

COURTS AND THE EPA INTERPRET NPDES GENERAL PERMIT REQUIREMENTS FOR CAFOS

BY

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Concentrated animal feeding operations (CAFOs) have come under scrutiny due to the longstanding impairment of many U.S. waters. Federal law classifies some CAFOs as point sources, and a federal CAFO Rule enunciates requirements governing permitted discharges under National Pollutant Discharge Elimination System (NPDES) permits. Shortcomings of the federal CAFO Rule and state permitting rules led environmental groups to challenge the regulatory provisions. Especially problematic is the issuance of permits without reviewing sufficient information and the exclusion of public participation in the development of effluent limitations. Perhaps more troubling are the disparities in state-administered NPDES programs. States complying with federal directives and dischargers in compliance with federal standards are placed at a disadvantage by being good environmental stewards.

I.	INTRODUCTION.....	102
II.	OBJECTIONS TO REGULATIONS AUTHORIZING DISCHARGES BY CAFOS	105
	A. Land Application of Manure	106
	B. General Permits	108
III.	MICHIGAN’S REGULATORY CHALLENGE	112
	A. Discharge Rates of a Nutrient Management Plan	113
	B. Public Participation.....	115
IV.	FEDERAL EFFLUENT LIMITATIONS AND MICHIGAN’S REQUIREMENTS.....	117
	A. Imposing Effluent Limitations	117
	B. Michigan’s Water Quality Standards	120
V.	THE FUTURE OF “GENERAL PERMITS”	121
VI.	CONCLUSION	123

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I. INTRODUCTION

The continued impairment of U.S. navigable waters despite more than thirty-five years of federal efforts under the Clean Water Act¹ presents inexorable challenges. By enacting the Federal Water Pollution Control Act in 1972—better known as the Clean Water Act—Congress hoped “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”² The Act adopts the basic rule that unpermitted discharges of pollutants from point sources into navigable waters are not allowed,³ and a permitting system authorizes discharges of limited amounts of pollutants.⁴ Although the Act has been successful in addressing many egregious pollution situations, the application of the National Pollutant Discharge Elimination System (NPDES) program to all point sources remains an elusive goal.⁵ It is estimated that forty-five percent of our rivers and streams and forty-seven percent of our lakes remain impaired.⁶

To carry out the purposes of the Act, the Administrator of the United States Environmental Protection Agency (EPA) was authorized to prescribe additional regulations for effluent limitations and supplemental best management practices to control pollutant runoff.⁷ Pursuant to this statutory authority, EPA sought to reduce pollution from concentrated animal feeding operations (CAFOs), which are large animal producing entities with great quantities of manure that have the potential to adversely affect the quality of nearby waters.⁸ Congress expressly included CAFOs in the Clean

¹ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2000).

² *Id.* § 1251(a); e.g., *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004) (noting the objective of the Clean Water Act is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”); *Arkansas v. Oklahoma*, 503 U.S. 91, 106 (1992) (noting that the achievement of state water quality standards was a major objective of the Clean Water Act).

³ 33 U.S.C. § 1311(a) (2000) (prohibiting discharges of pollutants); *id.* § 1342 (establishing a permitting system); *id.* § 1362(12) (defining “discharge of pollutants”); *id.* § 1362(14) (defining “point source”). “Navigable waters” are “waters of the United States, including the territorial seas.” *Id.* § 1362(7).

⁴ *Id.* §§ 1342, 1344.

⁵ In 2001, the United States Environmental Protection Agency reported that only about 20% of concentrated animal feeding operations (CAFOs) had secured required NPDES or state permits. See National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 2968–69, 3080 (Jan. 12, 2001) (codified at 40 C.F.R. pts. 122, 412).

⁶ OFFICE OF WATER, ENVTL. PROT. AGENCY, EPA 841-R-07-001, NATIONAL WATER QUALITY INVENTORY: REPORT TO CONGRESS, 2002 REPORTING CYCLE ES-2 (2007), available at <http://www.epa.gov/305b/2002report/report2002305b.pdf> (reporting for assessed miles and acreages being impaired).

⁷ 33 U.S.C. §§ 1314(b), (e), 1361(a) (2000).

⁸ See, e.g., Charles W. Abdalla, *The Industrialization of Agriculture: Implications for Public Concern and Environmental Consequences of Intensive Livestock Operations*, 10 PENN ST. ENVTL. L. REV. 175, 190 (2002) (advocating greater regulatory attention to jurisdictional boundaries for regulating animals); Terence J. Centner, *Establishing a Rational Basis for Regulating Animal Feeding Operations:*

Water Act's definition of "point source" of pollution.⁹ Therefore, a CAFO must obtain a permit before discharging into navigable waters.¹⁰ EPA defines CAFO as an animal feeding operation that meets additional characteristics concerning numbers of animals at a single facility and discharges pollutants,¹¹ and a federal CAFO Rule articulates provisions that apply to qualifying discharges.¹² Regulated discharges from the land application of CAFO manure are limited to those applied to ensure appropriate agricultural utilization of the nutrients.¹³

Over the past several years, environmental groups and others have initiated lawsuits against polluters and governmental agencies in an attempt to reduce the impairment of waters by CAFOs.¹⁴ Recently,

A View of the Evidence, 27 VT. L. REV. 115, 138–42 (2002) (exploring the quality of evidence being cited to justify new federal regulations for CAFOs); Theodore A. Feitshans & Kelly Zering, *Federal Regulation of Animal and Poultry Production Under the Clean Water Act: Opportunities for Employing Economic Analysis to Improve Societal Results*, 10 PENN ST. ENVTL. L. REV. 193, 209–15 (2002) (advocating regulations that consider social welfare and efficiency); David R. Gillay, *Oklahoma's Concentrated Animal Feeding Operations Act: Balancing the Interests of Landowners with the Exponential Growth of the Hog Industry*, 35 TULSA L.J. 627, 642–49 (2000) (analyzing Oklahoma's CAFO regulations); Martin A. Miller, *Coping with CAFOs: How Much Notice Must a Citizen Give?*, 68 MO. L. REV. 959, 981–82 (2003) (examining a citizen suit against a CAFO that suggests increased liability for CAFOs); Nancy A. Welsh & Barbara Gray, *Searching for a Sense of Control: The Challenge Presented By Community Conflicts Over Concentrated Animal Feeding Operations*, 10 PENN ST. ENVTL. L. REV. 295, 315–21 (2002) (evaluating decision-making processes to address CAFO-related disputes); Amy Willbanks, *The Unified National Strategy for Animal Feeding Operations: Another Federal-State Partnership in Environmental Regulation*, 8 S.C. ENVTL. L.J. 283, 288–89 (2000) (intimating that the federal government will become more active in responding to water pollution problems).

⁹ 33 U.S.C. § 1362(14) (2000).

¹⁰ *Id.* § 1311(a).

¹¹ 40 C.F.R. § 122.23(b)(2), (4)–(6) (2008). *See also* Terence J. Centner, *Enforcing Environmental Regulations: Concentrated Animal Feeding Operations*, 69 MO. L. REV. 697, 702–03 (2004) (enumerating the regulatory definition of CAFOs). *See generally* Ryan Alan Mohr, Note, *Waterkeeper Alliance v. EPA: A Demonstration in Regulating the Regulators*, 10 GREAT PLAINS NAT. RESOURCES J. 17, 20 (2006) (discussing the debate over defining a CAFO).

¹² 40 C.F.R. pts. 122, 412 (2008). An animal feeding operation is an animal production operation that confines and feeds animals "for a total of 45 days or more during any 12-month period." *Id.* § 122.23(b)(1)(i). In addition, the animals must prevent vegetative forage growth from surviving the normal growing season over a portion of the confined area. *Id.* § 122.23(b)(1)(ii). *See generally* Michael Steeves, *The EPA's Proposed CAFO Regulations Fall Short of Ensuring the Integrity of Our Nation's Waters*, 22 J. LAND RESOURCES & ENVTL. L. 367, 368–75 (2002) (discussing problems with CAFO regulations); Scott Jerger, *EPA's New CAFO Land Application Requirements: An Exercise in Unsupervised Self-Monitoring*, 23 STAN. ENVTL. L.J. 91, 104 (2004) (noting uncertainty over regulating applications of manure due to the agricultural stormwater exemption).

¹³ 40 C.F.R. § 122.23(e) (2008).

¹⁴ *See, e.g.*, *Waterkeeper Alliance, Inc. v. EPA (Waterkeeper)*, 399 F.3d 486, 497 (2d Cir. 2005) (contesting federal CAFO regulations); *Cnty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 953–54 (9th Cir. 2002) (affirming the district court's finding of ongoing violations by the defendant); *Coldani v. Hamm*, No. Civ. S-07-660 RRB EFB, 2007 U.S. Dist. LEXIS 62644, at *1 (E.D. Cal. Aug. 14, 2007) (considering a citizen suit challenge to enforce the Clean Water Act); *Coon v. Willet Dairy*, 5:02-CV-1195 (FJS/GJD), 2007 U.S. Dist. LEXIS 51718, at *1–*3 (N.D.N.Y. July 17, 2007) (alleging various environmental injuries from CAFO operations); *Johnson County Citizen Comm. v. U.S. Env'tl. Prot. Agency*, No. 3L05-0222, 2005 U.S. Dist. LEXIS 33190, at *9–*10 (M.D. Tenn.

the twin issues of information required to be submitted prior to authorization for permitted discharges and opportunities for public input during the NPDES permitting process have forced courts and regulators to reassess the use of general permits. Judicial pronouncements by two courts and revisions in 2008 to the federal CAFO Rule illuminate difficulties in structuring general permitting regulations to contain requisite effluent limitations and provide opportunities for public input.¹⁵ Since many state agencies depend on general permits to reduce their administrative burdens, these pronouncements offer insights on how permitting authorities may need to restructure general permitting provisions to meet statutory requirements.

Sept. 9, 2005) (challenging Tennessee's alleged noncompliance with federal NPDES requirements); *Save the Valley v. U.S. Envtl. Prot. Agency*, 223 F. Supp. 2d 997, 1013 (S.D. Ind. 2002) (alleging inadequate state regulation of CAFOs); *United States v. New Portland Meadows, Inc.*, Civ. No. 00-507-AS, 2002 U.S. Dist. LEXIS 19153, at *7-8 (D. Or. 2002) (alleging a discharge in violation of a condition in a permit); *Water Keeper Alliance v. Smithfield Foods, Inc.*, No. 4:01-CV-27-H(3), 2001 U.S. Dist. LEXIS 21314, at *3 (E.D.N.C. Sept. 20, 2001) (alleging a failure to secure a CAFO permit); *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1181-82 (D. Idaho 2001) (alleging violation of a NPDES permit); *Cnty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, No. CY-98-3011-EFS, 2001 U.S. Dist. LEXIS 3579, at *63-64 (E.D. Wash. Feb. 27, 2001) (upholding awards for violations of 16 water quality provisions); *Citizens Legal Envtl. Action Network, Inc. v. Premium Standard Farms, Inc.*, No. 97-6073-CV-SJ-6, 2000 U.S. Dist. LEXIS 1990, at *1-2 (W.D. Mo. Feb. 23, 2000), *aff'd*, 397 F.3d 592, 594 (8th Cir. 2005) (concerning health and environmental ills of large-scale hog operations); *Cnty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 65 F. Supp. 2d 1129, 1155-56 (E.D. Wash. 1999) (finding violations of the Clean Water Act by dairies); *Cnty. Ass'n for Restoration of the Env't v. Sid Koopman Dairy*, 54 F. Supp. 2d 976, 981 (E.D. Wash. 1999) (finding defendants' dairies were CAFOs subject to point-source requirements); *Breitweiser v. Ind. Office of Envtl. Adjudication*, 775 N.E.2d 1175, 1176-77 (Ind. Ct. App. 2002) (challenging a permit issued to an animal feeding operation), *vacated*, 810 N.E.2d 699 (Ind. 2004); *Neuse River Found. v. Smithfield Foods*, 574 S.E.2d 48, 55 (N.C. Ct. App. 2002) (dismissing a citizen suit for lack of standing); *Tenn. Envtl. Council v. Tenn. Water Quality Control Bd.*, 254 S.W.3d 396, 400 (Tenn. Ct. App. 2007) (analyzing administrative issues concerning a petition to challenge issuance of a permit); *Maple Leaf Farms, Inc. v. State*, 633 N.W.2d 720, 729 (Wis. Ct. App. 2001) (regulating the land application of manure on off-site croplands).

¹⁵ *Waterkeeper*, 399 F.3d at 503; *Sierra Club Mackinac Chapter v. Dep't of Envtl. Quality (Sierra Club)*, 747 N.W.2d 321, 323 (Mich. Ct. App. 2008); Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to *Waterkeeper* Decision, 71 Fed. Reg. 37,744 (proposed June 30, 2006) (to be codified at 40 C.F.R. pts. 122, 412) [hereinafter Proposed CAFO Rule Amendment after *Waterkeeper*]; Revised National Pollutant Discharge Elimination System Permit Regulations for Concentrated Animal Feeding Operations; Supplemental Notice of Proposed Rulemaking, 73 Fed. Reg. 12,321 (proposed Mar. 7, 2008) (to be codified at 40 C.F.R. pt. 122) [hereinafter Supplemental CAFO Rulemaking]; Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the *Waterkeeper* Decision (Oct. 31, 2008), available at http://www.epa.gov/npdes/regulations/cafo_final_rule_preamble2008.pdf [hereinafter Revised 2008 CAFO Rule] (to be codified at 40 C.F.R. pts. 9, 122, 412).

II. OBJECTIONS TO REGULATIONS AUTHORIZING DISCHARGES BY CAFOS

Water pollution from animal feeding operations has been a topic of litigation since the 1990s.¹⁶ Due to governmental reports showing agriculture as a major contributor to impaired water quality,¹⁷ environmental groups pressed for more stringent regulations.¹⁸ In 1992, EPA entered a consent decree whereby a new CAFO Rule would be adopted to more effectively limit pollutants entering federal waters.¹⁹ After lengthy deliberations and significant public input, EPA adopted a revised CAFO Rule that became effective on April 14, 2003.²⁰ Both environmental and farm groups were disappointed in various provisions of the 2003 Rule, leading to the challenge in *Waterkeeper Alliance, Inc. v. United States Environmental Protection Agency* (*Waterkeeper*).²¹ The environmental petitioners alleged flaws in provisions regarding governmental oversight and were successful with some of their arguments.²² The Second Circuit Court of Appeals vacated selected provisions of the Rule and remanded other provisions to EPA for further analysis and clarification.²³

One of the vacated provisions of the Rule concerned the submission of effluent limitations contained in nutrient management

¹⁶ See, e.g., *Natural Res. Def. Council v. Reilly*, 22 Env'tl. L. Rep. (Env'tl. Law Inst.) 20,108, 20,112 (D.D.C. Apr. 23, 1991) (requiring the EPA to develop new effluent limitation guidelines for some CAFOs); *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 118 (2d Cir. 1994) (finding that manure application could result in a discharge for which an NPDES permit was required).

¹⁷ National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7176, 7176 (Feb. 12, 2003) (codified at 40 C.F.R. pts. 122, 412) [hereinafter Preamble to EPA Final Rule] (maintaining that "[i]mproperly managed manure has caused serious acute and chronic water quality problems throughout the United States"); see also U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-95-200BR, ANIMAL AGRICULTURE: INFORMATION ON WASTE MANAGEMENT AND WATER QUALITY ISSUES 58 n.1 (1995), available at <http://www.gao.gov/archive/1995/rc95200b.pdf> (finding many unpermitted feedlot operations); U.S. DEP'T OF AGRIC. AND U.S. ENVTL. PROT. AGENCY, UNIFIED NATIONAL STRATEGY FOR ANIMAL FEEDING OPERATIONS ¶ 1.1 (1999) available at <http://www.epa.gov/npdes/pubs/finafost.pdf> (announcing a proposed strategy that the federal government will be more active with mandatory and voluntary programs regarding animal feeding operations).

¹⁸ See *supra* note 16 (early cases).

¹⁹ Preamble to EPA Final Rule, *supra* note 17.

²⁰ *Id.* The government received 11,000 comments. *Id.* at 7187. The CAFO Rule is codified at 40 C.F.R. pts. 122, 412 (effective Apr. 14, 2003) and includes a preamble with a lengthy explanation of considerations taken into account with the adoption of the rule. Due to the judicial ruling in *Waterkeeper*, some provisions were vacated and so do not apply. See Centner, *supra* note 11, at 712 (discussing the possible explanations for the lack of permits by CAFO owners and operators).

²¹ 399 F.3d 486, 497 (2d Cir. 2005).

²² *Id.* at 490.

²³ *Id.* at 524; see Terence J. Centner, *Clarifying NPDES Requirements for Concentrated Animal Feeding Operations*, 14 PENN ST. ENV'T'L L. REV. 361 (2006) (evaluating the pronouncements of the *Waterkeeper* decision); John C. Becker, *Waterkeeper Alliance, Inc. v. EPA: Why It Is Important*, 36 ENVTL. L. RPTR. NEWS & ANALYSIS 10,566, 10,574 (2006) (arguing that environmental statutes that fail to enunciate a purpose of preventing pollution may not offer as much environmental protection as generally assumed).

plans prior to approval of NPDES permits.²⁴ In the 2003 CAFO Rule, EPA had decided that the terms of nutrient management plans were not required to be included in NPDES permit applications.²⁵ The *Waterkeeper* court disagreed with EPA's decision.²⁶ Because the definition of effluent limitation means any restriction on quantities, rates, and concentrations of nutrients,²⁷ nutrient management plans are effluent limitations.²⁸ Therefore, the failure to require the terms of the nutrient management plans be included in NPDES permits violated the Clean Water Act²⁹ and the Administrative Procedure Act.³⁰

Another objection to CAFO permitting provisions was recently raised in *Sierra Club Mackinac Chapter v. Department of Environmental Quality (Sierra Club)*.³¹ The petitioner challenged Michigan's CAFO permitting provisions, claiming that authorization for discharges under the state's general permit did not satisfy the requirements of the Clean Water Act concerning discharge rates and public participation.³² The Michigan appellate court agreed, reversed the circuit court, and remanded the issues for further proceedings.³³ *Sierra Club* extends the *Waterkeeper* submission and review of effluent limitations requirements and mandates public participation in developing nutrient management plans.

A. Land Application of Manure

The federal CAFO Rule requires effluent limitations to be set forth in NPDES permits for discharges occurring from land application of manure from CAFOs.³⁴ Regulated land application areas include all lands under the control of a CAFO owner or operator to which manure from the production area is or may be

²⁴ *Waterkeeper*, 399 F.3d at 524.

²⁵ Preamble to EPA Final Rule, *supra* note 17, at 7212 (noting in the preamble that the amount or rate at which manure can be applied to ensure appropriate agricultural utilization of nutrients varies based on site-specific factors at the CAFO so that reliance on numeric effluent limitation guidelines to control land application discharges was infeasible).

²⁶ *Waterkeeper*, 399 F.3d at 502–03.

²⁷ Federal Water Pollution Control Act, 33 U.S.C. § 1362(11) (2000); *see also Waterkeeper*, 399 F.3d at 502.

²⁸ *Waterkeeper*, 399 F.3d at 502.

²⁹ 33 U.S.C. § 1311(a)–(b) (2000); *see also id.* § 1342(a) (noting that permits must meet the requirements of other provisions of the Clean Water Act).

³⁰ 5 U.S.C. § 706(2)(A) (2000); *Waterkeeper*, 399 F.3d at 498, 503.

³¹ 747 N.W.2d 321, 332 (Mich. Ct. App. 2008).

³² *Id.* at 323, 334.

³³ *Id.* at 334–35; *see* 33 U.S.C. § 1251(e) (2000) (authorizing public participation).

³⁴ 40 C.F.R. § 122.23(b), (e) (2008). The federal regulations actually cover manure, litter, and process wastewater, but for convenience, the term manure will be used. *Id.* § 122.23(a); *see also Concerned Area Residents for the Env't*, 34 F.3d 114, 118 (2d Cir. 1994) (finding that manure application by CAFOs was regulated under the Clean Water Act).

applied.³⁵ Applying manure to land is viewed favorably as a sustainable agronomic practice that has considerable value in providing nutrients for crop production and contributing to soil fertility.³⁶ Because manure application at agronomic rates has a minimal potential to adversely affect water quality,³⁷ it is allowed if the CAFO owner or operator meets the Clean Water Act's requirements for an NPDES permit.³⁸

Thereby, the CAFO Rule differentiates between the application of manure as a fertilizer, which is permitted, and inappropriate applications of manure.³⁹ The Rule provides that manure needs to be "applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients"⁴⁰ CAFO owners and operators meet this requirement by implementing a nutrient management plan whereby manure is used to provide suitable nutrients for plant growth and crop production.⁴¹ By limiting applications of nutrients necessary for agronomic production, a nutrient management plan prevents unacceptable disposal practices that might impair water quality.⁴² Simultaneously, the Clean Water Act recognizes that agricultural stormwater discharges are permitted.⁴³

While the Clean Water Act provides for federal NPDES permits to authorize discharges, most states have assumed a delegation of authority from the federal government to issue state permits.⁴⁴ In forty-five states, federal NPDES permits are suspended so that a state

³⁵ 40 C.F.R. § 122.23(b)(3) (2008). This includes rented acreage. *Id.* Animal production areas, including animal confinement areas, manure storage areas, raw materials storage areas, and waste containment areas, are also regulated. *Id.* §§ 122.23(b)(8), 412.2(h).

³⁶ A. Bakhsh, R.S. Kanwar, & D.L. Karlen, *Effects of Liquid Swine Manure Applications on NO₃-N Leaching Losses to Subsurface Drainage Water from Loamy Soils in Iowa*, 109 AGRIC., ECOSYSTEMS & ENV'T 118, 119 (2005) (discussing possible benefits and damages from the use of manure); M.C. Ramos, J.N. Quinton, & S.F. Tyrrel, *Effects of Cattle Manure on Erosion Rates and Runoff Water Pollution by Faecal Coliforms*, 78 J. ENVTL. MGMT. 97, 97 (2006) (noting benefits from applying manure to land).

³⁷ Preamble to EPA Final Rule, *supra* note 17, at 7227.

³⁸ 33 U.S.C. §§ 1342, 1344 (2000); *see also* 40 C.F.R. § 122.23(e) (2008).

³⁹ 40 C.F.R. § 122.23(e) (2008).

⁴⁰ *Id.* (referencing 40 C.F.R. § 122.42(e)).

⁴¹ *Id.* § 122.42(e)(1).

⁴² *Id.*

⁴³ An exemption in the Clean Water Act allows CAFOs to have agricultural stormwater discharges from precipitation-related events. 33 U.S.C. § 1362(14) (2000). The Act provides that "[t]he term 'point source' . . . does not include agricultural stormwater discharges and return flows from irrigated agriculture." *Id.*; *see* Preamble to EPA Final Rule, *supra* note 17, at 7197-98 (discussing the distinction between discharges regulated by NPDES permits and agricultural stormwater discharges that are not regulated); *see also infra* note 141 and accompanying text.

⁴⁴ EPA, National Pollutant Discharge Elimination System, State Program Status (Apr. 2003), <http://cfpub.epa.gov/npdes/statestats.cfm> (last visited Sept. 26, 2008).

agency issues permits.⁴⁵ States implementing permitting programs are required to delineate discharge standards and limitations at least as stringent as those required by federal law.⁴⁶ For example, the Michigan Department of Environmental Quality has authority to administer the state's NPDES program under the Natural Resources and Environmental Protection Act.⁴⁷

B. General Permits

Administrative burdens in issuing permits to large numbers of similarly situated dischargers led EPA to develop regulations for general permits.⁴⁸ Regulations allow coverage of multiple facilities in a geographical area under a blanket permit wherein industries are categorized according to similarities in size and the nature of their runoff potential.⁴⁹ Under a general permit, the permitting authority issues "notices of intent" rather than individualized permits, which drastically⁵⁰ reduces the amount of time required for administrative review.

⁴⁵ *Id.*; see 33 U.S.C. § 1342(b)(1), (c) (2000) (authorizing states with approved programs to issue permits and suspend federal permits); 40 C.F.R. §§ 122.23(a), 122.26(a)(6) (2008) (delineating coverage for CAFOs in state programs).

⁴⁶ 33 U.S.C. §§ 1311(a), 1342(b), 1362(12) (2000).

[A state] may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter [33 U.S.C. §§ 1251 et seq.]; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

Id. § 1370.

⁴⁷ MICH. COMP. LAWS SERV. § 324.3103(3) (LexisNexis 2008).

⁴⁸ See OFFICE OF WASTEWATER MGMT., EPA, STATE GENERAL PERMITS PROGRAM DEVELOPMENT 1 (1989), available at <http://www.epa.gov/npdes/pubs/owm0465.pdf>; see also National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 48,002 (Nov. 16, 1990); National Pollutant Discharge Elimination System General Permits and Reporting Requirements for Storm Water Discharge Associated With Industrial Activity, 56 Fed. Reg. 40,948, 40,961 (Aug. 16, 1991); National Pollutant Discharge Elimination System—Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722, 68,737, 68,762 (Dec. 8, 1999); *Env'tl. Def. Ctr. v. U.S. Env'tl. Prot. Agency* (*Environmental Defense Center*), 344 F.3d 832, 881 (9th Cir. 2003) (observing the reduced administrative burden offered by a general permitting program); *Tex. Indep. Producers & Royalty Owners Ass'n v. U.S. Env'tl. Prot. Agency* (*Texas Independent Producers*), 410 F.3d 964, 968 (7th Cir. 2005) (noting the reduced administrative burden under general permits); Jeffrey M. Gaba, *Generally Illegal: NPDES General Permits under the Clean Water Act*, 31 HARV. ENVTL. L. REV. 409, 421–22 (2007).

⁴⁹ See National Pollutant Discharge Elimination System; Revision of Regulations, 44 Fed. Reg. 32,854, 32,916 (June 7, 1979) (codified at 40 C.F.R. pt. 122.48) (delineating provisions for general permits); see also Jennifer L. Seidenberg, Note, *Texas Independent Producers & Royalty Owners Association v. EPA: Redefining the Role of Public Participation in the Clean Water Act*, 33 ECOLOGY L.Q. 699, 705 (2007) (discussing why the EPA adopted general permits for storm water).

⁵⁰ See *Environmental Defense Center*, 344 F.3d at 881.

A notice of intent is a formal acceptance of permitting terms elaborated in the approved general permit so that a discharger can receive authority to discharge.⁵¹ Issuance of notices of intent under a general permit has resulted in fewer details of dischargers' nutrient management requirements and public participation opportunities than generally accompany individual NPDES program permits.⁵² Notices of intent under general permits have been authorized for CAFOs, municipal storm waters, and water treatment facilities.⁵³

Controversy exists as to whether authority to discharge after issuance of a notice of intent is pursuant to a permit or something else. If a notice of intent is not equivalent to a permit, the permitting requirements of the Clean Water Act do not apply.⁵⁴ In *Environmental Defense Center, Inc. v. United States Environmental Protection Agency (Environmental Defense Center)*,⁵⁵ the Ninth Circuit Court of Appeals found that notices of intent were permit applications that were functional equivalents of NPDES permits.⁵⁶ This meant that the public availability of permit application materials and an opportunity for public participation in the permitting process applied to the issuance of notices of intent.⁵⁷

Conversely, in *Texas Independent Producers & Royalty Owners Ass'n v. United States Environmental Protection Agency (Texas Independent Producers)*,⁵⁸ the Seventh Circuit Court of Appeals concluded that notices of intent were not permits or permit applications.⁵⁹ Rather, the general permit was the document that received regulatory approval.⁶⁰ While the Seventh Circuit considered the earlier *Environmental Defense Center* case, the court declined to

⁵¹ *Id.* at 853.

⁵² *Sierra Club*, 747 N.W.2d 321, 334 (Mich. Ct. App. 2008); *see also* Gaba, *supra* note 48, at 411 (criticizing the use of general permits due to the inability of citizens to participate in the development of an NPDES permit).

⁵³ 40 C.F.R. §§ 122.23, 122.26, 122.33 (2008).

⁵⁴ *Texas Independent Producers*, 410 F.3d 964, 978 (7th Cir. 2005).

⁵⁵ 344 F.3d 832 (9th Cir. 2003).

⁵⁶ *See id.* at 853 (stating that because the notice of intent "establishes what the discharger will do to reduce discharges to the 'maximum extent practicable,'" it "crosses the threshold from being an item of procedural correspondence to being a substantive component of a regulatory regime" (quoting 33 U.S.C. § 1342(p)(3)(B) (2000))).

⁵⁷ *Compare id.* at 856–57 (concluding that notices of intent must be subject to the CWA's public availability and public hearings requirements because they are "functionally equivalent" to the permit applications envisioned by Congress when creating the requirements, and thus failure to follow the requirements for the notices of intent would "violate[] the clear intent of Congress"), *and* Federal Water Pollution Control Act, 33 U.S.C. § 1251(e) (2000) (providing for "[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established" under the Act), *with* Seidenberg, *supra* note 49, at 718–19 (evaluating the conclusion that notices of intent are not permits).

⁵⁸ 410 F.3d 964 (7th Cir. 2005).

⁵⁹ *See id.* at 978 (finding EPA's argument that the terms "permit" and "permit application" did not include notices of intent to be "a permissible construction").

⁶⁰ *See id.* (agreeing with EPA's "eminently reasonable" rationales regarding the general permit scheme).

impose public participation requirements on permitting agencies where the public had an opportunity to be heard when the general permit was adopted.⁶¹ In the absence of congressional direction on the issue, the Seventh Circuit deferred to EPA's interpretation that notices of intent were not permits.⁶² The *Texas Independent Producers* decision means that dischargers under a general permit in the Seventh Circuit do not enumerate site-specific effluent limitations for discharges but rather implement limitations themselves.⁶³ Because notices of intent are not permits, no public input is required prior to issuance.⁶⁴

In response to the need to revise the 2003 CAFO Rule due to the *Waterkeeper* decision, EPA proposed in 2006 and 2008 to require submission and review of nutrient management plans prior to the issuance of NPDES permits.⁶⁵ In 2008, EPA adopted a revised final rule.⁶⁶ The 2008 Rule differentiates notices of intent from permit applications.⁶⁷ However, the provisions prescribe the same nutrient management plans for both.⁶⁸

Under EPA's 2008 Rule, nine elements of nutrient management plans need to accompany permit applications and notices of intent.⁶⁹

⁶¹ See *id.* at 978–79 n.13 (considering the Ninth Circuit's contrary conclusion in *Environmental Defense Center*); *id.* at 978 (agreeing with EPA's argument that "there is no need for additional public comment or a notice period" under the general permit scheme).

⁶² See *id.* at 978 (finding ambiguity as to whether Congress intended to treat notices of intent as permits or permit applications and therefore looking to EPA's construction of the terms); see also John H. Minan, *General Industrial Storm Water Permits and the Construction Industry: What Does the Clean Water Act Require?*, 9 CHAP. L. REV. 265, 310–11 (2006) (concluding that EPA's position that notices of intent are not permits or permit applications was reasonable).

⁶³ See *Texas Independent Producers*, 410 F.3d at 969 (discussing various features of the final general permit issued by EPA, including its requirement "that the operator create, maintain, and implement a site-specific Storm Water Pollution Prevention Plan").

⁶⁴ See *id.* at 980 (concluding that, because the notices of intent are not permits, the CWA's public notice and hearing requirements do not apply).

⁶⁵ See Proposed CAFO Rule Amendment after *Waterkeeper*, *supra* note 15, at 37,785; Supplemental CAFO Rulemaking, *supra* note 15, at 12,329.

⁶⁶ Revised 2008 CAFO Rule, *supra* note 15.

⁶⁷ See *id.* at 222 (to be codified at 40 C.F.R. § 122.23(d)(1)).

⁶⁸ See *id.* at 221 (to be codified at 40 C.F.R. § 122.21(i)(1)(x)).

⁶⁹ *Id.* (to be codified at 40 C.F.R. § 122.21(i)(1)(x)). The federal regulations require that:

[Each] nutrient management plan must, to the extent applicable:

- (i) Ensure adequate storage of manure, litter, and process wastewater, including procedures to ensure proper operation and maintenance of the storage facilities;
- (ii) Ensure proper management of mortalities (*i.e.*, dead animals) to ensure that they are not disposed of in a liquid manure, storm water, or process wastewater storage or treatment system that is not specifically designed to treat animal mortalities;
- (iii) Ensure that clean water is diverted, as appropriate, from the production area;
- (iv) Prevent direct contact of confined animals with waters of the United States;
- (v) Ensure that chemicals and other contaminants handled on-site are not disposed of in any manure, litter, process wastewater, or storm water storage or treatment system unless specifically designed to treat such chemicals and other contaminants;

CAFO owners or operators seeking authorization for discharges accompanying their land application of manure cannot simply file a brief notice of intent under a general permit.⁷⁰ While nutrient management details prescribed in a general permit provide a starting point, a CAFO owner or operator needs to delineate site-specific nutrient management practices⁷¹ that ensure appropriate agricultural utilization of manure nutrients.

EPA's 2008 Rule recognizes that the terms of a general permit are insufficient for authorizing discharges.⁷² Notices of intent that become part of a general permit must incorporate applicable effluent limitations for each authorized discharger, and be available to the public.⁷³ EPA has acknowledged the fact that if effluent limitations are set forth in nutrient management plans, the only way a permitting agency can ascertain compliance with the Clean Water Act is to review these plans.⁷⁴

(vi) Identify appropriate site specific conservation practices to be implemented, including as appropriate buffers or equivalent practices, to control runoff of pollutants to waters of the United States;

(vii) Identify protocols for appropriate testing of manure, litter, process wastewater, and soil;

(viii) Establish protocols to land apply manure, litter or process wastewater in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater; and

(ix) Identify specific records that will be maintained to document the implementation and management of the minimum elements described in paragraphs (e)(1)(i) through (e)(1)(viii) of this section.

40 C.F.R. § 122.42(e)(1) (2008).

⁷⁰ Notices of intent typically did not contain the details of a nutrient management plan but rather the permittee agreed to develop and implement such a plan. *See, e.g.*, MICH. DEP'T OF ENVTL. QUALITY, LARGE CONCENTRATED ANIMAL FEEDING OPERATIONS GEN. PERMIT, PERMIT NO. MIG019000, pt. I.A.4 (2005), available at <http://www.deq.state.mi.us/documents/deq-water-npdes-generalpermit-MIG019000.pdf> [hereinafter MICHIGAN'S GENERAL PERMIT II] (agreeing to implement a nutrient management plan).

⁷¹ Revised 2008 CAFO Rule, *supra* note 15, at 224 (to be codified at 40 C.F.R. § 122.23(h)(1)).

⁷² *Id.* at 230 (to be codified at 40 C.F.R. § 122.42(e)(5)). *See also Environmental Defense Center*, 344 F.3d 832, 853 (9th Cir. 2003) (supporting the conclusion that notices of intent are functionally equivalent to a permit).

⁷³ Revised 2008 CAFO Rule, *supra* note 15, at 224 (to be codified at 40 C.F.R. § 122.23(h)(1)).

[T]he Director must notify the public of the Director's proposal to grant coverage under the permit to the CAFO and make available for public review and comment the notice of intent submitted by the CAFO, including the CAFO's nutrient management plan, and the draft terms of the nutrient management plan to be incorporated into the permit. The process for submitting public comments and hearing requests, and the hearing process if a request for a hearing is granted, must follow the procedures applicable to draft permits set forth in 40 CFR 124.11 through 124.13.

Id.

⁷⁴ *Id.*

The Director must review notices of intent submitted by CAFO owners or operators to ensure that the notice of intent includes the information required by § 122.21(i)(1), including a nutrient

III. MICHIGAN'S REGULATORY CHALLENGE

In *Sierra Club*, the petitioner (Sierra Club) appealed from an unfavorable declaratory ruling issued by the Michigan Department of Environmental Quality (MDEQ) pertaining to the agency's administration of certain elements of the Federal Water Pollution Control Act.⁷⁵ The petitioner claimed Michigan's NPDES provisions were not substantially equivalent to federal regulations.⁷⁶ Three aspects of Michigan's General Permit MIG010000 (Michigan's General Permit I) for CAFOs were advanced as being inadequate under federal law.⁷⁷ Interested groups submitted briefs and the MDEQ issued Declaratory Ruling 2005-01 supporting the state's general permit.⁷⁸ The ruling, however, also directed the MDEQ to make modifications to its general permit and application process.⁷⁹

Dissatisfied with the agency's ruling, and frustrated with its inability to actively participate in Michigan's NPDES permitting process for CAFOs, the Sierra Club appealed.⁸⁰ The circuit court affirmed the ruling, noting that the MDEQ was required to reformat the general permit and concluded the Declaratory Ruling was "neither arbitrary, capricious or an abuse of unwarranted discretion."⁸¹ On appeal to the Michigan Court of Appeals, two substantive issues on CAFO permitting requirements were presented: 1) whether discharge rates established by nutrient management plans were effluent limitations that must be included in the general permit;

management plan that meets the requirements of § 122.42(e) and applicable effluent limitations and standards, including those specified in 40 CFR part 412.

Id. This is quite different than what the EPA argued in *Waterkeeper*, 399 F.3d 486, 501 (2d Cir. 2005) (EPA arguing that nutrient management plans do not constitute effluent limitation guidelines) and *Environmental Defense Center*, 344 F.3d at 853 (EPA stating that notices of intent do not need to be reviewed by permitting authorities).

⁷⁵ *Sierra Club*, 747 N.W.2d 321, 323 (Mich. Ct. App. 2008).

⁷⁶ *Id.* at 332.

⁷⁷ MICH. DEPT. OF ENVTL. QUALITY, DECLARATORY RULING NUMBER 2005-01 1-12 (2005), available at <http://www.deq.state.mi.us/documents/deq-oah-Sierra%20Club%20Dec%20Ruling-31-MIG010000-Jun-15-2005.pdf>. [hereinafter MDEQ RULING 2005-01]. See also MICH. DEPT. OF ENVTL. QUALITY, NEW LARGE CONCENTRATED ANIMAL FEEDING OPERATIONS, PERMIT NO. MIG010000, available at <http://www.deq.state.mi.us/documents/deq-water-generalpermit-npdes-MIG010000.pdf>. Actually, General Permit No. MIG440000 was the first CAFO permit, but this was not acknowledged by the *Sierra Club* court. MICHIGAN'S GENERAL PERMIT II, *supra* note 70, at 1. Under the Michigan Administrative Code, a general permit means "a national permit issued authorizing a category of similar discharges." MICH. ADMIN. CODE r. 323.2103(a) (2008).

⁷⁸ MDEQ RULING 2005-01, *supra* note 77, at 15.

⁷⁹ *Id.* In response to the Sierra Club's petition, MDEQ directed its Water Bureau to

(1) reorganize the "minimum standards" section of the general permit for clarity; (2) identify all proposed "land application areas" and adjacent water bodies at the time a CAFO applies for authorization; and (3) make the comprehensive nutrient management plan submitted in accordance with the general permit's requirements "available to the public upon request."

Sierra Club, 747 N.W.2d at 327.

⁸⁰ *Sierra Club*, 747 N.W.2d at 328.

⁸¹ *Id.* at 328-29.

and 2) whether the public was able to sufficiently participate in permit approvals.⁸² The court also addressed a jurisdictional challenge to the petitioner's lawsuit, and an application for leave has been filed with the Michigan Supreme Court.⁸³

A. Discharge Rates of a Nutrient Management Plan

The investigation of the MDEQ's failure to review discharge rates incorporated in effluent limitations centered on the Clean Water Act's requirements for agency review.⁸⁴ Michigan's Administrative Code requires each general permit application to include a requirement that the permittee develop and implement a comprehensive nutrient management plan.⁸⁵ This plan must incorporate best management practices and procedures necessary to implement applicable effluent limitations.⁸⁶ The Administrative Code, however, does not require that a plan be reviewed prior to the issuance of a certificate of coverage issued under Michigan's general permit.⁸⁷ Because certificates of coverage are equivalent to notices of intent, issuance of a certificate authorizes discharges of pollutants.

While the *Sierra Club* appeal was progressing, the MDEQ responded to the directions of Declaratory Ruling 2005-01 to modify Michigan's General Permit I.⁸⁸ New nutrient management plan requirements were added in Part I.A.4 of Michigan's General Permit

⁸² *Id.* at 323.

⁸³ *Id.* at 329. See also Michigan Department of Environmental Quality's Application for Leave to Appeal, *Sierra Club Mackinac Chapter v. Dept. of Env'tl. Quality*, 747 N.W.2d 321 (Mich. Ct. App. 2008), filed, (Mich. Sup. Ct. Feb. 26, 2008) (No. 135898).

⁸⁴ *Sierra Club*, 747 N.W.2d at 323, 332–34.

⁸⁵ MICH. ADMIN. CODE r. 323.2196(5)(a) (2008). The effluent limitations and technical standards of the Michigan regulations for comprehensive nutrient management plans are very similar to the federal limitations and standards for nutrient management plans. See *Sierra Club*, 747 N.W.2d at 324–25; MICHIGAN'S GENERAL PERMIT II, *supra* note 70, at pt. I.A.4. CAFOs being issued certificates of coverage are considered permittees under Michigan's General Permit II. See, e.g., MDEQ CERTIFICATE OF COVERAGE UNDER GENERAL PERMIT NO. MIG019000 CAFO GENERAL PERMIT, CERTIFICATE OF COVERAGE NO. MIG01020, BRADFORD DAIRY-CAFO (2008), available at http://www.michigan.gov/documents/deq/wb-npdes-COC-MIG010120_208422_7.pdf.

⁸⁶ MICHIGAN'S GENERAL PERMIT II, *supra* note 70, at pt. I.A.4.b.

⁸⁷ *Sierra Club*, 747 N.W.2d at 333–34.

⁸⁸ *Id.* at 328. The conditions were:

1. All effluent limitations, including the minimum standards portion of the CNMP section, will be included within a new NMP portion of the effluent limitations section. The [Water Bureau of the MDEQ] will draft a new general permit for CAFOs that incorporates these concepts. The new general permit will be subject to a new public notice and hearing process.
2. All proposed land application areas and adjacent water bodies shall be identified at the time a CAFO applies for authorization.
3. The CNMP prepared in accordance with the permit's requirements shall be submitted to the appropriate [Water Bureau] district office upon completion and be available to the public upon request.

MDEQ RULING 2005-01, *supra* note 77, at 15.

MIG019000 (Michigan's General Permit II) for CAFOs.⁸⁹ CAFO permittees applying for a certificate of coverage under a general permit need to implement requirements of a nutrient management plan.⁹⁰ CAFO permittees also continue to prepare and implement a comprehensive nutrient management plan under Part I.A.5 of Michigan's General Permit II,⁹¹ creating dual nutrient management plan requirements. Michigan's General Permit II was issued in November 2005 and superseded Michigan's General Permit I.⁹²

The replacement of the permitting provisions of Michigan's General Permit I by those of Michigan's General Permit II created some difficulties for the *Sierra Club* appellate court. Because the circuit court had analyzed the legality of provisions considered in the MDEQ's Declaratory Ruling 2005-01, the appeal necessarily addressed provisions of Michigan's General Permit I.⁹³ But due to the fact that Michigan's General Permit I had been superseded by the time the Michigan Court of Appeals considered the appeal, the latter part of the *Sierra Club* decision analyzed the requirements of Michigan's General Permit II.⁹⁴ *Sierra Club* never fully identified or explained the differences in requirements between the two permitting systems.⁹⁵ However, Michigan's General Permit II added to the provisions of Michigan's General Permit I.⁹⁶ Therefore, the court's analysis of the provisions of Michigan's General Permit I was apropos for Michigan's General Permit II.

The provisions of Michigan's General Permit II for Part I.A.4 nutrient management plans delineate requirements for the land application of CAFO waste and identify requirements for the implementation of best management practices by the permittee.⁹⁷ Under best management practices, permittees applying manure to land are required to conduct field assessments for nutrient utilization,

⁸⁹ MICHIGAN'S GENERAL PERMIT II, *supra* note 70, at pt. I.A.4.b.7; *see also* MDEQ RULING 2005-01, *supra* note 77, at 15 (directing MDEQ to modify its nutrient management plan by including an effluent limitation section).

⁹⁰ MICHIGAN'S GENERAL PERMIT II, *supra* note 70, at pt. I.A.4. The *Sierra Club* court considered provisions of nutrient management plans in its evaluation of effluent limitations requirements. *Sierra Club*, 747 N.W.2d at 333-34.

⁹¹ MICHIGAN'S GENERAL PERMIT II, *supra* note 70, at pt. I.A.5.

⁹² *See id.* at 1.

⁹³ *See Sierra Club*, 747 N.W.2d at 326-29.

⁹⁴ *See id.* at 332-35. The court first references Michigan's General Permit II in footnotes 10 and 11, but waits until its analysis of the effluent limitations to begin its consideration of the revised permit. *Id.* at 324, 328-29.

⁹⁵ *See id.* at 332-34; *see* MDEQ RULING 2005-01, *supra* note 77, at 15. Conditions one and three were incorporated in Michigan's General Permit II. MICHIGAN'S GENERAL PERMIT II, *supra* note 70, at pts. I.A.4, I.A.5.b. The second requirement concerning identification of all proposed land application areas and adjacent water bodies was not incorporated into Michigan's General Permit II, but is required in Michigan's Wastewater Discharge Permit Application. WATER BUREAU, MICH. DEP'T OF ENVTL. QUALITY, WASTEWATER DISCHARGE PERMIT APPLICATION 3 (2008), *available at* http://www.michigan.gov/documents/deq/water-npdes-application_219429_7.pdf.

⁹⁶ MICHIGAN'S GENERAL PERMIT II, *supra* note 70, at 1.

⁹⁷ *Id.* at pt. I.A.4.b.

sampling of manure, and sampling of soils.⁹⁸ Permittees shall also comply with nutrient application limitations.⁹⁹ Michigan's General Permit II, however, does not articulate any requirement that an identifiable nutrient management plan be submitted to the MDEQ or be made available to the public.¹⁰⁰ Moreover, rules for nutrient management plans have not been incorporated into Michigan's provisions for Wastewater Discharge Permits set forth in the Michigan Administrative Code.¹⁰¹

As to comprehensive nutrient management plans required by Part I.A.5 of Michigan's General Permit II, permittees are required to submit their plans to the MDEQ,¹⁰² but there is no separate instruction for the MDEQ's review of the plans. Therefore, Michigan's General Permit II requires permittees to implement particulars concerning nutrient management, but certificates of coverage are issued without review of any nutrient management particulars.¹⁰³ Without agency oversight, a self-regulatory permitting system governs discharges.¹⁰⁴ The MDEQ's authorization of discharges without reviewing a discharger's effluent limitations supported the conclusion that the Michigan CAFO regulations were inadequate under federal law.¹⁰⁵

B. Public Participation

The second major substantive issue addressed in *Sierra Club* involved the ability of the public to participate in approval of a certificate of coverage.¹⁰⁶ When confronted with the issue of public participation by the Sierra Club, the MDEQ recognized that additional public review beyond what was required in Michigan's General Permit I was needed.¹⁰⁷ Therefore, the MDEQ offered to amend its general permit and provide more information to the public, as well as post certificates on the agency's web page.¹⁰⁸ Declaratory

⁹⁸ *Id.* at pt. I.A.4.b.7.a–b.

⁹⁹ *Id.* at pt. I.A.4.b.7.c.

¹⁰⁰ *Id.* at pt. I.A.4 (requiring implementation, inspection, application, compliance, and recording, but not submission).

¹⁰¹ See MICH. ADMIN. CODE r. 323.2196(5)(a) (2008) (addressing comprehensive nutrient management plans).

¹⁰² MICHIGAN'S GENERAL PERMIT II, *supra* note 70, at pt. I.A.5.b.

¹⁰³ *Sierra Club*, 747 N.W.2d 321, 332–34 (Mich. Ct. App. 2008).

¹⁰⁴ See *Waterkeeper*, 399 F.3d 486, 498 (2d Cir. 2005) (disapproving of self-regulatory permitting regimes); *Environmental Defense Center*, 344 F.3d 832, 854 (9th Cir. 2003) (considering a self-regulatory system).

¹⁰⁵ *Sierra Club*, 747 N.W.2d at 335.

¹⁰⁶ *Id.* at 334.

¹⁰⁷ MDEQ RULING 2005-01, *supra* note 77, at 7–8. MDEQ was cognizant of the judicial pronouncements on public participation by the *Waterkeeper* and *Environmental Defense Center* courts. *Id.* at 5–8.

¹⁰⁸ *Id.* at 6–7 (setting forth a new requirement to require a separate nutrient management plan); *id.* at 8 (setting forth a new requirement for a distinct nutrient management section); *id.* at 9 (stating the future

Ruling 2005-01 directed the MDEQ to require permit applicants to submit comprehensive nutrient management plans, and this was incorporated in Michigan's General Permit II.¹⁰⁹

In evaluating public participation, *Sierra Club* started with section 101 of the Clean Water Act:

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.¹¹⁰

Moreover, the Act requires that permits be issued "after opportunity for public hearing."¹¹¹ In the delegation of authority to states, the EPA Administrator approves state programs if the public receives notice of each permit application and is provided "an opportunity for public hearing before a ruling on each such application"¹¹²

After enunciating the federal public hearing requirements, the *Sierra Club* court addressed the state requirements concerning public input for comprehensive nutrient management plans.¹¹³ Under Michigan's General Permit II, an owner or operator of a CAFO secures authorization to discharge by simply submitting a certificate of coverage containing a comprehensive nutrient management plan.¹¹⁴ Documents submitted under a general permit are posted on the agency's website for fourteen days, and interested persons can file comments and request a public hearing.¹¹⁵ The MDEQ, however, did not elaborate on how it used the public's input, and in any case, did not review the comprehensive nutrient management plan.¹¹⁶ Under the *Sierra Club* ruling, this procedure was found to lack an appropriate opportunity for meaningful review during the development of permittees' nutrient management plans.¹¹⁷

requirement of identification of proposed land application areas and adjacent water bodies); *id.* at 12 (stating the future requirement that copies of the comprehensive nutrient management plan be submitted to the MDEQ); *id.* at 15 (directing MDEQ to take actions previously noted in the ruling).

¹⁰⁹ *Id.* at 15.

¹¹⁰ Federal Water Pollution Control Act, 33 U.S.C. § 1251(e) (2000).

¹¹¹ *Id.* § 1342(a)(1).

¹¹² *Id.* § 1342(b)(3).

¹¹³ *Sierra Club*, 747 N.W.2d 321, 334 (Mich. Ct. App. 2008).

¹¹⁴ MDEQ RULING 2005-01, *supra* note 77, at 7; *see also* Seidenberg, *supra* note 49, at 712 (noting the need for public participation for meaningful enforcement of the Clean Water Act).

¹¹⁵ MDEQ RULING 2005-01, *supra* note 77, at 7.

¹¹⁶ *Sierra Club*, 747 N.W.2d at 328, 333 (noting that the plan is submitted but reviewed by someone else).

¹¹⁷ *Id.* at 334–35.

This situation was viewed as not satisfying the requirements of the Clean Water Act.¹¹⁸ Statutory requirements for public participation require more than the posting of a comprehensive nutrient management plan that is not reviewed by the permitting agency.¹¹⁹ The approval process for certificates of coverage failed to offer opportunities for public participation in developing and revising nutrient management plans.¹²⁰ Therefore, the *Sierra Club* court concluded that Michigan's General Permit II failed to satisfy the public participation requirements of section 101 of the Clean Water Act.¹²¹

IV. FEDERAL EFFLUENT LIMITATIONS AND MICHIGAN'S REQUIREMENTS

The issue before the *Sierra Club* court was whether Michigan's General Permit II's requirements were comparable to what is mandated by the federal CAFO Rule.¹²² Under the Clean Water Act, technology-based and water quality-based effluent limitations are imposed for all sources of pollutants through NPDES permits to control the discharge of pollutants.¹²³ The Act defines effluent limitation as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters"¹²⁴ Effluent limitations must be based on the application of the best practicable control technology currently available.¹²⁵

A. Imposing Effluent Limitations

Under the federal CAFO Rule, nutrient management plans include best management practices to implement effluent limitations and standards.¹²⁶ For the land application of manure from certain Large CAFOs,¹²⁷ the nutrient management plan needs to incorporate application rates for manure applied to land under the ownership or operational control of the CAFO to "minimize phosphorus and nitrogen transport from the field to surface waters in compliance with

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*; Federal Water Pollution Control Act, 33 U.S.C. § 1251(e) (2000).

¹²² See *Sierra Club*, 747 N.W.2d at 323.

¹²³ 33 U.S.C. § 1311(a), (b), (e) (2000).

¹²⁴ *Id.* § 1362(11).

¹²⁵ *Id.* § 1311(b).

¹²⁶ 40 C.F.R. § 122.42(e)(1) (2008).

¹²⁷ See *id.* § 122.23(b)(4). Large CAFOs do not need a permit if they can demonstrate they have no potential to discharge. *Id.* § 122.23(d)(2); see also *Waterkeeper*, 399 F.3d 486, 506 (2d Cir. 2005) (finding that the Clean Water Act prevents imposing an obligation to apply for a permit on CAFOs without discharges).

the technical standards for nutrient management”¹²⁸ The technical standards must include

a field-specific assessment of the potential for nitrogen and phosphorus transport from the field to surface waters, and address the form, source, amount, timing, and method of application of nutrients on each field to achieve realistic production goals, while minimizing nitrogen and phosphorus movement to surface waters; and . . . appropriate flexibilities for any CAFO to implement nutrient management practices to comply with the technical standards¹²⁹

The narrative effluent limitations in the *Federal Code of Regulations* ensure that pollutants from CAFOs do not unnecessarily impair water quality.¹³⁰ Without effluent limitations, a certificate of coverage under a general permit fails to establish pollutant levels, and thus does not comply with the Clean Water Act.¹³¹ Because permits issued by a permitting authority are statutorily required to set forth effluent limitations, permitting authorities can only countenance discharges if they comply with the Act.¹³² For situations where CAFO owners and operators seek to be authorized under a general permit through issuance of certificates of coverage, permitting authorities are unable to authorize discharges if no required effluent limitations are enumerated.¹³³

The need for effluent limitations before authorizing discharges is also supported by the Clean Water Act’s enforcement provisions.¹³⁴ The enforcement of the standards of a permit is a principal means for achieving the water quality goals mandated by the Act.¹³⁵ Without effluent limitations delineating particulars for a CAFO’s land application of manure, it is impossible to establish what discharges

¹²⁸ 40 C.F.R. § 412.4(c)(2) (2008).

¹²⁹ *Id.* § 412.4(c)(2)(i–ii).

¹³⁰ See 33 U.S.C. § 1342(a)(2) (2000); *Arkansas v. Oklahoma*, 503 U.S. 91, 102 (1992) (noting conditions for NPDES permits shall be prescribed to assure compliance).

¹³¹ 33 U.S.C. § 1311(a)–(b) (2000). The CAFO Rule limits pollutant levels through restrictions on the land application of manure. 40 C.F.R. § 122.42(e) (2008).

¹³² *Our Children’s Earth Found. v. U.S. Env’tl. Prot. Agency*, 527 F.3d 842, 848 (9th Cir. 2008) (citing *Waterkeeper*, 399 F.3d at 491; *S. Fla. Water Mgmt. Dist.*, 541 U.S. 95, 124 (2004)).

¹³³ See *Se. Alaska Conservation Council v. U.S. Army Corps of Eng’rs*, 486 F.3d 638, 646 (9th Cir. 2007) (acknowledging that numerical discharge restrictions to reduce pollutants may be required before discharges are sanctioned by a permit); *Citizens Coal Council v. U.S. Env’tl. Prot. Agency*, 385 F.3d 969, 973 (6th Cir. 2004) (noting that NPDES permits may only be issued if the discharges comply with effluent limitations), *rev’d on other grounds*, 447 F.3d 879 (6th Cir. 2006) (en banc).

¹³⁴ See, e.g., *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 151 (4th Cir. 2000) (observing a shift in focus under the Clean Water Act from water quality standards to effluent limitations precluding unauthorized discharges).

¹³⁵ *U.S. Env’tl. Prot. Agency v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 223 (1976) (noting that permits define and facilitate enforcement of dischargers’ obligations); see also *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 316 n.10 (1982) (citing the importance of having terms in permits that allow the enforcement of a discharger’s obligations (quoting *U.S. Env’tl. Prot. Agency v. California ex rel. State Water Res. Control Bd.*, 426 U.S. at 205)).

are allowed by the permit.¹³⁶ Regulatory agencies and citizens are unable to preclude illegal discharges through enforcement actions if no information exists to ascertain standards and limitations.¹³⁷ The *Sierra Club* court recognized this fact in noting that the MDEQ's approval of certificates of coverage under Michigan's General Permit II allowed CAFOs "to determine and adopt application rates for disposal of waste" without agency oversight.¹³⁸ If a permitting agency does not review nutrient management plans, it allows a self-regulatory permitting system to address discharges.¹³⁹

For the land application of CAFO manure, allowable discharges are those that qualify under the agricultural stormwater discharge exemption.¹⁴⁰ The CAFO Rule defines agricultural stormwater discharges to include any manure from land areas under the control of a CAFO where the manure has otherwise been applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients.¹⁴¹ Unless the owner or operator submits a plan enumerating effluent limitations that shows how the application of manure achieves production goals while minimizing nutrient movement to surface waters,¹⁴² the permitting agency cannot ascertain whether discharges qualify as agricultural stormwater discharges.¹⁴³ The *Waterkeeper* court decided that if nutrient management plans containing effluent limitations are not reviewed, there is no oversight by permitting authorities to ascertain whether a permittee's effluent limitations comply with the applicable regulations.¹⁴⁴

¹³⁶ See *Waterkeeper*, 399 F.3d 486, 500 (2d Cir. 2005) (finding that in the absence of a reviewed nutrient management plan, a CAFO might misunderstand or misrepresent their specific situation and adopt improper or inappropriate waste application rates).

¹³⁷ See *Russian River Watershed Prot. Comm. v. City of Santa Rosa*, 142 F.3d 1136, 1139 (9th Cir. 1998) (noting citizens' rights to enforce effluent standards including violations of NPDES permits); *Swartz v. Beach*, 229 F. Supp. 2d 1239, 1268 (D. Wyo. 2002) (violating effluent standards imposed by an NPDES permit allows a citizen suit under the Clean Water Act).

¹³⁸ *Sierra Club*, 747 N.W.2d 321, 333 (Mich. Ct. App. 2008).

¹³⁹ See *Waterkeeper*, 399 F.3d at 498–99; *Environmental Defense Center*, 344 F.3d 832, 854–55 (9th Cir. 2003).

¹⁴⁰ "The term 'point source' . . . does not include agricultural stormwater discharges and return flows from irrigated agriculture." Federal Water Pollution Control Act, 33 U.S.C. § 1362(14) (2000). See 40 C.F.R. § 122.23(e) (2008) (stating that discharges from the land application of manure are not subject to NPDES permit requirements if they are agricultural stormwater discharges).

¹⁴¹ 40 C.F.R. § 122.23(e) (2008). Stormwater is defined as "storm water runoff, snow melt runoff, and surface runoff and drainage." *Id.* § 122.26(b)(13).

¹⁴² *Id.* § 412.4(c)(1).

¹⁴³ The only way to determine whether a discharge is an agricultural stormwater discharge is to determine whether the manure was applied according to the site specific nitrogen or phosphorus based rate mandated by the CAFO Rule. See *Waterkeeper*, 399 F.3d at 501; see also 40 C.F.R. § 412.4(c)(1) (2008).

¹⁴⁴ *Waterkeeper*, 399 F.3d at 502.

B. Michigan's Water Quality Standards

To differentiate Michigan's NPDES permitting requirements from the federal regulations analyzed in *Waterkeeper*, MDEQ maintained that Michigan's comprehensive nutrient management plans were not the same as nutrient management plans under federal law.¹⁴⁵ Michigan's water resources provisions delineate water quality standards in general permits to prevent injurious discharges.¹⁴⁶ Since injurious discharges are prohibited, MDEQ maintained that a CAFO's comprehensive nutrient management plan was "a management plan for use in meeting the set of minimum standards in the General Permit . . ."¹⁴⁷ Under MDEQ's argument, the state's general water quality standards assured compliance with federal water quality standards, even in the absence of site-specific effluent limitations for a CAFO discharger.¹⁴⁸

The *Sierra Club* court responded to MDEQ's argument by considering the need for discharge rates. The pollution problem involves the disposal of millions of tons of manure each year.¹⁴⁹ For CAFO production areas, including animal confinement and waste containment areas,¹⁵⁰ the federal CAFO Rule basically precludes any discharge of manure or other pollutant.¹⁵¹ Therefore, the most common way for pollutants from CAFOs to reach surface waters is through the improper land application of manure.¹⁵² To limit pollutants from the land application of manure, land application discharges from CAFOs are subject to NPDES permitting requirements.¹⁵³

The *Sierra Club* court was aware of the Second Circuit's findings in *Waterkeeper* and the shortcomings of the federal CAFO Rule.¹⁵⁴ The petitioner's allegation that Michigan's CAFO program did not require review of effluent limitations in NPDES permits was similar to the objection on effluent limitations raised in

¹⁴⁵ MDEQ RULING 2005-01, *supra* note 77, at 4–5; see MICH. ADMIN. CODE r. 323.2196(5) (2008).

¹⁴⁶ MDEQ RULING 2005-01, *supra* note 77, at 4 (citing MICH. COMP. LAWS § 324.3109).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Sierra Club*, 747 N.W.2d 321, 332 (Mich. Ct. App. 2008) (citing *Waterkeeper*, 399 F.3d at 493).

¹⁵⁰ 40 C.F.R. § 122.23(b)(8) (2008).

¹⁵¹ *Id.* §§ 412.15(a), 412.25(a), 412.31(a), 412.43(a)(1), 412.46(a) (prescribing zero discharges from CAFO production areas but recognizing exceptions).

¹⁵² *Sierra Club*, 747 N.W.2d at 332. The EPA concluded that significant impairment of waters comes from the application of CAFO manure on fields. See Preamble to EPA Final Rule, 68 Fed. Reg. 7176, 7237 (Feb. 12, 2003) (codified at 40 C.F.R. pts. 122, 412); *Waterkeeper*, 399 F.3d 486, 495 (2d Cir. 2005).

¹⁵³ 40 C.F.R. § 122.23(e) (2008). The effluent limitations of part 412 of the C.F.R. also apply to certain Large CAFOs. *Id.* § 412.4.

¹⁵⁴ *Sierra Club*, 747 N.W.2d at 324–26.

Waterkeeper.¹⁵⁵ The *Sierra Club* court's analysis focused on whether the provisions of Michigan's General Permit II required the submission of discharge rates set forth in effluent limitations prior to authorization of discharges.¹⁵⁶

The court declined to adopt MDEQ's argument that Michigan's general permit imposed water quality standards that obviated the need for effluent limitations set forth in nutrient management plans.¹⁵⁷ The court opined that the federal regulations intended that permitted discharges required oversight of effluent limitations.¹⁵⁸ Following *Waterkeeper* and *Environmental Defense Center*, the *Sierra Club* court concluded that MDEQ needed to conduct a meaningful review of each nutrient management plan prior to authorizing discharges.¹⁵⁹ Section 402(b) of the Clean Water Act required permitting agencies to apply effluent limitations that assure compliance.¹⁶⁰

V. THE FUTURE OF "GENERAL PERMITS"

The employment of general permits to authorize discharges is based on enforceability and efficiency concerns.¹⁶¹ After a district and circuit court of appeal suggested in the 1970s that EPA might use general permits to mitigate the burdens of individual permit applications,¹⁶² these permits have been widely employed to authorize discharges for CAFOs, municipal storm waters, and water treatment facilities.¹⁶³ While separate regulatory requirements exist for the three categories of discharges, the pronouncements on CAFO general permits may be expected to have repercussions for the other two categories.¹⁶⁴

¹⁵⁵ See *Waterkeeper*, 399 F.3d at 498–99 (discussing CAFO rule's failure to provide meaningful review of nutrient management plans); MDEQ RULING 2005-01, *supra* note 77, at 5, 10; *Sierra Club*, 747 N.W.2d at 325.

¹⁵⁶ *Sierra Club*, 747 N.W.2d at 333–34.

¹⁵⁷ *Id.* at 333; MDEQ RULING 2005-01, *supra* note 77, at 13.

¹⁵⁸ *Sierra Club*, 747 N.W.2d at 333.

¹⁵⁹ *Id.* at nn.64, 65; *Environmental Defense Center*, 344 F.3d 832, 832 (9th Cir. 2003). Although the Michigan Court of Appeals is not bound by the *Waterkeeper* holding, it deferred to the reasoning of the federal court. *Sierra Club*, 747 N.W.2d at 333. The revised 2008 CAFO Rule confirms the conclusion of the Court of Appeals. Revised 2008 CAFO Rule, *supra* note 15, at 224, 229 (to be codified at 40 C.F.R. §§ 122.23(h)(1); 122.28(b)).

¹⁶⁰ *Waterkeeper*, 399 F.3d 486, 498 (2d Cir. 2005) (citing Federal Water Pollution Control Act, 33 U.S.C. § 1342(a)(2)). These requirements apply to state administered NPDES programs. 33 U.S.C. § 1342(b)(1)(A) (2000).

¹⁶¹ Seidenberg, *supra* note 49, at 707 (relating how a court suggested the EPA develop general permits).

¹⁶² *Natural Res. Def. Council v. Train*, 396 F. Supp. 1393, 1400–02 (D.D.C. 1975), *aff'd*, *Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 1381 (D.C. Cir. 1977).

¹⁶³ 40 C.F.R. §§ 122.23, 122.26, 122.33 (2008).

¹⁶⁴ The issues involve the enunciation of water quality standards required by the regulations and public participation. See *id.* (other general permitting regulations).

Over the years, EPA has relied on a self-regulatory system whereby approval of discharges under notices of intent lacked permitting authority oversight of how individual dischargers would meet regulatory requirements.¹⁶⁵ However, if federal regulations require “minimizing [nutrient] movement to surface waters”¹⁶⁶ or reduction in “the discharge of pollutants to the maximum extent practicable,”¹⁶⁷ these limitations necessarily involve some type of consideration of site-specific particulars. For a CAFO’s effluent limitations established in a nutrient management plan, the minimization of pollutant flows requires nutrient testing of manure and soils.¹⁶⁸ In the absence of information about management and conservation practices, protocols for applying manure to fields, and computerized studies matching expected nutrients with crop needs, minimization cannot be ascertained.¹⁶⁹ General permits do not include sufficient information to establish the required regulatory limitations on discharges. Rather, a potential discharger sets forth the required information in a nutrient management plan.

The *Environmental Defense Center* and *Waterkeeper* courts found the absence of review of a discharger’s measures to minimize pollutant discharges was contrary to the clear intent of Congress.¹⁷⁰ In its 2008 Rule, EPA requires every notice of intent (which in Michigan means a certificate of coverage) to include nine elements from the discharger’s nutrient management plan.¹⁷¹ These elements establish effluent limitations to minimize nutrient transport to surface waters.

With the adoption of the more detailed provisions of the 2008 Rule, the nutrient management details prescribed by general permits are insufficient to support the issuance of notices of intent.¹⁷² CAFO owners or operators seeking authorization for discharges accompanying their land application of manure need to do more than file a simple notice of intent under a general permit.¹⁷³ Instead, a CAFO owner or operator needs to delineate site-specific nutrient management practices to ensure appropriate agricultural utilization of nutrients from the manure they are applying to their fields.¹⁷⁴ The

¹⁶⁵ See *Environmental Defense Center*, 344 F.3d 832, 854 (9th Cir. 2003) (addressing EPA’s failure to regulate under a self-regulatory system employing general permits).

¹⁶⁶ 40 C.F.R. § 412.4(c)(2)(i) (2008) (applying to CAFOs).

¹⁶⁷ Federal Water Pollution Control Act, 33 U.S.C. § 1342(p)(3)(B)(iii) (2000) (applying to municipal storm sewers).

¹⁶⁸ 40 C.F.R. § 122.42(e)(1)(vii) (2008).

¹⁶⁹ *Id.* § 122.42(e)(1).

¹⁷⁰ *Environmental Defense Center*, 344 F.3d at 856; *Waterkeeper*, 399 F.3d 486, 498 (2d Cir. 2005).

¹⁷¹ Revised 2008 CAFO Rule, *supra* note 15, at 224; see *supra* notes 69–71.

¹⁷² Because there are no known discharge sites, a general permit cannot set forth specific effluent limitations required to minimize pollution.

¹⁷³ Notices of intent typically do not contain the details of a nutrient management plan but rather agree to develop and implement such a plan. See, e.g., MICHIGAN’S GENERAL PERMIT II, *supra* note 70, at pt. I.A.4.

¹⁷⁴ Revised 2008 CAFO Rule, *supra* note 15, at 224.

nutrient management particulars need to be available to the public, with some type of public participation.¹⁷⁵

Waterkeeper also noted that the public should be entitled to assist in the development and enforcement of effluent limitations.¹⁷⁶ Because notices of intent delineate effluent limitations that were not set forth in a general permit, the public participation opportunities accompanying the adoption of the general permit are insufficient.¹⁷⁷ Rather, the permitting authority needs to provide an opportunity for some type of meaningful public input concerning the plan of each permittee.¹⁷⁸ This does not necessarily mean that the permitting authority must hold a public hearing.¹⁷⁹ Given the focus and objectives of general permits, public input to notices of intent might involve public notification of the discharger's proposal and an opportunity to comment prior to the authorization of a discharge by the permitting agency.¹⁸⁰

VI. CONCLUSION

To restore the integrity of the nation's waters, Congress enacted the Clean Water Act with a statutory permitting system to allow qualifying discharges from point sources of pollutants. The Act intended to reduce water pollution through requirements mandating the adoption of technology and wastewater secondary treatment.¹⁸¹ Because desired water quality goals have not been met, petitions have been filed to seek compliance with the Act and accompanying rules.¹⁸² Judicial decisions from the Second and Ninth Circuit Courts of Appeal have advanced water quality goals by compelling EPA and permitting agencies to take additional action to stop unacceptable discharges.¹⁸³

¹⁷⁵ *Id.* (to be codified at 40 C.F.R. §§ 122.23(h)(1)); *see also Waterkeeper*, 399 F.3d at 503–04.

¹⁷⁶ *Waterkeeper*, 399 F.3d at 503.

¹⁷⁷ *See Sierra Club*, 747 N.W.2d 321, 334 (Mich. Ct. App. 2008) (acknowledging that Michigan's General Permit II did not provide for public participation in the development of comprehensive nutrient management plans).

¹⁷⁸ *Id.* at 335.

¹⁷⁹ *See Becker*, *supra* note 23, at 10,574 (observing that a notice and comment opportunity may suffice).

¹⁸⁰ *Sierra Club*, 747 N.W.2d at 334 (concluding that the permitting authority needs to allow public input in the development of effluent limitations prior to authorization of a discharge). The revised 2008 Rule adopts this public participation requirement for notices of intent. Revised 2008 CAFO Rule, *supra* note 15, at 224 (to be codified at 40 C.F.R. § 122.23(h)(1)).

¹⁸¹ Federal Water Pollution Control Act, 33 U.S.C. §§ 1311(b), 1342 (2000).

¹⁸² *See supra* note 14 and accompanying text.

¹⁸³ *Concerned Area Residents for the Env't*, 34 F.3d 114, 118 (2d Cir. 1994) (finding that manure application with runoff could be regulated as a point source); *Waterkeeper*, 399 F.3d 486, 500 (2d Cir. 2005) (finding the CAFO Rule failed to enunciate sufficient controls over CAFO manure discharges); *Environmental Defense Center*, 344 F.3d 832, 840 (9th Cir. 2003) (challenging an administrative rule issued by the EPA to control pollutants introduced by storm sewers); *Our Children's Earth Found.*, 527 F.3d 842, 844 (9th Cir. 2008) (alleging that the EPA failed to fulfill its mandate to review effluent

With respect to discharges from CAFOs, the *Waterkeeper* and *Sierra Club* decisions require agencies to expand their oversight of permitted dischargers. Due to the directions given by the *Waterkeeper* court, EPA has adopted a revised federal CAFO Rule that requires review and approval of nutrient management plans by the permitting authority.¹⁸⁴ Prior to the approval of a permit, including a notice of intent under a general permit, applicants will need to include nine elements from their nutrient management plan detailing effluent limitations.¹⁸⁵ Thereby, these elements will provide the information to establish standards so that the permitting agency can ascertain that the authorized discharges meet water quality objectives.¹⁸⁶ The judicial directives also require greater public participation in the development of a nutrient management plan that accompanies an application for a notice of intent or certificate of coverage.¹⁸⁷

Shortcomings of existing permitting regulations for CAFOs highlighted in the *Waterkeeper* and *Sierra Club* cases suggest that other state provisions for discharges under general permits may also be inadequate.¹⁸⁸ The judicial pronouncements and EPA's altered stance on effluent limitations mean permitting authorities will need to do more, but no clear answers are provided as to how much more is required.¹⁸⁹ The *Sierra Club* decision calls for an agency's mandatory review of a nutrient management plan to account for public comments.¹⁹⁰ EPA's revisions to the CAFO Rule in 2008 concerning notices of intent, public input, and approval by the permitting agency add considerably to the regulatory protection against unauthorized discharges.¹⁹¹

At the same time, the Clean Water Act was not intended to mandate excessive administrative requirements.¹⁹² Indeed, to the maximum extent possible, regulatory procedures employed to implement the Act were intended to "encourage the drastic minimization of paperwork and interagency decision procedures, and

guidelines); *Se. Alaska Conservation Council*, 486 F.3d 638, 654 (9th Cir. 2007) (finding discharge violations from mining activities).

¹⁸⁴ Revised 2008 CAFO Rule, *supra* note 15, at 224, 229 (to be codified at 40 C.F.R. §§ 122.23(h)(1), 122.42(e)).

¹⁸⁵ *Id.* at 95, 224, 229–30 (to be codified at 40 C.F.R. §§ 122.23(h)(1), 122.28(b)(2)(vii), 122.42(e)).

¹⁸⁶ *Id.* at 224.

¹⁸⁷ *Waterkeeper*, 399 F.3d at 503; *Sierra Club*, 747 N.W.2d 321, 334 (Mich. Ct. App. 2008).

¹⁸⁸ *See Environmental Defense Center*, 344 F.3d at 858.

¹⁸⁹ *See supra* note 74 and accompanying text.

¹⁹⁰ *Sierra Club*, 747 N.W.2d at 335.

¹⁹¹ Revised 2008 CAFO Rule, *supra* note 15, at 224 (to be codified at 40 C.F.R. § 122.23(h)(1)). This provides for a procedure for the public to comment and request a hearing, and requires the authoring Director to respond to significant comments. *Id.* Moreover, whenever a Director authorizes coverage of a CAFO operator or owner under a general permit, the terms of the nutrient management plan are incorporated as terms and conditions of the permit. *Id.*

¹⁹² *See Minan, supra* note 62, at 267, 298 (arguing that public participation does not require a hearing, as such would unduly burden permitting agencies).

the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.”¹⁹³ In developing and interpreting regulations governing general permits, EPA needs to account for practicalities of overseeing discharges.¹⁹⁴ To make the “best use of available manpower and funds,” a permitting system needs to consider the obligations placed on permittees and permitting authorities.¹⁹⁵

Although credible nutrient management plans are needed to minimize pollutant discharges, the *Waterkeeper* and *Sierra Club* decisions do not preclude the use of general permits. Rather, the courts castigated self-regulatory systems whereby permittees’ nutrient management plans determined authorized discharges due to the absence of agency oversight.¹⁹⁶ To comply with the courts’ directives, effluent limitations must be submitted to the permitting authority and made available for public input. Public input pursuant to administrative guidelines may or may not include a public hearing.¹⁹⁷ Since the approval process under a general permit is intended to be expeditious, in most cases, public participation in developing a notice of intent would involve submitted comments that are considered by the permitting agency.¹⁹⁸ If the submitted information shows nutrient management practices that ensure the appropriate agricultural utilization of nutrients, the permitting agency could proceed and issue the notice of intent authorizing discharges.

The judicial conclusions regarding a few glaring problems, such as no permitting authority approval, should not be employed to formulate a manure Gestapo approach for the implementation of effluent limitations.¹⁹⁹ States with credible NPDES programs should be provided flexibility within the regulations to utilize existing systems to address compliance issues.²⁰⁰ A decision by a court or

¹⁹³ Federal Water Pollution Control Act, 33 U.S.C. § 1251(f) (2000).

¹⁹⁴ See Gaba, *supra* note 48, at 457 (observing that practicality and efficiency do not translate into legality).

¹⁹⁵ See *supra* note 193, and accompanying text.

¹⁹⁶ *Waterkeeper*, 399 F.3d 486, 499–500 (2d Cir. 2005); *Sierra Club*, 747 N.W.2d 321, 327–28, 335 (Mich. Ct. App. 2008).

¹⁹⁷ See 33 U.S.C. § 1342(a)(1) (2000).

¹⁹⁸ See Brad Blank, Comment, *The Unitary Waters Approach: The Government’s Misguided Attempt to Limit the Reach of the Clean Water Act*, 42 SAN DIEGO L. REV. 1259, 1282 (2005) (noting the ability of general permits to streamline implementation of NPDES permits); Priscillia de Muizon, Note, “Meaningfully Distinct” Waters, the Unitary Waters Theory, and the Clean Water Act: Miccosukee v. South Florida Water Management District, 32 ECOLOGY L.Q. 417, 442 (2005) (advancing the concept that general permits can be issued quickly).

¹⁹⁹ See Terence J. Centner, *Concentrated Feeding Operations: An Examination of Current Regulations and Suggestions for Limiting Negative Externalities*, 25 COLUM. J. ENVTL. L. 219, 250 (2000) (advocating that an optimal strategy to regulate CAFO environmental problems is to use market incentives to account for environmental costs). The revised 2008 Rule requires consideration of the comments but does not require a public hearing. Revised 2008 CAFO Rule, *supra* note 15, at 224 (to be codified at 40 C.F.R. § 122.23(h)(1)).

²⁰⁰ See *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 85 (2d Cir. 2006) (acknowledging the flexibilities of the Clean Water Act and NPDES permitting

EPA to preclude the use of general use permits, or to impose so many conditions on the use of general permits that they become difficult to use, would be contrary to this statutory command.²⁰¹ Given the directives given by the *Waterkeeper* and *Sierra Club* courts, states should be able to restructure their general permitting provisions to comply with the Clean Water Act with a few changes concerning public participation and agency review.

While the courts and EPA are legitimately worrying about self-regulatory NPDES permitting systems, other issues may deserve greater attention. Comments on EPA's 2006 proposed amendments suggest a greater problem exists in the differences in state-administered NPDES programs.²⁰² Does our federal and state NPDES permitting system penalize dischargers who comply as opposed to unpunished shirkers?²⁰³ Are dischargers in the Second and Ninth Circuits, or selected states with excellent environmental compliance records, bearing greater financial burdens than corresponding businesses in other areas of the country? Given the reluctance of EPA to withdraw approval of a state-administered NPDES program, compliance with the Clean Water Act seems to be driven by disparate citizen actions and individualized state regulatory efforts.²⁰⁴ State decisions to not enforce water quality requirements and to not fund

provisions); *Citizens Coal Council v. U.S. Env'tl. Prot. Agency*, 385 F.3d 969, 983 (6th Cir. 2004) (finding that the EPA has considerable flexibility in framing permits to achieve reductions of pollutants), *rev'd on other grounds*, 447 F.3d 879 (6th Cir. 2006) (en banc); see also Comment attachment submitted by John W. Lincoln, President, New York Farm Bureau, to the U.S. EPA concerning the development of new CAFO regulations, Docket ID No. EPA-HQ-OW-2005-0037, Document ID No. EPA-HQ-OW-2005-0037-0595.1, at 2 (Aug. 29, 2006), available at <http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=09000064801c1b7f> [hereinafter New York Farm Bureau] (suggesting that flexibility is preferred to avoid unnecessary costs and to foster innovation).

²⁰¹ *Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist.*, 2006 U.S. Dist. LEXIS 89450, at *143 (S.D. Fla. Dec. 11, 2006) (agreeing with the Second Circuit that the Clean Water Act and NPDES permitting provisions are to provide flexibility in regulating discharges).

²⁰² New York Farm Bureau, *supra* note 200 (claiming that New York's CAFO program implements controls that vastly outdistance the water-quality efforts implemented in other states); see Letter from the Union of Concerned Scientists to the U.S. EPA concerning the development of new CAFO Regulations, Docket ID No. EPA-HQ-OW-2005-0037, Document ID No. EPA-HQ-OW-2005-0037-0613, at 5 (Aug. 29, 2006), available at <http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=09000064801c2822> (recommending the EPA establish more disincentives for operators who elect not to file permits).

²⁰³ Five years after the adoption of the 2003 CAFO Rule, EPA does not have not have a systematic way of identifying and inspecting all of the CAFOs nationwide that have been issued permits. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-944, CONCENTRATED ANIMAL FEEDING OPERATIONS: EPA NEEDS MORE INFORMATION AND A CLEARLY DEFINED STRATEGY TO PROTECT AIR AND WATER QUALITY FROM POLLUTANTS OF CONCERN 17 (2008) available at <http://www.gao.gov/new.items/d08944.pdf>; see also Centner, *supra* note 11, at 710–18 (noting problems in the enforcement of CAFO regulations).

²⁰⁴ Victor Flatt, *A Dirty River Runs Through It (The Failure of Enforcement in the Clean Water Act)*, 25 B.C. ENVTL. AFF. L. REV. 1, 31 (2004) (noting that EPA lacked the resources to oversee a state's water quality program so that the federal agency would not withdraw state approval of any state enforcement program).

2008] *INTERPRETATIONS OF PERMIT REQUIREMENTS FOR CAFOS* 127

compliance efforts are contributing to unpermitted discharges.²⁰⁵ Given individual state oversight of NPDES programs and the lack of enforcement, there is a race to the bottom to appease polluters and attract industry.²⁰⁶ Federalism was not intended to sanction these disparities in environmental quality.

²⁰⁵ See Clifford Rechtschaffen, *Enforcing the Clean Water Act in the Twenty-First Century: Harnessing the Power of the Public Spotlight*, 55 ALA. L. REV. 775, 782 (2004) (maintaining that study after study show repeated and flagrant violations of the Act); Richard Webster, *Federal Environmental Enforcement: Is Less More?*, 18 FORDHAM ENVTL. L. REV. 303, 314 (2007) (reporting EPA data showing low compliance rates for major discharges); U.S. GEN. ACCOUNTING OFFICE, LIVESTOCK AGRICULTURE: INCREASED EPA OVERSIGHT WILL IMPROVE ENVIRONMENTAL PROGRAM FOR CONCENTRATED ANIMAL FEEDING OPERATIONS 4 (2003), available at <http://www.gao.gov/new.items/d03285.pdf> (recommending that EPA increase its oversight of state CAFO regulations).

²⁰⁶ See David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not be a Crowd When Enforcement Authority is Shared by the United States, the States, and Their Citizens*, 54 MD. L. REV. 1552, 1615 (1995) (acknowledging that states are hesitant to penalize municipal governments and to impose penalties that might be perceived as creating a bad business climate); Erik R. Lehtinen, Note, *Virginia as a Case Study: EPA Should Be Willing to Withdraw NPDES Permitting Authority from Deficient States*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 617, 648 (1999) (claiming there is a race to the bottom under the Clean Water Act and that the EPA is powerless to stop it); Stephen C. Robertson, Note, *State Permitting: United States v. Smithfield Foods, Inc. and Federal Overfiling under the Clean Water Act*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 593, 602 (1999) (noting the race to the bottom theory and the threat of a large firm to leave the state of Virginia if the state agency enforced federal law).