Keeping the Citizens Out: How Virginia Has Manipulated the Mandate of the Clean Water Act

Demian Schane
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"The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."—James Madison

Traditionally, law enforcement authority has vested with the states. Before 1972, there were federal and state efforts to manage water pollution, but the states were in charge of establishing water quality standards and enforcing them. The failure of this polluter-friendly system was illustrated when the Cuyahoga River in Cleveland, Ohio burst into flames. When Congress enacted the 1972 Amendments to the Clean Water Act ("CWA" or "Act"), it sought to revitalize the health of our waters and to promulgate enforcement mechanisms to protect them for the future.

The CWA envisions a collaborative effort among states, citizens, and the federal government. A current view of the Act's structure is that the federal and state governments play the leading role in enforcement, while citizens fill in the gaps. This triumvirate, however, has not provided the remedy for poor water quality that the CWA originally intended. A major problem has been enforcement of the Act's standards.

In Virginia, the courts and legislature have weakened considerably the

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3 See id. at 5.


5 Congress stated that its goal was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a) (1994).

6 See North & South Rivers Watershed Ass'n v. Town of Scituate, 949 F.2d 552, 555 (1st Cir. 1991) (citing Gwaltney of Smithfield v. Chesapeake Bay Found., 484 U.S. 49, 60 (1987)).

7 See generally ADLER ET AL., supra note 2 (citing enforcement problems under the CWA).
citizen's role in enforcing the CWA. Termed citizen attorneys general, interested persons normally can enforce the provisions of the CWA by filing suits in court when a permit is violated or when a permit does not meet the requirements of the CWA, but the Environmental Protection Agency ("EPA") issued it anyway. Virginia courts have curtailed this role by denying standing to those citizens who challenge the legality of state-issued pollution permits.8

Responding to petitions from several environmental groups, the EPA proposed to amend the requirements a state must satisfy in order to receive federal authorization for implementing a permit program under section 402 of the CWA.9 If EPA promulgates the proposal, the CWA would "require that state law must provide any interested person an opportunity to challenge the approval or denial of 402 permits issued by the State in State court."10 This change targets Virginia and would reverse Virginia's current practice.11 As a result, Virginia's Attorney General ("Attorney General") and Department of Environmental Quality ("DEQ")12 submitted comments opposing EPA's proposal.

This Note examines the need for and the legality of this proposed rule. It accomplishes this end through a study of the CWA, Virginia's implementation of section 402's permit program, and related legal issues. Specifically, Part I briefly explores the structure of the permitting scheme under the CWA. Part II discusses the standing doctrine and how the Virginia courts and legislature have frustrated the CWA's mandate that public participation in enforcing the CWA be encouraged.13 Part III focuses on the basis for EPA's proposed rule and illustrates Virginia's challenge to it. Lastly, Part IV examines a permit issued by DEQ and concludes that EPA's proposed rule is needed in order to effectuate the intent behind the CWA.

8 See discussion infra Part II.A.
10 Id. (emphasis added).
11 Other states also would be affected. See ADLER ET AL., supra note 2, at 166 n.148.
12 The DEQ is Virginia's equivalent of the federal EPA. Before the DEQ was created, Virginia's environmental regulations were managed by the State Water Control Board ("SWCB"). DEQ replaced this agency in 1994.
I. THE PERMIT PROCESS UNDER THE CWA

The Clean Water Act deems "the discharge of any pollutant by any person shall be unlawful"\(^\text{14}\) except under certain circumstances such as pursuant to a National Pollutant Discharge Elimination System ("NPDES") permit.\(^\text{15}\) The Act defines the "discharge of any pollutant"\(^\text{16}\) as "any addition of any pollutant to navigable waters from any point source."\(^\text{17}\) Any "person"\(^\text{18}\) who discharges or wants to discharge a pollutant from a point source into the waters of the United States must apply for a permit.\(^\text{19}\)

A. Obtaining a Permit

In order to obtain a permit, an applicant must provide EPA with information regarding the planned facility and its proposed discharges.\(^\text{20}\) The applicant also must obtain certification from the state in which the discharge originates.\(^\text{21}\) The state's certification ensures that the discharge complies with all applicable state water quality standards.\(^\text{22}\)

\(^\text{14}\) CWA § 301(a), 33 U.S.C. § 1311(a).
\(^\text{15}\) Under the Act, a "'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural wasted discharged into water." CWA § 502(6), 33 U.S.C. § 1362(6).
\(^\text{16}\) CWA § 502(12), 33 U.S.C. § 1362(12). "The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." CWA § 502(14), 33 U.S.C. § 1362(14).
\(^\text{17}\) The Act defines "person" to include "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." CWA § 502(5), 33 U.S.C. § 1362(5).
\(^\text{18}\) See THE CLEAN WATER ACT HANDBOOK 60 (Parthenia B. Evans ed. 1994).
\(^\text{22}\) See 40 C.F.R. § 124.55.
If these requirements are met, EPA prepares a draft permit and explanatory fact sheet.\textsuperscript{23} EPA then provides the public with notice, thereby initiating a thirty-day public comment period.\textsuperscript{24} During this comment period, persons who believe the proposed permit is improper must raise all reasonably ascertainable issues and arguments in support of their position.\textsuperscript{25} Furthermore, during this period any interested person can request a public hearing.\textsuperscript{26} Once the comment period and hearing (if requested) end, EPA considers the administrative record compiled during the comment period and determines whether the permit should be issued.\textsuperscript{27}

After EPA makes its final decision on the permit, any interested party may request an evidentiary hearing\textsuperscript{28} to challenge EPA’s resolution of any issue raised during the comment period.\textsuperscript{29} If EPA denies a request for an evidentiary hearing, then after thirty days, the decision constitutes final agency action unless an appeal is made to the Environmental Appeals Board (“Board”).\textsuperscript{30} If the Board denies this appeal (or hears it but affirms the decision), then the decision is final.\textsuperscript{31} Under section 509(b)(1) of the CWA, “any interested person” may obtain review of the EPA’s final permit decision.\textsuperscript{32}

B. State Implementation of the NPDES Permit Program

Section 402 of the CWA governs the permitting process. Under subsection (a), EPA has the authority, after a public hearing, to issue a permit for the discharge of any pollutant. A state, however, may assume this permit-issuing authority unless EPA determines the state does not meet certain

\textsuperscript{23} See id. §§ 124.6, .8, .56.
\textsuperscript{24} See id. § 124.10(a)(1)(ii), (b)(1).
\textsuperscript{25} See id. § 124.13.
\textsuperscript{26} See id. § 124.11.
\textsuperscript{27} See id. §§ 124.15, .18, .19.
\textsuperscript{28} Evidentiary hearings typically are more formal than a public hearing in that they are more adjudicatory in nature and therefore, normally involve a formal record. See Hamilton, Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking, 60 CAL. L. REV. 1276 (1972).
\textsuperscript{29} See 40 C.F.R. § 124.74(a).
\textsuperscript{30} See id. §§ 124.60(c)(5), .91.
\textsuperscript{31} See id. § 124.91(f)(1). See generally Adams v. Environmental Protection Agency, 38 F.3d 43, 47-48 (1st Cir. 1994) (discussing final agency action).
At a minimum, the state must demonstrate it has the capability to issue permits, to modify or terminate them, to ensure that the public and any affected state receive notice for each permit application, to provide an opportunity for public comment and a hearing on permit decisions, to abate permit violations, and to provide appropriate civil and criminal penalties as enforcement mechanisms. If a state meets these requirements, EPA must approve its program.

EPA can still revoke its approval should the state fail to maintain section 402's requirements of the permit program. The CWA provides:

Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program.

EPA must first notify the state of its intention to withdraw the program and supply it with the reasons for its decision. In addition to the power of revocation, the CWA enables EPA to oversee a state's permit program.

Where a state has assumed the permit issuing power, the CWA requires the state to submit a copy of every permit application to EPA. At this point, EPA can object to the permit and, provided EPA follows the notice

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33 See CWA § 402(b), 33 U.S.C. § 1342(b).
34 The modification or termination could occur when a permit holder violates the set conditions or makes misrepresentations in obtaining the permit or when changes in any condition occur that require either a reduction or end to the permitted discharge. See CWA § 402(b)(1)(C)(i)-(iii), 33 U.S.C. § 1342(b)(1)(C)(i)-(iii).
35 See CWA § 402(b), 33 U.S.C. § 1342(b).
36 See THE CLEAN WATER ACT HANDBOOK, supra note 19, at 75-76.
37 See CWA § 402(b), 33 U.S.C. § 1342(b).
38 CWA § 402(c)(3), 33 U.S.C. § 1342(c)(3).
39 See id.
40 See id. § 1342(d)(1).
and statement of reasons guidelines, the state cannot issue the permit. In practice, however, EPA does not review all permit actions; instead, EPA and the state draw up a Memorandum of Agreement ("MOA") which identifies those categories of permits EPA will review. After the permit is approved, citizen attorneys general can challenge its legality. This attack is only possible where citizens have standing.

Section 505 of the CWA provides citizens with a right to judicial review in certain circumstances and under certain conditions. It states:

> [A]ny citizen may commence a civil action on his own behalf—(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Thus, where EPA runs the NPDES program, interested citizens can file claims against polluters who violate their permits and against EPA when it issues a permit in violation of the standards established under the CWA. In Virginia, however, courts no longer grant standing to citizen attorneys general who seek to challenge the DEQ for issuing a permit that does not

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41 See id. § 1342(d)(2). EPA must submit in writing the reasons for the objection and the actions that must be taken to eliminate the objection, including the effluent limitations and conditions that the permit would include if issued by the EPA. See id.

42 See THE CLEAN WATER ACT HANDBOOK, supra note 19, at 76. EPA may not waive review of "discharges into the territorial sea; discharges which may affect the waters of a state other than the one in which the discharge originates; discharges proposed to be regulated by general permits . . . ." Id.

43 CWA § 505(a), 33 U.S.C. § 1365(a).

44 See CWA § 509(b)(1)(F), 33 U.S.C. § 1369(b)(1)(F) (Stating that any interested person may seek review of EPA’s issuance or denial of a NPDES permit); see also Adams v. Environmental Protection Agency, 38 F.3d 43, 48 (1st Cir. 1994) ("[O]nce an EPA permit decision has become final, any interested person may obtain judicial review of the decision by petitioning for review in the Circuit Court of Appeals.") (emphasis added).
comport with the standards of the CWA.

II. CHALLENGING STATE ISSUED PERMITS IN VIRGINIA

A. Standing

Although the CWA broadens the "categories of injury that may be alleged in support of standing," a plaintiff still must satisfy the constitutional requirements for standing to exist.45 The Supreme Court has recognized three minimal conditions that must be proven.46 First, the plaintiff must have suffered an "injury in fact;" second, there must be a causal relationship such that the injury is traceable to the defendant's conduct; and third, the injury will likely be redressed by a favorable judicial decision.47 In environmental actions, plaintiffs have met these minimal requirements where they suffered injury to their aesthetic or recreational interests so long as the interest was more than a general environmental protectionist one.48 Because these are only the minimum requirements, Congress or state legislatures are free to enact statutes that create more stringent standing prerequisites.

Virginia assumed authority to issue NPDES permits (known as VPDES permits), but in doing so, Virginia's legislature also created stricter standing requirements than the CWA when it passed the State Water Control Law ("SWCL"). This decision contradicts Congress' stated policy that "[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States."49

46 These requirements are derived from Article III of the Constitution which "limits the jurisdiction of federal courts to 'Cases' and 'Controversies' . . . ." Id. at 559.
47 See id. at 560-61.
48 See THE CLEAN WATER ACT HANDBOOK, supra note 19, at 219.
B. Virginia’s Standing

In Virginia, citizens are prevented from using the judicial system to ensure that permits are lawful. This obstacle is the result of Virginia’s state courts’ resolution of a conflict between Virginia’s Administrative Process Act (“VAPA”) and its State Water Control Law. VAPA indicates that

[a]ny person affected by and claiming the unlawfulness of any regulation, or party aggrieved by and claiming unlawfulness of a case decision, . . . shall have a right to the direct review thereof by an appropriate and timely court action against the agency as such or its officers or agents in the manner provided by the rules of the Supreme Court of Virginia.50

Virginia’s Water Control Law provides “[a]ny owner aggrieved by a final decision of the [State Water Control] Board51 . . . is entitled to judicial review thereof in accordance with the provisions of the Administrative Process Act.”52 Reconciling the difference between “person affected” and “owner aggrieved,” Virginia courts have held the state legislature incorporated the restrictive latter to supersede the former for actions based on section 62.1-44.29 of the SWCL.53

Virginia Beach Beautification Commission v. Board of Zoning Appeals,54 Environmental Defense Fund v. Virginia State Water Control Board,55 and Town of Fries v. State Water Control Board56 demonstrate this interpretation. In Virginia Beach Beautification Commission, the Supreme Court of Virginia affirmed the trial court’s decision that the Virginia Beautification Commission (“Commission”) lacked standing.57

51 The State Water Control Board (“SWCB”) has been incorporated into the Department of Environmental Quality (“DEQ”). See supra note 12.
52 State Water Control Law, VA. CODE ANN. § 62.1-44.29 (Michie 1995) (emphasis added).
53 See supra text accompanying note 28 to contrast the liberal standing provided where the EPA issues the permit.
54 344 S.E.2d 899 (Va. 1986).
57 See 344 S.E.2d at 903.
Commission was a 400-member corporation whose goal was "to help make and keep Virginia Beach one of the most beautiful cities in the state." When the Board of Zoning Appeals ("Board") approved a plan to permit construction of an advertising sign on a highway, the Commission sued in an attempt to reverse the Board's decision.

The Commission filed its suit pursuant to a Virginia statute which provides that any person "aggrieved" by any decision of the Board of Zoning Appeals can seek judicial review. The thrust of the court's decision was that for a person to be "aggrieved," she must have some direct interest in the subject matter of the claim. The court further elaborated that a direct interest means the person must have "an immediate, pecuniary and substantial interest in the litigation, and not a remote or indirect interest." Thus, according to the court, "[t]he word 'aggrieved' in a statute contemplates a substantial grievance and means a denial of some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally." Because the Commission owned no property within or in close proximity to the advertising sign, it did not qualify as an "aggrieved" party.

In Environmental Defense Fund v. Virginia State Water Control Board, SWCB had granted a poultry processing plant's request to modify its discharge permit such that it could discharge differing amounts of effluent in correlation with changes in the river flow rates. Under the modified permit, the plant could discharge higher amounts during the rainy season when the river flow was high and lower amounts during the dry season when the river flow was low. The Environmental Defense Fund ("EDF") contested the

58 Id. at 902.
59 See id. at 900.
60 See id. at 902.
61 See id.
62 Id. (quoting from Nicholas v. Lawrence, 171 S.E. 673, 674 (Va. 1933)).
63 Id. at 902-03.
64 See id. at 903.
66 See id.
validity of the permit.\textsuperscript{67} The Virginia Court of Appeals affirmed the trial court’s holding that EDF lacked standing.

The court held that when a law contains a specific standing requirement, that requirement “is controlling over the standardized court review” in the Virginia Administrative Process Act.\textsuperscript{68} Therefore, in order for EDF to have standing, it had to demonstrate that it was an “owner aggrieved” as incorporated in the State Water Control Law and not merely a party “affected.”\textsuperscript{69} The court focused on who was an owner, and it agreed with the lower court that an owner is “‘any entity subject to the State Water Control Board’s power and jurisdiction; i.e., any entity which owns or operates an actual or potential discharge source or a permit issued by the Board.’”\textsuperscript{70}

Finally, in \textit{Town of Fries v. State Water Control Board}, the Virginia Court of Appeals demonstrated how the narrow meaning of “owner aggrieved” restricts judicial review of state issued permits. The Town of Fries, the Fries Civic League, Natural Sands and Products, Inc., and fifteen riparian landowners sought judicial review of a VPDES permit granted by SWCB to the City of Galax.\textsuperscript{71} The permit authorized the City of Galax “to build an enlarged sewage treatment plant that would discharge directly into the New River, upstream of the Town of Fries.”\textsuperscript{72} Citing \textit{Virginia Beach Beautification Commission and Environmental Defense Fund}, the court held that none of the plaintiffs was an “owner aggrieved,” and that therefore they

\textsuperscript{67} See id. at 730. In addition, the processing plant had requested the permit modification pursuant to an SWCB internal memorandum permitting all regional directors to employ flow-tiered standards in VPDES permits. See id. at 729. EDF challenged the validity of using this memorandum as a rule or regulation because it was not promulgated in accordance with the rulemaking procedures outlined in the Virginia Administrative Process Act. See id. at 730. The court never addressed this issue because it found EDF lacked standing. See id. at 732.

\textsuperscript{68} Id.

\textsuperscript{69} Although the trial court had ruled EDF was neither a “party” nor “affected,” the court of appeals held that only the restrictive “owner aggrieved” standard should be applied. See id. at 730-32.

\textsuperscript{70} Id. at 732 (quoting from the trial court). The court further noted this interpretation coincided with the Legislature’s 1990 amendment to the SWCL which further limited the definition of owner to one “‘that owns, operates, charters, rents, or otherwise exercises control over or is responsible for any actual or potential discharge of sewage, industrial wastes, or other wastes to state waters . . . .’” Id. (quoting from State Water Control Law, VA. CODE ANN. § 62.1-44.3(5) (Michie 1995)).


\textsuperscript{72} Id. at 635-36.
failed to prove standing.\textsuperscript{73}

The Town of Fries represented citizens who intended to use the New River for drinking water, the fifteen individuals "simply own[ed] land adjoining the New River, and, although Natural Sands and Products, Inc., held a VPDES permit, its only interest was due to the possible degradation of New River."\textsuperscript{74} Although this interest may not have been sufficient to constitute an "owner aggrieved" and, thus, to satisfy Virginia's standing requirement, the Town of Fries would have standing in federal court to challenge EPA for issuing the same permit. Under section 509(b) of the CWA, "any interested person" may challenge EPA for issuing a permit that allegedly violates the Act.\textsuperscript{75} The Supreme Court of the United States has noted that "[t]he review provisions of § 509 are open to '[a]ny person,' and thus provide an additional procedure to 'private attorneys general' seeking to enforce the Act . . . ."\textsuperscript{76} To remedy the inconsistency between Virginia's permit program and those that the federal government runs, EPA proposed to augment the requirements a state must meet to assume control of the NPDES permit program.

III. THE PROPOSAL

The EPA cites sections 101(e), 304(i), 402(b) and (c), and 501(a) of the CWA for its authority to promulgate the rule.\textsuperscript{77} Section 501(a) authorizes EPA to "prescribe such regulations as are necessary to carry out [its] functions under this chapter."\textsuperscript{78} According to Congress, one of EPA's functions is to foster public participation in enforcing the CWA.

Section 101(e) states, "[P]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this

\textsuperscript{73} See id. at 637.
\textsuperscript{74} Id.
\textsuperscript{77} See Amendment, supra note 9, at 14,589.
\textsuperscript{78} CWA § 501(a), 33 U.S.C § 1361(a).
chapter shall be provided for, encouraged, and assisted by the Administrator and the States." 79 This section clearly demonstrates one congressional goal in implementing the CWA. Furthermore, the legislative history of this section supports EPA’s argument that Congress intended to promote public participation in the enforcement process. The Senate report claimed, "[a] high degree of informed public participation in the control process is essential to the accomplishment of the objectives we seek—a restored and protected natural environment." 80 Thus, as a general statement of policy, section 101(e) supports EPA’s proposed rule. The other sections EPA cites provide the specific powers upon which EPA relies for instituting the additional requirement that a state provide access to its courts to any interested person when contesting the approval or denial of a NPDES permit. Virginia’s challenge to EPA’s authority for implementing this proposal is unpersuasive.

In his comments to EPA, Virginia’s Attorney General made four arguments contesting the legality of requiring states to provide judicial review to citizens who wish to challenge the approval or denial of state issued NPDES permits. 81 First, he argued Congress did not grant EPA authority to impose such a requirement. 82 He stated that EPA’s reliance on sections 402(b) and 304(i) for its authority to promulgate the proposed rule was misplaced. 83 The Attorney General’s arguments, however, are unconvincing. They focus on each section in isolation and construe EPA’s authority under the CWA too narrowly.

According to Virginia’s Attorney General, "[t]he plain reading of § 402(b) does not lend itself to an interpretation that Congress intended EPA to interfere with the judicial review and citizen standing provisions of state law." 84 Furthermore, because Virginia meets all of the requirements of section 402(b) and because the section states the Administrator “shall approve” a state program if those elements are met, EPA is without authority

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79 CWA § 101(e), § 1251(e) (emphasis added).
82 See id. at 5.
83 See id. at 5-6.
84 Id. at 5.
to alter Virginia’s permit program. Section 402(b), however, provides EPA with sufficient discretion to find Virginia’s program inadequate.

Under section 402(b), “[t]he Administrator shall approve each submitted program unless he determines that adequate authority does not exist . . . to abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.” Therefore, in order to ensure the states themselves do not violate the permit program, EPA could require a state to provide citizen attorneys general with access to its courts.

One challenge to this interpretation contends that this section does not apply to a state that violates the permit program but only to a permit holder. Supporting this contention, one could argue that because section 402(d)(2) provides EPA with the right to object to a permit, Congress provided EPA with sufficient oversight of the states. Furthermore, because Congress spoke on the issue, an interpretation of section 402(b)(7) giving EPA authority to require states to permit citizen attorneys general the right to object to a permit would render section 402(b) superfluous. This challenge, however, would probably fail because section 402(b)(7) is general enough to be viewed as an additional precaution in the event EPA is incapable of reviewing every state-issued permit. In fact, EPA’s resources are so inadequate that it reaches agreements with states stipulating it will review only certain types of

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85 See id. 86 CWA § 402(b), 33 U.S.C. § 1342(b) (1994) (emphasis added). In its proposed rule, EPA did not cite CWA § 402(b)(7) but relied on § 402(b)(3) which provides that the Administrator will approve a state permit program if it “insure[s] that the public, and any other State the waters of which may be affected, receive[s] notice of each application for a permit and provide[s] an opportunity for public hearing before a ruling on each such application.” Amendment, supra note 9, at 14,589 (quoting CWA § 402(b)(3), 33 U.S.C. § 1342(b)(3)). Virginia’s Attorney General correctly challenges this purported basis for the proposed rule. He argues EPA improperly treats public participation under section 402(b)(3) as synonymous with judicial review. See Letter from the Attorney General, supra note 81, at 8. Section 402(b)(3) provides EPA need not approve a state permit program unless the state is able to “insure that the public . . . receive[s] notice of each application for a permit and provide an opportunity for public hearing before a ruling on each such application . . . .” CWA § 402(b)(3), 33 U.S.C. § 1342(b)(3). The “public participation” requirement does not demand a state to provide a trial. Under the Federal Administrative Procedure Act, an agency must hold a formal hearing when the statute requires a determination “on the record after opportunity for an agency hearing.” 5 U.S.C. § 554(a) (1994). The broad scope of section 402(b)(7) of the CWA, however, supplies EPA with the proper authority. See infra text accompanying note 87.
permits. The Virginia Attorney General’s second argument focused on EPA’s alleged authority under section 304(i). This section authorizes EPA to:

promulgate guidelines establishing the minimum procedural and other elements of any State program under section 1342 of this title, which shall include: (A) monitoring requirements; (B) reporting requirements (including procedures to make information available to the public); (C) enforcement provisions; and (D) funding, personnel qualifications, and manpower requirements (including a requirement that no board or body which approves permit applications or portions thereof shall include, as a member, any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit).

The Attorney General’s contention was that this section “appears to provide EPA with even less authority than § 402(b) . . . .” The problem with this argument is that it assumes the four listed types of requirements EPA must create are the only types it can create. The statute, however, is not restrictive because it states that the requirements “shall include.” Therefore, this part of the Attorney General’s challenge to EPA’s proposal also must fail.

The Attorney General’s third contention was that Congress clearly required judicial review of “[a]ction of the State regulatory authority pursuant to an approved State program” in the Surface Mining Control and Reclamation Act (“SMCRA”); therefore, it knew how to impose such specific requirements but chose not to do so in the CWA. Although this argument is not without merit, it fails for two reasons.

First, the fact that two statutes do not use the same language but permit the same regulations should not be dispositive. Unlike the Office of Surface Mining Reclamation and Enforcement in the SMCRA, Congress may have wanted to give EPA broader authority to decide which requirements to

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87 See supra text accompanying note 42.
88 CWA § 304(i), 33 U.S.C. § 1314(i) (emphasis added).
89 Letter from the Attorney General, supra note 81, at 5.
90 See id. at 6 (quoting SMCRA § 526(e), 30 U.S.C. § 1276(e) (1994)).
impose on a state's permit program. Furthermore, this distinction is supported by Congress' express desire that EPA, "in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation . . ." The SMCRA does not contain similar language.

Second, provided EPA's interpretation of the CWA is reasonable, its determination must govern:

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.

The permissibility of EPA's construction is demonstrated in the broad language of sections 101, 304, 402, and 505 of the CWA.

Finally, Virginia's Attorney General sought asylum in the Tenth Amendment and claimed the proposed rule requires a state to waive its

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91 Virginia's Attorney General tries to strengthen his argument by noting that the CWA's amendments were passed contemporaneously with SMCRA (in 1977). See Letter from the Attorney General, supra note 81, at 6. This point is not dispositive; furthermore, the relevant provisions of the CWA were part of the original act passed in 1972.
92 CWA § 101(e), 33 U.S.C. § 1251(e).
94 See discussion supra Part III.
sovereign immunity. He cited Gregory v. Ashcroft and claimed in order to interfere with matters concerning a state's sovereign powers, Congress must have made its intent "unmistakably clear" in the pertinent statute. Because the CWA allegedly is silent on State court review of State permitting decisions, Congress' intent was not "unmistakably clear." Thus, the Attorney General concluded that EPA's proposal would violate the Tenth Amendment. There are two flaws in this claim: first, the Attorney General's reliance on Gregory is misplaced, and second, he ignored prior case law more on point.

The Attorney General used Gregory for the proposition that "where Congress intends to interfere with the judgment of State authorities in a matter which concerns the State's sovereign powers, that intent must be made unmistakably clear in the language of the statute." Thus, because the CWA is silent on judicial review in state courts of state permitting decisions, the Attorney General argued EPA cannot interfere with Virginia's standing provisions concerning the permit program. He maintained that "before the EPA [can] assume the authority to interfere with the judgments of State authorities concerning the nature and extent of a waiver of sovereign immunity, that authority must be clearly and unmistakably conferred by Congress in the CWA." This argument assumes, however, that the operation of the NPDES permit program is "a matter which concerns the State's sovereign powers" and thus is subject to the the court's mandate in Gregory.

The issue in Gregory involved a matter more relevant to a state's sovereign powers. In Gregory, Missouri state judges challenged the Missouri Constitution's mandatory requirement that all judges retire when they reach the age of seventy. In affirming its constitutionality, the Supreme Court noted, "This provision goes beyond an area traditionally regulated by the

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95 See Letter from the Attorney General, supra note 81, at 7. Gilmore does not address EPA's claim that sections 101(e) and 501(a) also support the proposal's validity.
97 See Letter from the Attorney General, supra note 81, at 7.
98 See id.
99 Id.
100 See id.
101 Id.
States; it is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.  

Although the states originally regulated pollution, such power does not define a state "as a sovereign." Moreover, where Congress promulgates federal environmental regulation such that the states may play an active role in its implementation, the Supreme Court has rejected Tenth Amendment challenges.

In *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, the Court denied a Tenth Amendment challenge to the Surface Mining Control and Reclamation Act. The Court explained:

> [T]he States are not compelled to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government. Thus, there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a regulatory program. . . . The most that can be said is that the Surface Mining Act establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.

Like the SMCRA, the CWA does not require states to participate; it is optional. Furthermore, as Congress could have enacted a statute prohibiting any state regulation of surface coal mining, the Court found irrational any suggestion that the Act became "constitutionally suspect simply because Congress chose to allow the States a regulatory role." Thus, because

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103 *Id.* at 461.
105 *Id.* at 288-89.
106 *Id.* at 290.
Virginia’s right to control its pollution permit program is not a fundamental sovereign power and because its participation in the regulatory scheme is voluntary, the Attorney General’s Tenth Amendment challenge to EPA’s proposal must also fail.

IV. CONCLUSION

As a result of Virginia’s “owner aggrieved” standing requirement, the only entity who can challenge the legality of a VPDES permit is the permit holder. Although DEQ must submit proposed permits to EPA which can object or make recommendations to the proposed permit within thirty days from the date of receipt, EPA lacks adequate resources to effectively oversee every detail of VPDES permits. There is no reason to assume a VPDES permit holder would object to its permit on the grounds that it is too lenient; therefore, in drafting permits, DEQ has no incentive to create stringent discharge limits. Allied Corporation’s (“Allied”) permit to discharge pollution into the James River in Hopewell, Virginia demonstrates this problem.

On March 31, 1995, DEQ renewed Allied’s VPDES permit. Allied discharges pollutants into Gravelly and Poythress Runs which are tributaries that lead into the James River. Although the permit designates these tributaries as the receiving streams, the permit allows Allied to calculate

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107 As compared to the CWA’s “interested person” standard. See text accompanying notes 32 and 50.


109 See Hodas, supra note 15, at 1604, for the proposition that in order to create compliance with environmental laws, four elements are required: “(1) significant likelihood that violation will be detected; (2) swift and sure enforcement response; (3) appropriately severe sanctions; and (4) that each of these factors will be perceived as real.” The government, however, does not, nor ever will, have the sufficient resources to meet these requirements.

110 Occasionally one may encounter a benevolent corporation willing to challenge DEQ because its VPDES permit does not meet the CWA’s minimum requirements.

111 DEQ Permit No. VA0005291 (copy on file with William & Mary Environmental Law & Policy Review) [hereinafter Permit].

112 Receiving streams are those bodies of water into which Allied directly pollutes.
KEEPING THE CITIZENS OUT

the level of pollution based on the water quality standards of the James River. Thus, the permit effectively treats Gravelly and Poythress Runs as an extension of Allied's discharge pipe and not as state waters.

Environmental groups challenged the validity of this permit. These groups set forth two arguments. First, challenging DEQ's claim that the tributaries are ephemeral streams and the permit, therefore, should be based on the James River, which is the nearest free-flowing stream, the groups contended DEQ's definition of ephemeral streams did not apply. In an internal memorandum, DEQ had defined an ephemeral stream as one that "would normally have no active aquatic community." A fishery survey, however, reported the presence of at least thirteen species in Gravelly Run. Second, the environmental groups noted that Virginia's State Water Control Law defined state waters as "all waters, on the surface and under the ground . . . ." Furthermore, Hopewell designated the land surrounding Gravelly Run as a "Resource Protection Area" to be protected under the Chesapeake Bay Preservation Act. Thus, the environmental groups argued Gravelly Run is a part of the state's waters and should be the body of water from which Allied calculates the level of water toxicity. Unable to make their challenges in a state court, the groups could only request a formal public hearing from DEQ. DEQ denied any changes. Instead, DEQ held a meeting where the members of the public could offer their comments. Following

113 See Permit, supra note 111.
115 See Letter from Chesapeake Bay Foundation to Department of Environmental Quality, supra note 114.
116 Id. (citing from Larry G. Lawson and Alan J. Anthony, Department of Environmental Quality, OWRM Program Guidance Memorandum 91-002 (Jan. 15, 1992)).
117 See id.
118 Letter from Public Employees for Environmental Responsibility to Department of Environmental Quality, supra note 114 (citing VA. CODE ANN. § 62.1-10 (Michie 1992)).
119 See Letter from Chesapeake Bay Foundation to Department of Environmental Quality, supra note 114.
120 See id.; see also Letter from Public Employees for Environmental Responsibility to Department of Environmental Quality, supra note 114.
121 Interview with Roy Hoagland, Attorney for Chesapeake Bay Foundation, in Richmond, Va. (Feb. 1, 1996).
the meeting, no action occurred, and the Allied permit remained unchanged.

Had EPA never delegated to Virginia the authority to run the NPDES program and had EPA issued the Allied permit, citizens could have challenged the permit in federal court. Without the availability of such a challenge, there remains no realistic check. It is unlikely the holder will complain, and because of the strain on EPA's resources, the federal government has basically abandoned its enforcement role in states that run the NPDES permit program. Moreover, Virginia has an incentive to continue issuing permits that violate the standards of the CWA in favor of the polluter/holder: it can induce businesses to locate within its borders with assurances of lax standards and weak enforcement which translate into economic advantages over competitors in states with more stringent pollution requirements.

EPA's proposed rule will guarantee that private citizens will be able to protect the waters of their state. Congress envisioned that citizens play such a role and provided EPA with significant power to ensure it. As the rule is legally valid, EPA should promulgate its proposal so that citizen attorneys general will be able to continue their effective enforcement of the CWA and uphold the pollution limits created by the CWA.

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122 See CWA § 505(a), 33 U.S.C. § 1365(a) (1994). Note, however, that the citizens first would have had to raise the challenge with EPA. See CWA § 505(b)(1)(A), 33 U.S.C. § 1365(b)(1)(A). Once EPA's decision to issue the permit became final, then the citizen group could have challenged the permit in federal district court. See Federal Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1994).

123 See generally Hodas, supra note 15.

124 The businesses would be able to spend less on cleaning up and also worry significantly less about possible litigation costs. See id. at 1615-18; see also Cathryn McCue, Virginia Polluters Go Free, Critics Say, ROANOKE TIMES & WORLD NEWS, Jan. 8, 1995, at A1 (DEQ's "desire to avoid adversarial relationships with industries and localities, whom it refers to as 'customers,' has influenced how permits are written, how fast they're issued, how policies are made and how enforcement is pursued, [DEQ] employees say.")

125 As of 1993, "citizen suit judicial enforcement nearly equaled all CWA judicial enforcement efforts brought throughout the nation by all the states and the federal government combined." Hodas, supra note 15, at 1620.