulation, the other provisions of section 402(p) should also be considered. The standards do not exist in isolation. Congress established a permitting moratorium in section 402(p) for storm water discharges that took place prior to 1994.¹⁸⁵ Permits were not required for discharges composed entirely of storm water. During the permitting moratorium, the EPA was tasked with conducting certain studies.¹⁸⁶ One task was to establish “procedures and methods to control storm water discharges to

182. *Bldg. Indus. Ass’n*, 22 Cal. Rptr. at 139-40.

183. *See, e.g., Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711 (1996).

184. Water Quality Act of 1987, Pub. L. No. 100-4, § 405, 101 Stat. 7, 69 (1987), amended by Water Development Resources Act of 1992, Pub. L. No. 102-580, § 364, 102 Stat. 4797, 4862 (1992).

185. Clean Water Act § 402(p)(1), 33 U.S.C. § 1342(p)(1) (2000). Prior to October 1, 1994, storm water permits were not required. The moratorium did not apply to (1) discharges already subject to NPDES permits, (2) industrial discharges, (3) large and medium municipal separate sewer systems, and (4) discharges significantly contributing to WQS violations.

186. Clean Water Act § 402(p)(5), 33 U.S.C. § 1342(p)(5) (2000).

the extent necessary to mitigate impacts on water quality.”¹⁸⁷ Thereafter, the EPA was to issue regulations “to protect water quality.”¹⁸⁸

Congress also created an exception. The above moratorium does not apply to a storm water discharge that the Administrator or the State determines “contributes to a violation of a *water quality standard* or is a significant contributor of pollutants to waters of the United States.”¹⁸⁹ Thus, discharges that violated WQS were required, and thus not exempt from the moratorium. Some states took action by declaring unregulated storm water to be a “significant contributor” of contamination.¹⁹⁰

Section 402(p)(2)(E)¹⁹¹ clearly states Congress’s special concern with protecting WQS, and in doing so, it draws no distinction between industrial and MS4 discharges. The argument that Congress intended to make MEP the exclusive standard in the context of MS4 regulation is problematic when juxtaposed with these provisions. One would have to maintain that Congress intended that WQS were to be relevant between 1987 and 1994, but that thereafter only the less protective standard of MEP applied. Without some arguable policy justification, this claim for the shift in policy from a “stricter” to a “less strict” standard seems, to put it charitably, curious at best.¹⁹² A more sensible construction is that Congress intended to continue, at a minimum, the discretionary authority to use WQS when the storm water discharge contributes to a violation of WQS.

Section 402(p)(6) directs the EPA to develop a comprehensive program to regulate small MS4s. In *Environmental Defense Center*,¹⁹³ plaintiffs argued, among other things, that Congress had not authorized the EPA to use NPDES general permits to implement the Phase II program for small MS4s. The argument was based on the claim that section 402(p)(6) indicated the elements of the program without

187. Clean Water Act § 402(p)(5)(C), 33 U.S.C. § 1342(p)(5)(C) (2000).

188. Clean Water Act § 402(p)(6), 33 U.S.C. § 1342(p)(6) (2000).

189. Clean Water Act § 402(p)(2)(E), 33 U.S.C. § 1342(p)(2)(E) (2000) (emphasis added).

190. See, e.g., Storm Water Enforcement Act of 1998, 1998 Cal. Stat. 998, § 1 (“The Legislature hereby finds and declares . . . : (a) Unregulated storm water runoff is a leading cause of contamination of the state’s surface water and groundwater.”).

191. Clean Water Act § 402(p)(2)(E), 33 U.S.C. § 1342(p)(2)(E) (2000).

192. *Bldg. Indus. Ass’n of San Diego County v. State Water Res. Control Bd.*, 22 Cal. Rptr. 3d 128, 142 (Ct. App. 2004) (characterizing WQS as a stricter standard than MEP).

193. *Env’tl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832 (9th Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004).

mentioning “permits,” and therefore Congress intended to foreclose use of a program based on NPDES general permits.¹⁹⁴ The Ninth Circuit rejected the argument. It reasoned that the fact that NPDES permits were not identified on the statutory list¹⁹⁵ was not determinative because the list was manifestly intended by Congress to be nonexclusive. The more reasonable construction, in the court’s view, was that Congress’s silence about the use of NPDES permits was an indication of its desire to give the EPA the flexibility to use them or not, rather than prohibiting their use.

In many respects, the constructional issue is similar to the argument that MEP should be considered the sole standard. Congress’s desire to grant the EPA flexibility to restore and maintain the integrity of the nation’s waters, which influenced the Ninth Circuit in *Environmental Defense Center*, applies with equal or greater force to Phase I permitting because Congress expressly authorizes the use of “such other provisions” as deemed appropriate in section 402(p).¹⁹⁶

2. The NPDES Program

As previously discussed, MS4 permits are NPDES permits. Under the general provisions of the NPDES permit program, all NPDES permits are required to insure compliance with applicable water quality requirements.¹⁹⁷ The claim that MEP is the exclusive standard deviates from the general requirements of the NPDES program.

In *Defenders of Wildlife*, the Ninth Circuit determined that Congress intended to replace the requirements of section 301 with the requirements in section 402(p).¹⁹⁸ As previously discussed, the court did not distinguish between technology-based effluent limits and WQS.¹⁹⁹ One reading of the court’s opinion might suggest that the replacement theory applies both to technology-based effluent limits and to WQS. An alternate and narrower reading of the opinion is that Congress only intended to replace the numeric technology-based limits with best management practices (BMPs), which were then to be assessed for compliance by the MEP standard, and not WQS.

But the Ninth Circuit also found that section 402(p) granted regulators the discretionary authority to use WQS. One might argue that this

194. *Id.* at 844.

195. Clean Water Act § 402(p)(6), 33 U.S.C. § 1342(p)(6) (2000) (listing performance standards, guidelines, guidance, and management practices and treatment requirements).

196. Clean Water Act § 402(p)(3)(B), 33 U.S.C. § 1342(p)(3)(B) (2000).

197. 40 C.F.R. 122.44(d) (2004) (water quality standards and state requirements).

198. *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. 1999).

199. *See supra* notes 158–66 and accompanying text.

portion of the opinion dealing with WQS is dicta because the only question before the court was whether numeric limits were required in an MS4 permit, and thus the court's opinion of the discretionary authority possessed by regulators was beyond the scope of the issue before the court. This view misses an important consideration. The intervenor-cities argued that the EPA could not, under the CWA, require compliance with WQS "through numerical limits or otherwise."²⁰⁰ To the extent that "otherwise" was intended to foreclose the use of discretionary authority, the Ninth Circuit's discussion ought not to be considered dicta because it directly addresses an issue raised by the intervenors.

In the *BIA* case, the California Fourth District Court of Appeal characterized the Ninth Circuit's discussion of discretionary authority as dicta. Nevertheless, it went on to say, "[a]lthough dicta, this conclusion [on the discretionary authority to require strict compliance with WQS] reached by a federal court interpreting federal law is persuasive and is consistent with our independent analysis of the statutory language."²⁰¹ Regardless of whether the Ninth Circuit's view on discretionary authority is considered dicta, the present case law, although limited, supports the view that WQS may be used in MS4 permitting.

3. *The CWA "Savings Provisions"*

Section 101(b) preserves and protects the primary responsibilities and rights of the states. The declared policy of Congress is "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources."²⁰²

The preservation of independent state authority also is recognized in section 510, which provides that nothing "shall preclude or deny the right of any State or political subdivision . . . to adopt or enforce (A) any standard or limitation respecting discharges of pollutants," except to the extent that it might be less stringent.²⁰³ The claim that MEP forecloses a state from using WQS, which were characterized in the *BIA* case as

200. *Defenders of Wildlife*, 191 F.3d at 1166.

201. *Bldg. Indus. Ass'n of San Diego County v. State Water Res. Control Bd.*, 22 Cal. Rptr. 3d 128, 143 (Ct. App. 2004).

202. Clean Water Act § 101(b), 33 U.S.C. § 1251(b) (2000).

203. Clean Water Act § 510, 33 U.S.C. § 1370 (2000).

“stricter” than MEP,²⁰⁴ would run counter to these “savings” provisions. It would also raise possible constitutional issues as to the power of Congress to do so.²⁰⁵

4. CWA Section 401

Section 401 requires any applicant for a federal license or permit that may result in “any discharge” to navigable waters to secure a certification that the discharge will comply with state WQS.²⁰⁶ The federal license or permit may not be issued without the certification, thus providing states with an effective veto of a project when WQS are not met.

In *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*,²⁰⁷ the Court held that a state minimum instream flow requirement was a permissible section 401 condition for a proposed hydroelectric project on the Dosewallips River in Washington. The state of Washington set the flow requirements to protect the river’s beneficial use as a fish habitat. Thus, the protection of WQS has been recognized by the Supreme Court as a legitimate exercise of state prerogative under section 401.

Section 401 certification is triggered by “any discharge” to navigable waters. Thus, the certification process applies regardless of whether the permit issuing authority is the EPA or state. It would be strange public policy to require a federally issued storm water permit, which would be the situation when the EPA issues the MS4 permits, to be subject to WQS requirements through the 401 certification process but to foreclose a state that issues the MS4 permits from requiring WQS compliance. The better policy, based on furthering the integrated goals of the CWA, is to subject both to WQS requirements.

5. CWA Section 303(d)

Section 303(d) contains the “total maximum daily load” (TMDL) program. It is geared toward remediating water quality situations in

204. *Bldg. Indus. Ass’n*, 22 Cal. Rptr. at 142.

205. *See* *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001) (avoiding the constitutional issue as to Congress’s power under the Commerce Clause, the Supreme Court observed that allowing the Corps to assert federal jurisdiction would impinge on the states’ traditional and primary power over land and water and raise “significant constitutional questions.”). U.S. CONST. amend. X. (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”).

206. Clean Water Act § 401, 33 U.S.C. § 1341 (2000).

207. *PUD No. 1 of Jefferson County v. Wash. Dept. of Ecology*, 511 U.S. 700 (1994).

which the assimilative capacity of the receiving waterbody is exceeded.²⁰⁸ In general terms, a TMDL is a calculation of the maximum quantity (or load) of a specific pollutant that may be added to the waterbody, if any, from all sources²⁰⁹ without exceeding the applicable WQS. Thus, when WQS are not being met, dischargers²¹⁰ may be required, pursuant to the TMDL program,²¹¹ to meet effluent control limits that are stricter than technology-based limits.²¹²

For an impaired waterbody, the TMDL program sets the amount of identified pollutants that may be discharged without violating the applicable WQS. As a matter of policy, using remedial strategies after WQS have been exceeded is a poor policy substitute to attacking the water quality problem before it demands remediation under the TMDL program. Prohibiting discharges that cause or contribute to a violation of WQS may be seen as a proactive policy for protecting the beneficial use of the receiving water before triggering the remedial TMDL program. At a minimum, allowing regulators the discretion to use WQS in the context of MS4 permitting is consistent with the policy objectives of the TMDL program.

6. CWA Section 319

In 1987, Congress added section 319 establishing NPS management programs.²¹³ Among other things, it requires states to identify navigable waters which, without additional action to control NPS pollution, cannot meet applicable WQS.²¹⁴ While there are no specific permit requirements

208. See generally HOUCK, *supra* note 21.

209. The EPA has consistently called for the allocation of NPS within the TMDL program. *Id.* at 61.

210. TMDLs apply to point source and nonpoint source discharges. In *Pronsolino v. Natri*, 291 F.3d 1123, 1140-41 (9th Cir. 2002), the Ninth Circuit Court of Appeals ruled that CWA section 303(d) authorizes the EPA and the states to list and to establish TMDLs for waters impaired only by nonpoint sources.

211. Clean Water Act § 303(d), 33 U.S.C. § 1313(d) (2000).

212. Clean Water Act § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C)(2000); see also § 1312 (2000). It authorizes the EPA to establish water quality-related effluent limits whenever technology-based limits are insufficient to protect a specific portion of a waterbody. The EPA often relies on the states to accomplish this task under the commonly referred to “303(d) list.” Clean Water Act § 303(d), 33 U.S.C. § 1313(d).

213. Clean Water Act § 319, 33 U.S.C. § 1329 (2000).

214. Clean Water Act § 319(a)(1)(A), 33 U.S.C. § 1329(a)(1)(A) (2000). The nonpoint source program requires state assessment reports to identify “best management practices and measures to control each category and subcategory of nonpoint sources . . . and to reduce, to the maximum extent practicable, the level of pollution resulting from

established by section 319, this regulatory shortcoming is offset by the fact that most NPS dischargers in urbanized areas are subject to the MS4 permit requirements of section 402(p). Using the discretionary authority available to regulators to control MS4 discharges by prohibiting discharges that exceed WQS provides an effective strategy for dealing with the complexities of NPS pollution, thus reenforcing the policies stated by Congress in section 319.²¹⁵

VIII. CONCLUSION

The National Pollutant Discharge Elimination System (NPDES) program of the Federal Clean Water Act (CWA) has been an important success story as it relates to the regulation and control of discharges of “point source” (PS) pollution. Much has been accomplished in protecting the water quality of our nation’s waters. Today’s challenge is effectively dealing with “nonpoint source” (NPS) pollution. The need for effective storm water regulation lies at the heart of meeting the NPS challenge.

Every state and every major watershed in the United States is under assault from unregulated or underregulated sources of NPS runoff. Contamination from storm water runoff has been characterized as being comparable to, if not greater than, contamination from PS pollution. This makes storm water runoff a leading source of water quality impairment of our nation’s waters.

The effective regulation of municipal separate storm sewer system (MS4) conveyance systems is critical to dealing with the water quality impairment problem. MS4 conveyance systems carry a toxic brew of dangerous anthropogenic wastes into local receiving waters across the United States. Absent diversion to the sanitary sewer system, no treatment of the discharge occurs, so what goes into the MS4, comes out of it untreated. This makes regulation of “separate” systems of central moment to the regulatory effort to protect water quality.

The NPDES permit program regulates industrial storm water systems as well as MS4 systems. The discharge “from” the MS4 system to navigable waters is the theoretical basis for the federal regulation of the MS4 as a PS. Section 402(p) requires that permits “shall require” controls to reduce the discharge of pollutants “from” the MS4 to the “maximum extent practicable” (MEP). It also requires that MS4 permits comply with “such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.” On the input

such category, subcategory, or source.” Clean Water Act § 319(a)(1)(C), 33 U.S.C. § 1329(a)(1)(C) (2000).

215. JAMES SALZMAN & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY 140 (2003).

side of the conveyance system, section 402(p) requires MS4 permits to effectively prohibit nonstorm water discharges “into” storm sewers.

The statutory fit between MEP and the discretionary grant of power under the “such other provisions” language of section 402(p) has created a breeding ground for legal disagreement as well as regulatory uncertainty. Because the economic and environmental stakes are high to permittees, which are typically local government, as well as to the building industry, environmentalists, and regulators, MS4 regulation has fomented legal controversy. More litigation can be expected to test this legal fit as regulators increasingly prohibit MS4 discharges that cause or contribute to the violation of Water Quality Standards (WQS).

One view is that MEP should be treated as the sole substantive permit limit. This view rejects the argument that WQS have any role to play in MS4 regulation. Stated more robustly, MS4 permit prohibitions based on WQS ignore Congress’s direction by reading the “practicable” standard out of the statute. In short, the statutory trump card is practicability, not WQS.

In this article, I have argued that MEP ought not be considered the exclusive regulatory standard. I maintain that regulators have the discretionary authority to prohibit MS4 storm water discharges that cause or contribute to a violation of WQS. When this authority is exercised, WQS operate as a legal floor above which MEP efforts should be assessed for purposes of determining permit compliance. I argue that this view is consistent both with Congress’s intent and the traditional role assigned to WQS. Because WQS provide a clearer standard for protecting water quality, I also maintain that it promotes greater regulatory certainty for enforcement purposes. In the final analysis, my view is that WQS must be taken seriously in the administrative arena of MS4 permit regulation.

