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THE CLEAN WATER ACT'S ANTIDEGRADATION POLICY: HAS IT BEEN “DUMPED”?

KATHERINE A. ZOGAS*

I. INTRODUCTION

“BP gets break on dumping in lake” is what the headline of the paper read on July 15, 2007.¹ “BP” was British Petroleum America (“BP”), the “lake” was Lake Michigan, and the “dumping” was of pollutants.² Lake Michigan is the largest body of fresh water that rests completely within the U.S.³ It provides drinking water for six million people in Northeast Illinois and provides recreation for citizens of Indiana, Illinois, Wisconsin, and Michigan.⁴ BP sought to have its National Pollutant Discharge Elimination System (“NPDES”) permit renewed so that it could increase its refinery discharges into the Lake in contemplation of expanding its oil refinery in Whiting, Indiana.⁵ The newspaper headline was simply a sign of the times. The “break” given to BP reminded the public that the Federal Water Pollution Control Act, more commonly known as the Clean Water Act (“CWA”), was still very much a part of the times.⁶

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1. Michael Hawthorne, *BP Gets Break on Dumping in Lake*, CHI. TRIB., July 15, 2007, § 1, at 1. This article was the first of many to appear, notifying the greater public that Indiana had just renewed BP’s National Pollutant Discharge Elimination System permit. The permit was renewed because, in part, BP’s planned oil refinery expansion would create eighty new jobs and provide security and diversity of oil supplies. *Id.*

2. *Id.*

3. Ill. Env’tl. Prot. Agency, <http://www.epa.state.il.us/water/surface-water/lake-michigan-mon.html> (last visited Sept. 28, 2007).

4. *Id.*

5. Hawthorne, *supra* note 1, at 1; see Posting of BP Products North America, Inc., Whiting Refinery NPDES Permit No. IN 0000108 to IDEM [hereinafter *BP Permit*] (on file with author), available at <http://www.in.gov/idem/5338.htm#BP> (detailing the limitations on pollutants that may lawfully be discharged by BP under this permit as approved by the Indiana Department of Environmental Management).

6. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (2006).

Congress' stated goal in implementing the CWA over thirty years ago, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters[,]" was a grand one.⁷ A further national goal of the CWA was that the discharge of pollutants into the U.S.'s navigable waters would be eliminated as early as 1985.⁸ Today, such goals remain distinguished and yet elusive. The U.S. Environmental Protection Agency ("EPA") and the States are charged with implementing and ensuring compliance with the CWA.⁹ The cooperation expected between the EPA and States under the CWA has been a source of concern.¹⁰

The national attention BP has received recently over the application for a renewal of its NPDES permit has highlighted the extent of EPA-State cooperation under the CWA.¹¹ It has also highlighted another major CWA policy: antidegradation.¹² When

7. 33 U.S.C. § 1251(a).

8. 33 U.S.C. § 1251(a)(1).

9. 33 U.S.C. § 1251(a).

10. See Michael Hawthorne, *BP to Reconsider Permit on Refinery: Move Follows Outcry over Lake Pollution*, CHI. TRIB., Aug. 16, 2007, at 1 (noting that Federal and State regulators asserted they did not have legal authority to rescind BP's recently renewed permit in response to a "groundswell of protests from politicians and the public"); see also Rebecca Berfanger, *Refinery Permit Finalized; What IDEM, BP, Environmentalists Have to Say on Legal Issues*, THE IND. LAW., Aug. 8, 2007, at 1, (noting, in response to the public attention given the situation, that a BP spokesperson said both Indiana and the EPA found BP's renewed permit satisfactory). But see Jerome M. Organ, *Limitations on State Agency Authority to Adopt Environmental Standards More Stringent than Federal Standards: Policy Considerations and Interpretive Problems*, 54 MD. L. REV. 1373, 1374 (1995) (explaining that Congress desired that cooperation between the federal and State governments be a major component of the new legislation so that environmental regulation could be experimental in nature).

Although many cast doubt upon the feasibility of cooperation between the EPA and States, this method of enforcement was an attempt to revise a flawed State-regulated pollution control system. The water quality-based approach used prior to 1972, "provided incentives for states to use less restrictive pollution control criteria to attract economic development by 'pollution shopping' industries." Mark C. Van Putten & Bradley D. Jackson, *The Dilution of the Clean Water Act*, 19 U. MICH. J.L. REFORM 863, 871 (1986). The States used scientific uncertainties to manipulate the requirements for individual industries. *Id.* at 871-72.

11. 33 U.S.C. § 1251(b); see Michael Hawthorne, *EPA Will Ask BP to Offset Pollution*, CHI. TRIB., August 15, 2007, at 1 (emphasizing the EPA's continual insistence that it could not stop BP from lawfully dumping more pollutants into Lake Michigan under the NPDES permit issued to BP by Indiana).

12. See Environmental Protection Agency Water Quality Standards Rule, 40 C.F.R. § 131.12 (2008) (setting the minimum requirements states must adopt under the antidegradation policy); Van Putten & Jackson, *supra* note 10, at 895 (explaining that the antidegradation policy was never explicitly ratified by the CWA's statutory language nor explicitly approved in the legislative history of amendments to the CWA, though "Congress apparently knew of the policy's existence and implicitly ratified it in the [CWA's] goal[s]").

the EPA and States enable each other to deviate from the CWA, what recourse does the public have?

Part II will illustrate the history of the CWA, its expectation of cooperation between the EPA and the States, and its antidegradation policy contained in the NPDES permit program. Part III will examine the way in which the antidegradation policy and the Indiana Administrative Code have worked together to allow BP to increase pollutant discharges into Lake Michigan in spite of public disapproval. Finally, Part IV will propose a new balancing approach to ensure dedication to the essence of the CWA.

II. THE CWA'S EVOLUTION

A. *Social Conscience, Implementation, and Cooperation*

Congress enacted the CWA in 1972 following an ever-increasing public outcry over the condition of the nation's waters.¹³ The "most dramatic alarm rang" when a river, full of oil and industrial waste, burst into flames in Ohio.¹⁴ However, in enacting the CWA, Congress did not just respond to the public and such disquieting events; it also acknowledged its own failure with previous measures it had taken to reduce water pollution.¹⁵ The time had come¹⁶ for Congress to accept the present state of affairs

13. 33 U.S.C. §§ 1251-1387 (2007); see ROBERT W. ADLER, JESSICA C. LANDMAN & DIANE M. CAMERON, *THE CLEAN WATER ACT 20 YEARS LATER* 5-6 (1993) (illustrating the public's heightened awareness of the critical situation involving water pollution in the U.S. by listing the numerous reports of polluted waters and contaminated fish); *THE CLEAN WATER ACT HANDBOOK* 1, 5-7 (Mark A. Ryan ed., A.B.A. 2d ed. 2003) [hereinafter *CWA HANDBOOK*] (illustrating the legislative history of the CWA).

14. ADLER, *supra* note 13, at 5.

15. See William L. Andreen, *Beyond Words of Exhortation: The Congressional Prescription for Vigorous Federal Enforcement of the Clean Water Act*, 55 GEO. WASH. L. REV. 202, 202 (1987) (noting that Congress had found, to its alarm, that industries and cities were using the Nation's waters as "convenient disposal site[s]" for continually increasing amounts of garbage even though pollution controls were in place); Van Putten & Jackson, *supra* note 10, at 867 (explaining that the CWA came about because of Congress's twenty-five year experience with unsuccessful attempts to control federal and state water pollution).

16. Interestingly, pollution legislation from as early as 1899 was still in effect to some degree. Kenneth M. Murchison, *Learning from More than Five-and-a-Half Decades of Federal Water Pollution Control Legislation: Twenty Lessons for the Future*, 32 B.C. ENVTL. AFF. L. REV. 527, 529 (2005). The Rivers and Harbors Appropriation Act of 1899, a precursor to modern water pollution control legislation, had been a force in the twentieth century creation of the CWA. Rivers and Harbors Appropriation Act of 1899, 30 Stat. 1121 (codified as amended at 33 U.S.C. §§ 401-418 (2002)). The CWA's NPDES permit program served to supplement as well as replace the Rivers and Harbors Act's permit program. *CWA HANDBOOK*, *supra* note 13, at 6.

as a “cancer” that could no longer be ignored.¹⁷

The implementation of the CWA meant a new approach to mitigating water pollution. Rather than confine the implementation of the CWA to the EPA, Congress explicitly recognized the States as having the primary responsibility for the success of this new legislation.¹⁸ Congress further expressed that its policy under the CWA was to recognize the “rights of States to prevent, reduce, and eliminate pollution.”¹⁹ In other words, Congress had determined that cooperation between the EPA and the States was not only desirable, but necessary.²⁰ Congress also took it one step further and expressly called for public participation in the implementation of the CWA.²¹

Although the States had been informed of their numerous responsibilities under the CWA, the EPA retained a vast amount of its own responsibilities. In connection with this new emphasis on EPA-State cooperation, the EPA had the continuing obligation to provide guidance to the States regarding pollutants that posed risks to the health of humans and wildlife.²² This aspect of the EPA’s role under the CWA remains unchanged today and is just as important as it was at the time the CWA was enacted.²³

17. ADLER, *supra* note 13, at 7. In 1972, Senator Ed Muskie tried to persuade his fellow senators to pass the 1972 CWA by stating, “[t]he cancer of water pollution was engendered by our abuse of our lakes, streams, rivers and oceans; it has thrived on our half-hearted attempts to control it; and like any other disease, it can kill us.” *Id.*

18. 33 U.S.C. § 1251(b).

19. *Id.* (emphasis added).

20. 33 U.S.C. § 1251(g); *see also* D.C. v. Schramm, 631 F.2d 854, 860 (D.C. Cir. 1980) (explaining that the CWA itself and its legislative history reflect Congress’s desire to put the regulatory burden on the States while the EPA would retain broad discretion in administering the CWA); *Prairie Rivers Network v. Ill. Pollution Control Bd.*, 781 N.E.2d 372, 377 (Ill. App. Ct. 2002) (emphasizing that “[a]lthough the administration and enforcement of the permit program initially was vested entirely in the US EPA, Congress intended that much of this authority would devolve to the states.”).

21. 33 U.S.C. § 1251(e).

22. 33 U.S.C. § 1254(b)(6); ADLER, *supra* note 13, at 120.

23. In that designated role, the EPA has published the Water Quality Standards Handbook (“Handbook”). U.S. ENVTL. PROT. AGENCY, WATER QUALITY STANDARDS HANDBOOK INT-1 (Government Institutes 2d ed. 1995)(1983) [hereinafter EPA HANDBOOK]. As its name suggests, the EPA Handbook provides a detailed explanation of terminology used in the CWA as well as the ways in which a State can transform that terminology into meaningful guidelines. *Id.* at 3-1, 3-16. The EPA Handbook includes a glossary, flow charts, and cross-references between the various provisions of the CWA and provides even more specific guidance through documents found in the appendices. *Id.* at GLOSS-1, 3-7, A-1. For purposes of this Comment, Chapter Three of the Handbook is significant as it provides an in-depth analysis of “water quality criteria.” *Id.* at 3-1.

Additionally, the U.S. EPA continually promulgates water quality criteria guidance on its website. U.S. Environmental Protection Agency, Introduction

The “impetus”²⁴ for the CWA in 1972—water pollution levels dangerous to humans and wildlife alike—does not exist in the same form today. Neither can it be said that the EPA and States have ceased to cooperate under the CWA. And yet, pollution of the U.S. waters continues, public outcry against it is once more on the rise, and EPA-State interaction (so far as BP is concerned) permits increased pollutant discharges into Lake Michigan. An explanation of the NPDES permit program, therefore, is necessary to understand the present state of affairs.

B. Antidegradation Policy Accepts Degradation

The most significant part of the CWA, in terms of EPA-State cooperation, appears in Section 1342, which provides for the NPDES permit program.²⁵ The permit program, in its most basic terms, sets limits for individual pollutant dischargers,²⁶ such as BP. These individual pollutant dischargers must ensure compliance with the CWA.²⁷ The issuance of an NPDES permit to an individual discharger is best understood as a stamp of approval from both the EPA and an individual State that the discharger has acknowledged limits within which it may act to comply with the CWA.²⁸

While the NPDES permit program highlights the cooperation between the EPA and individual States under the CWA, it serves an even more important role. The NPDES permit program translates water quality standards (required of each State for their various bodies of water) into effective controls on the amount of

to the CWA, <http://www.epa.gov/watertrain/cwa/> (last visited on Nov. 2, 2008). States rely upon the EPA's guidance in setting their own water quality criteria. ADLER, *supra* note 13, at 120. Where States fail to implement such standards, the EPA must do so. *Id.*

24. ADLER, *supra* note 13, at 5.

25. 33 U.S.C. § 1342.

26. See CWA HANDBOOK, *supra* note 13, at 9-14 (summarizing the various definitions of terms found in CWA section 1342 in order to fully understand that section of the NPDES permit program). CWA “defines the term ‘discharge of a pollutant’ to mean ‘any addition of any pollutant to navigable waters from any point source.’” *Id.* at 10. The CWA Handbook provides that in order to understand the CWA definition, other terms must be defined further. *Id.*

27. 33 U.S.C. § 1342; see Andreen, *supra* note 15, at 204 (“The [NPDES] permit transforms generally applicable effluent limitations and other standards into enforceable obligations of the individual discharger.”).

28. 33 U.S.C. § 1342(a)(1) (“[T]he [EPA] Administrator may . . . issue a permit for the discharge of any pollutant . . . upon condition that such discharge will meet . . . all applicable requirements under [this Act].”); see also Andreen, *supra* note 15, at 204 (summarizing the NPDES permit program and concluding that an NPDES permit defines compliance with the CWA for dischargers and makes the job of government enforcement easier).

pollution “person[s]”²⁹ can discharge into “navigable”³⁰ waters.³¹ In other words, NPDES permits set standards for compliance with effluent limitations,³² and consequently, compliance with the CWA. The NPDES permit program is arguably the CWA’s strongest attribute.³³ However, even this program is not without its detractors.³⁴

BP, planning a considerable expansion of its oil refinery in Whiting, Indiana,³⁵ and facing the expiration of its previous NPDES permit, necessarily had to comply with CWA requirements in attaining a renewed NPDES permit.³⁶ BP applied to the Indiana Department of Environmental Management (“IDEM”) because the State of Indiana, and specifically IDEM, were delegated the authority to implement the NPDES permit program within Indiana.³⁷

29. 33 U.S.C. § 1311.

30. 33 U.S.C. § 1362(7).

31. See EPA Administered Permit Programs: The National Pollutant Discharge Elimination System Rule, 40 C.F.R. § 122.2 (2008) (defining “waters,” in one way, as those waters currently used, were used or may be used for interstate commerce); see also Posting of BP Products North America, Inc. Whiting Refinery Fact Sheet to IDEM, March 2007 [hereinafter BP Fact Sheet] (on file with author), available at <http://www.in.gov/idem/5338.htm#BP> (identifying Lake Michigan for purposes of BP’s NPDES permit application).

32. 33 U.S.C. § 1311; 33 U.S.C. § 1342.

33. See Andreen, *supra* note 15, at 204 (noting that the EPA Administrator’s awareness of NPDES permit violations makes it easier to take “quick, effective action to obtain compliance” with the CWA). *Contra* ADLER, *supra* note 13, at 150-66 (detailing the NPDES permit program’s numerous deficiencies).

34. See ADLER, *supra* note 13, at 158 (explaining that expired NPDES permits have been a continual problem for the program and therefore a barrier to the ultimate accomplishment of “zero discharge” under the CWA). States often operate in much the same way as the EPA does, in issuing NPDES permits and then allowing for automatic extension of a permit’s effective period. *Id.* Actually, BP’s current permit had expired on February 28, 1995. BP Fact Sheet, *supra* note 31, at 1. That permit had been “administratively extended due to [BP’s] submittal of a timely renewal application in accordance with 327 IAC 5-2.” *Id.* This automatic extension possibility translates into facilities continuing to discharge without repercussion though their permits are years passed original expiration. ADLER, *supra* note 13, at 158. Permits are further weakened by the option of renewal or reissuance. *Id.* BP sought renewal of its NPDES permit originally issued in March 1990. BP Fact Sheet, *supra* note 31, at 1.

35. Hawthorne, *supra* note 1, at 1.

36. 33 U.S.C. § 1311; 33 U.S.C. § 1362; see also BP Fact Sheet, *supra* note 31, at 1 (explaining BP’s application for renewal of its NPDES permit following the decision to modify its refinery).

37. 33 U.S.C. § 1342(b); IND. CODE ANN. § 13-15-1-2 (West 2007); see also Johnson County Citizen Comm. for Clean Air & Water v. United States EPA, No. 3:05-0222, 2005 U.S. Dist. LEXIS 33190, at *3-4 (M.D. Tenn. Sept. 9, 2005) (explaining that the EPA’s role becomes supervisory once a State has been granted NPDES permitting authority, though the State must still comply

In being granted the authority to implement the NPDES permit program, the State of Indiana was required to prove that it had promulgated water quality standards³⁸ so that effluent limitations could be met accordingly.³⁹ Water quality standards are laws or regulations that consist of three necessary elements.⁴⁰ The Indiana Administrative Code provides the three elements: (1) setting forth the designated use of each of its water bodies; (2) the water quality criteria necessary to protect those uses; and (3) an antidegradation statement.⁴¹

The antidegradation statement is standard language provided by the Code of Federal Regulations.⁴² The exception, allowing for degradation, is contained within it. In relevant part, the regulation reads, “[w]here the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, . . . that allowing lower water quality is necessary to accommodate important economic or social development”⁴³ States that have been granted approval by the EPA to administer their own NPDES permit programs have

with federal standards); *Prairie Rivers Network*, 781 N.E.2d at 380 (noting that EPA approval of a State’s NPDES permit program does not mean the State *directly* administers the CWA, but does mean the State has demonstrated to the EPA’s satisfaction that its program fulfills the statutory requirements and guidelines of the CWA).

38. 33 U.S.C. § 1342.

39. 33 U.S.C. § 1311.

40. CWA HANDBOOK, *supra* note 13, at 26 (setting forth the three necessary elements). Each of the necessary elements of a water quality standard relate to different sections of the CWA. *Id.* at 27-30; *see also* Water Quality Standards, 40 C.F.R. § 131.6 (setting forth six requirements for water quality standards submission). The obligation States have to implement water quality standards that include individual parts of the CWA reiterates that States do not *directly* administer the CWA, but simply meet its requirements. *Prairie Rivers Network*, 781 N.E.2d at 380. Furthermore, this relationship between State NPDES permit programs, the EPA, and the CWA reiterates the CWA’s focus on EPA-State cooperation. *See supra* notes 18-21 and accompanying text (discussing the states’ responsibility to enforce the CWA).

41. 327 IND. ADMIN. CODE 2-1-2 (2007); 40 C.F.R. § 131.12; *see also* CWA HANDBOOK, *supra* note 13, at 26-32 (providing further analysis of those necessary elements). It is important to distinguish the CWA’s antidegradation policy from its “antibacksliding” provision. 33 U.S.C. § 1342(o). The latter was added to the CWA by Congress in 1987 to constrain the weakening of permits absent narrow exceptions. ADLER, *supra* note 13, at 158. Antibacksliding involves a change in effluent limitations provided in individual NPDES permits, while the antidegradation policy involves changes in ambient water quality. Van Putten & Jackson, *supra* note 10, at 895. Furthermore, “the antidegradation policy applies to new as well as existing pollutant discharge sources, whereas the antibacksliding [provision] applies only to existing permitted sources.” *Id.*

42. 40 C.F.R. § 131.12.

43. 40 C.F.R. § 131.12(a)(2).

all included the same or similar boilerplate language in varying forms.⁴⁴

The Code of Federal Regulations rates water according to a three-tier system, which protects against antidegradation.⁴⁵ The exception contained within the antidegradation policy, recognizes economic and social development. This exception applies specifically to waters classified as "Tier II."⁴⁶ Yet, Lake Michigan, where BP sought to discharge increased amounts of pollutants is classified as "Tier III."⁴⁷ However, IDEM applied this exception to Lake Michigan.⁴⁸ When a high quality water is classified as Tier II, a State can issue or renew an NPDES permit even if the effluent limitations set in the individual discharger's permit are not as strict as would otherwise be required by the CWA.⁴⁹ The water quality standards that would have otherwise been required of BP in its application for a renewed NPDES permit appear similar to that of a neighboring State's criteria.⁵⁰

44. See, e.g., ILL. ADMIN. CODE tit. 35, § 302.105 (2007) (setting forth its antidegradation policy); 327 IND. ADMIN. CODE 2-1-2 (outlining the policy for "nondegradation" of surface water); MICH. ADMIN CODE r. 323.1098 (2007) (laying out the state's antidegradation policy); WIS. ADMIN. CODE NR § 102.05 (2007) (explaining the state's antidegradation policy).

45. 40 C.F.R. § 131.12. "Tier I" provides that "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." *Id.* "Tier II" waters are "high quality" waters or those that "exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water . . ." *Id.* "Tier III" provides that "[w]here high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected." *Id.*

46. *Id.* The Indiana Administrative Code Section 2-1-2 mirrors the federal tiers, but as to Indiana's "Tier III" waters, specific waters within the State are designated, including Lake Michigan. 327 IND. ADMIN. CODE 2-1-2. When there is a possibility of degradation, a State must provide an opportunity for public and intergovernmental participation in determining whether to allow the degradation. 40 C.F.R. § 131.12; 327 IND. ADMIN. CODE 2-1-2; CWA HANDBOOK, *supra* note 13, at 32. The proposed activity providing for possible degradation may nevertheless be approved if the State can offer "substantial and convincing justification." CWA HANDBOOK, *supra* note 13, at 32.

47. BP Fact Sheet, *supra* note 31, at 2 (explaining that Lake Michigan is an outstanding state resource water, or "Tier III" water body); see *supra* note 45 (stating the definition of "Tier III" waters). The Indiana Administrative Code provides an additional amount of protection and imposes additional requirements when it comes to Lake Michigan. See, 327 IND. ADMIN. CODE 2-1.5-4 (2007) (explaining the antidegradation policy as it applies to the Great Lakes system in particular).

48. BP Fact Sheet, *supra* note 31, at 16-17. Compare 40 C.F.R. § 131.12(a)(2), with 40 C.F.R. § 131.12(a)(3) (explaining the differences between Tier II and Tier III water quality).

49. 40 C.F.R. § 131.12.

50. Compare 327 IND. ADMIN. CODE 2-1.5-8-6 (2007) (setting surface water quality criteria for the protection of human health, for mercury and benzene

In its application for NPDES permit renewal, BP explained that it had plans to update its facility in Whiting, Indiana.⁵¹ Along with that renovation would come an increase in size and a need to discharge an increased amount of pollutants into Lake Michigan.⁵² As Indiana State officials explained, an increase in pollutant discharge would bring with it an increase in both temporary and permanent jobs for the people of the surrounding community.⁵³ Because this justification fell within the exception to the antidegradation policy of the CWA,⁵⁴ BP succeeded in getting a renewed NPDES permit, issued by IDEM and approved by the EPA.⁵⁵ As a result, BP could begin to degrade the water quality of Lake Michigan.⁵⁶ Although the first and most notable goal of the

particularly, at 0.0018 g/l and 510 g/l respectively, for drinking water), with ILL. ADMIN. CODE tit. 35, § 302.208 (setting numeric water quality standard for the protection of human health, for mercury and benzene particularly, at 0.012 ug/l and 310 ug/l respectively). Illinois does not set forth a distinction between drinking water and non-drinking water. *Id.*

51. BP Fact Sheet, *supra* note 31, at 1. BP's planned facility modification was necessary for it to process Canadian Extra Heavy Crude Oil. *Id.*

52. Hawthorne, *supra* note 1, at 1. While BP explained that efforts to refine Canadian oil would have positive effects for the public, its negative effects were embodied in the increased discharges allowed under its renewed NPDES permit. *Id.*

53. *Id.* Indiana State officials stressed that BP's facility expansion would provide 2,000 temporary construction jobs and eighty permanent jobs at the Whiting, Indiana refinery. Hawthorne, *supra* note 10, at 1. At the time BP sought to renew its NPDES permit in anticipation of facility expansion, the refinery employed 1,300 people. BP Fact Sheet, *supra* note 34, at 1.

54. 40 C.F.R. § 131.12(2); 327 IND. ADMIN. CODE 2-1-2. Indiana State officials' declarations that 2,000 temporary construction jobs and eighty permanent jobs would be created as a result of a \$3.8 billion expansion is evidently the social and economic development of benefit to the area that justified the degradation of Lake Michigan. 327 IND. ADMIN. CODE 5-2-11.7 (2007). It must be emphasized that because Lake Michigan is a Tier III water, under applicable Indiana law, it must be maintained and protected in its present high quality *without* degradation. 327 IND. ADMIN. CODE 2-1.5-4; BP Fact Sheet, *supra* note 34, at 2.

However, the fact sheet prepared by IDEM and made available on its website explains that increased discharges of pollutants by BP would be permitted if "the action responsible for the increased discharge . . . provides social or economic benefits to the area in which the discharge occurs . . ." BP Fact Sheet, *supra* note 31, at 16-17. This Comment considers Section 131.12 (and Indiana's version) together with Section 5-2-11.7 of Indiana's Administrative Code antidegradation implementation procedures provision because the above-quoted language is similar to that used in Section 131.12, Title 40 of the Federal Code of Regulations antidegradation policy.

55. *BP Permit*, *supra* note 5; see also BP Fact Sheet, *supra* note 31, at 6 (explaining that review and approval of the final permit by U.S. EPA Region Five was required because BP's facility was subject to federal effluent guidelines in addition to Indiana guidelines).

56. BP had submitted its application for a renewed NPDES permit in contemplation of modifying its facility. BP Fact Sheet, *supra* note 31. BP's expansion project will be finished in 2011. Hawthorne, *supra* note 10, at 1.

CWA is to eliminate the pollution of U.S. waters,⁵⁷ BP's NPDES permit allows BP to circumvent this goal and increase its discharge of pollution into Lake Michigan.⁵⁸

III. THE ANTIDegradation Policy as a Tool Used to Frustrate the CWA's Ultimate Goal

This section examines the way in which technical compliance with the CWA and State law may be accomplished through the use of exceptions within the law itself. Particularly, the exception to the antidegradation policy contained within the Indiana Administrative Code and the CWA has been invoked in BP's situation to renew its NPDES permit.⁵⁹

Although case law provides some discussion on the antidegradation exception, it does so within the context of broader issues and without a detailed analysis of the exception itself.⁶⁰ Nevertheless, case law illustrates the proper framework in which to consider the antidegradation exception specifically. Furthermore, the analysis here must examine the public's response to BP's renewal NPDES permit and the effect that response has had on BP, IDEM, and the EPA.⁶¹ The public's response highlights the conflict between the CWA's policies generally, the antidegradation policy specifically, and EPA-State cooperation.

A. BP Legally Renewed its NPDES Permit

Once BP determined that its planned refinery expansion would necessitate an increase of pollutant discharges into Lake Michigan,⁶² it properly notified IDEM to begin the permit renewal

57. 33 U.S.C. § 1251.

58. See Hawthorne, *supra* note 1, at 23 (alerting people to the fact that BP was allowed to increase the amount of pollution it would discharge into Lake Michigan because “[a] rarely invoked [Indiana] law trumps anti-pollution rules if a company offers ‘important social or economic benefits’”); *contra* Posting of Commissioner Thomas W. Easterly's Comments on BP's Permit to IDEM, <http://www.in.gov/idem/> (July 20, 2007) (last visited on Nov. 2, 2008) [hereinafter Easterly's Comments] (“IDEM has provided no exceptions to environmental conditions for this [BP] facility. The wastewater treatment permit meets all state laws and regulations that apply to the facility and project.”).

59. See *supra* note 58 and accompanying text.

60. See, e.g., Ala. Dep't of Env'tl. Mgmt. v. Legal Env't Assistance Found., Inc., 922 So. 2d 101, 113-14 (Ala. Civ. App. 2005) (involving consideration of how the Alabama Department of Environmental Management works under the state law to ensure its compliance with the CWA).

61. See Hawthorne, *supra* note 1 (noting the public's response to BP's new project, and how that response has affected BP, the EPA, and IDEM).

62. See BP Fact Sheet, *supra* note 31 (explaining BP's application for renewal of its NPDES permit following the decision to modify its refinery).

process.⁶³

1. *BP began its renewal application process in compliance with IDEM mandates⁶⁴ and the CWA⁶⁵*

As a threshold matter, BP had to show compliance with effluent limitations provided by IDEM.⁶⁶ In a letter released a month after the renewal permit was issued, IDEM reiterated that BP had to prove its compliance with certain effluent limitations that were higher than those set by federal law.⁶⁷ Where BP could not immediately comply with some of those proposed limitations in the renewed permit, it was given a schedule of compliance of three years.⁶⁸ Additionally, BP was given three months from the effective date of the permit to begin monitoring the designated parameters.⁶⁹ At the end of the renewal permit application process, BP was able to show that compliance with effluent limitations would be forthcoming, if not immediate.⁷⁰ BP's

63. See CWA HANDBOOK, *supra* note 13, at 44 (discussing the application process for NPDES permits as generally requiring 180 days prior to commencement of discharge); see also BP Fact Sheet, *supra* note 34, at 2 (providing March 2007 as the date of fact sheet publication which signified that BP had successfully applied for its renewal NPDES permit prior to that date).

64. See ADLER, *supra* note 13, at 166-68 (explaining that state NPDES permit programs, even if federally authorized, were not necessarily in line with the CWA and that inadequacies of some state programs were resolved by litigation).

65. Although Section III(A)(1) addresses the way in which BP has technically complied with the relevant provisions of the CWA and Indiana environmental law, it also highlights how "exceptions" to those laws exist to render compliance. See *infra* notes 82, 89.

66. See BP Fact Sheet, *supra* note 31, at 6 (explaining that BP's NPDES permit limits would be based upon the most stringent of (1) technology-based limitations, (2) best professional judgment, or (3) Indiana Water Quality-Based Effluent Limitations).

67. Easterly's Comments, *supra* note 58; see BP Fact Sheet, *supra* note 31, at 6 (explaining that because BP discharges into Lake Michigan, it is subject to the specific guidelines for Great Lakes system dischargers). In BP's situation, Indiana does have stricter standards than federal law, but elsewhere that may not be the situation. When state legislatures recognize that industries shop around for the least restrictive state environmental laws, legislatures may respond by minimizing state environmental agencies' ability to compel environmental regulations. Organ, *supra* note 10, at 1388-89. It is questionable whether such state legislative action impairs the ultimate goals of the CWA.

68. BP Fact Sheet, *supra* note 31, at 12. There are so many individual permits under the NPDES permit program that it is nearly impossible to review each permit to determine whether dischargers are in compliance and violations likely go unnoticed. ADLER, *supra* note 13, at 151. "Serious problems" exist with the permit program so that the CWA is likely not implemented properly. *Id.*

69. BP Fact Sheet, *supra* note 31, at 12.

70. See *supra* text accompanying notes 64-65 (explaining that BP was

situation aside, the initial requirement of proving compliance with proposed effluent limitations under the CWA has proven successful to a degree.⁷¹

Because BP was not able to ensure compliance with proposed effluent limitations in certain areas of Lake Michigan, it submitted an alternate mixing zone demonstration.⁷² A mixing zone is “a limited area or volume of water where initial dilution of a discharge takes place.”⁷³ Pursuant to the CWA, and at Indiana’s discretion,⁷⁴ BP was allowed a mixing zone because it had ensured that the zone would not adversely affect drinking water or interfere with aquatic life.⁷⁵ The alternate mixing zone allowed “limited violations”⁷⁶ of BP’s NPDES permit “in the immediate vicinity of [an] outfall.”⁷⁷ The justification for mixing zone “exceptions” is that they are “one way of using dilution and other factors to change the stringency with which water quality criteria are translated into enforceable permit limits.”⁷⁸

Once the application was deemed complete, IDEM prepared a draft permit and fact sheet,⁷⁹ publicizing both documents in March

complying with IDEM and CWA mandates when it began its renewal application). As to water pollution legislation generally, meeting deadlines in a timely manner has often not been a high priority; the list of missed deadlines is long. Murchison, *supra* note 16, at 593.

71. “The reduction in discharges from point sources has been substantial.” Murchison, *supra* note 16, at 578. The article follows this up by mentioning that the ultimate goal of the CWA is not being achieved. *Id.* at 579.

72. BP Fact Sheet, *supra* note 31, at 2; *see, e.g.*, 327 IND. ADMIN. CODE 2-1-4 (2007) (detailing mixing zones guidelines generally).

73. *See* ADLER, *supra* note 13, at 161 (explaining mixing zones); CWA HANDBOOK, *supra* note 13, at 39 (same).

74. *See* Hawthorne, *supra* note 1, at 23 (reporting that Indiana regulators granted BP the first-ever exemption to create a mixing zone in order to dilute pollution).

75. *See* BP Fact Sheet, *supra* note 31, at 3 (explaining that BP’s alternate mixing zone, in accordance with IND. ADMIN. CODE SECTION 5-2-11.4(b)(4) (2007), was proven not to cause any of the listed adverse impacts); *contra* Hawthorne, *supra* note 1 (reporting that there is a push to eliminate use of mixing zones because they threaten humans, fish, and wildlife).

76. ADLER, *supra* note 13, at 161.

77. *Id.* This presents yet another “exception” to the CWA’s “zero discharge” goal. *See supra* note 34 (discussing failures to achieve the zero discharge goal); Van Putten & Jackson, *supra* note 10, at 863 (discussing zero discharge goal and how the EPA attempts to achieve it). This mixing zone alternative within the CWA was “actively encouraged” by the EPA at earlier times. ADLER, *supra* note 13, at 161. Those in favor of mixing zones are said to “[trivialize] the zero discharge philosophy of the CWA, as well as the goal of no toxics in toxic amounts.” *Id.* Today, the EPA tends to discourage use of mixing zones. CWA HANDBOOK, *supra* note 13, at 40.

78. ADLER, *supra* note 13, at 161-62.

79. BP Fact Sheet, *supra* note 31, at 1. This Comment uses the Fact Sheet in part to determine BP’s compliance with the CWA.

2007.⁸⁰ BP therefore conformed with the further requirement of providing an opportunity for public participation in the NPDES renewal process.⁸¹ In response to the draft permit, forty-six people provided comments to IDEM during the comment period.⁸² This public comment period served the dual purposes of ensuring compliance with the law and preserving issues for appeal in the event BP's NPDES permit was challenged.⁸³

The initial steps BP took to renew its NPDES permit, in contemplation of facility expansion, were in substantial compliance with Indiana environmental law and the CWA. However, pollutant dischargers, such as BP, may benefit from the exceptions⁸⁴ to the CWA's basic prohibition⁸⁵ in reaching those levels of compliance.⁸⁶ In successfully renewing its NPDES permit, BP has been provided with a "permit shield."⁸⁷

2. *IDEM invoked a "rarely invoked"⁸⁸ exception to the CWA's antidegradation policy⁸⁹ in contravention of the CWA's ultimate goals*

Although Section 1251 of the CWA states that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985,"⁹⁰ Section 5-2-11.3, Title 327 of the Indiana Administrative Code permits additional discharge given sufficient justification.⁹¹ IDEM overcame the obvious conflict

80. *Id.*

81. See 40 C.F.R. § 124.10 (2007) (describing public notice requirements).

82. BP Refinery Fact Sheet, http://www.in.gov/idem/files/bp_factsheet.pdf. The opinions expressed by those forty-six people do not appear on the BP Refinery Fact Sheet. *Id.*

83. See 40 C.F.R. § 124.13 (2007) (describing the obligation to raise issues and provide information during public comment period); see also CWA HANDBOOK, *supra* note 13, at 47 (summarizing public comment/hearing requirement).

84. "There are, of course, exceptions to the Act's basic prohibition." Van Putten & Jackson, *supra* note 10, at 874.

85. *Id.*

86. Exceptions applicable to point sources have increased water-quality related problems. Murchison, *supra* note 16, at 592.

87. A "permit shield" is a considerable benefit to permittees because it shields them from meeting more stringent limitations that the EPA may later promulgate. CWA HANDBOOK, *supra* note 13, at 53.

88. Hawthorne, *supra* note 1, at 23.

89. This Comment discusses the exemption granted to BP from the perspective of the antidegradation implementation procedures provision contained in 327 IND. ADMIN. CODE 5-2-11.7, as well as the antidegradation policy contained in 327 IND. ADMIN. CODE 2-1-2.

90. 33 U.S.C. § 1251.

91. 327 IND. ADMIN. CODE 5-2-11.3 (2007). BP has to comply with Section 5-2-11.3 of the Indiana Administrative Code because the discharges will be into Lake Michigan.

between the CWA's ultimate goal and Indiana's Section 5-2-11.7 antidegradation implementation procedures through the justifications it set forth.

BP's initial submission of its antidegradation analysis was not adequate according to IDEM.⁹² Thereafter, IDEM determined BP sufficiently justified the degradation of Lake Michigan by satisfying a number of factors.⁹³ The exact determinations of specific factors were not provided in the IDEM fact sheet disseminated to the public pursuant to Section 1342 of the CWA.⁹⁴ Although IDEM was required to consider both the positive and negative social and economic consequences of BP's proposed pollutant discharges, two positive consequences were released to the public by Indiana State officials.⁹⁵ Furthermore, the fact sheet itself only provided: "[BP's antidegradation demonstration]. . . that the action responsible for the increased discharge of ammonia provides social or economic benefits to the area in which the discharge occurs has been made."⁹⁶

B. Case Law Avoids the Troubled Waters of the Antidegradation Policy Exception's Effect on the CWA's Ultimate Goal

1. The antidegradation policy's exception can be manipulated by the States

In *Rivers Unlimited, Inc. v. Schregardus*,⁹⁷ the Ohio court recognized that the state legislation stood in complete contrast to the federal antidegradation policy by allowing degradation without public participation or even consideration of economic and social need.⁹⁸ The Ohio legislature had enacted its antidegradation policy including the provision that "the director [of environmental protection] may allocate to existing sources eighty percent of the pollutant assimilative capacity . . . without further antidegradation review."⁹⁹ What the State antidegradation provision did, in effect, was preclude the public from being given notice and from being afforded a hearing prior to degradation activity.¹⁰⁰ To allow the

92. BP Fact Sheet, *supra* note 31, at 15.

93. See 327 IND. ADMIN. CODE 5-2-11.7 (listing considerations used to determine compliance with CWA when water quality degradation is permitted).

94. 33 U.S.C. § 1342.

95. Hawthorne, *supra* note 1, at 1.

96. BP Fact Sheet, *supra* note 31, at 16-17.

97. 86 Ohio Misc. 2d 78 (Ohio Ct. Com. Pl. 1995).

98. *Id.* at 92.

99. *Id.* at 88 (quoting Baldwin's Ohio Revised Code Annotated, OHIO REV. CODE ANN. § 6111.12 (West 2008)) (emphasis added in *Rivers Unlimited*).

100. *Rivers Unlimited*, 86 Ohio Misc. 2d at 93. This is in violation of the CWA which requires both notice and hearing prior to degradation. 40 C.F.R.

State's antidegradation policy to stand would allow frustration of the CWA's ultimate goals.¹⁰¹ The legislation was held invalid.¹⁰²

In *Ex parte Fowl River Protection Association, Inc. v. Board of Water and Sewer Commissioners of the City of Mobile*,¹⁰³ the Alabama court agreed with the plaintiffs challenging the State's interpretation of its antidegradation policy, holding the interpretation a violation of the policy.¹⁰⁴ The Alabama Environmental Management Commission ("AEMC") determined that the State's antidegradation policy would apply only to waters of higher quality than the public water supply.¹⁰⁵ Because the Alabama Department of Environmental Management ("ADEM") did not rate any waters as higher in quality than the public water supply, the antidegradation policy would not apply to any water in the State.¹⁰⁶

In another Ohio case, *Columbus and Franklin County Metropolitan Park District v. Shank*,¹⁰⁷ the Court determined that the Ohio Environmental Protection Agency's ("OEPA") interpretation would "eviscerate" the State's antidegradation policy because "it allows a clear degradation of water quality to be considered nondegradation."¹⁰⁸ The OEPA attempted to argue that the State's antidegradation policy permitted deterioration of water quality at point sources short of interference with the designated use.¹⁰⁹ The Court explained that OEPA's interpretation conflicted with federal law and that the latter required procedural safeguards before *any* amount of degradation could occur.¹¹⁰

In all three cases, the courts recognized the inconsistencies between State interpretation of the CWA's antidegradation policy exception and the policy exception itself, holding the interpretations invalid. But, the courts did not address whether

§ 131.12 (2007).

101. 40 C.F.R. § 131.12 (2007); *see also* 33 U.S.C. § 1251 (explaining that Congress's goal under the CWA is to restore and maintain the nation's waters).

102. *Rivers Unlimited*, 86 Ohio Misc. 2d at 93.

103. 572 So. 2d 446 (Ala. 1990).

104. *Id.* at 455. The Court explained that at a "practical level," the AEMC's determination allowed for degradation of all state water because none of them came within the antidegradation policy's application. *Id.* at 453.

105. *Id.*

106. *Id.*

107. 600 N.E.2d 1042 (Ohio 1992).

108. *Id.* at 1056.

109. *Id.* at 1054.

110. *Id.* at 1055 (emphasis added). OEPA interpreted the policy so that satisfaction of procedural requirements under the CWA would be unnecessary in certain situations. *Id.* The Court explained that "degradation" meant "any perceptible decrease in water quality," and not just changes short of interference with the designated use. *Id.*

the presence of the antidegradation policy (with the degradation exception) was itself the problem.¹¹¹

3. *Courts are unwilling to interfere with economic determinations made under the CWA's antidegradation policy*

The antidegradation policy exception to the CWA explicitly provides that States must consider what types of "economic or social development"¹¹² will result if degradation is allowed by a discharger. When determinations are based, in part, on economic considerations under the antidegradation exception, courts remain deferential to the States' determinations.¹¹³

In *Alabama Department of Environmental Management v. Legal Environmental Assistance Foundation, Inc.*,¹¹⁴ the Alabama court emphasized the judiciary's hands-off approach towards evaluating economic policy in the context of state environmental law.¹¹⁵ In the end, "ADEM . . . [had the] plenary power to manage the delicate balance between the economy and the environment of Alabama."¹¹⁶

There is a possibility that insufficient justifications for degradation will be upheld as valid. The question remains whether such justifications will be sufficient if courts engage in closer scrutiny of them.

111. See *supra* notes 99-1120 and accompanying text (discussing the relevant case law); see also Jeffrey M. Gaba, *New Sources, New Growth and the Clean Water Act*, 55 ALA. L. REV. 651, 684 (2004) (concluding that the EPA and States appear willing to limit antidegradation review which will mean discharges that result in significant degradation); Van Putten & Jackson, *supra* note 10, at 888, 891 (discussing anti-backsliding rule's exception as swallowing the actual rule and equating the exception with a "loophole" that ultimately undermines the CWA). The States' interpretations of their antidegradation policies (and attendant exceptions) can be seen as exceptions to exceptions.

112. 40 C.F.R. § 131.12 (2007).

113. See Murchison, *supra* note 16, at 583-84 (explaining that cost-benefit analysis in environmental regulation context is objectionable and that U.S. water pollution law has preference for degradation prevention only when the larger economic system will not be damaged by such prevention).

114. 922 So. 2d 101 (Ala. Civ. App. 2005).

115. *Id.* at 113. The Court went further:

ADEM must have discretion to decide whether, at some level, the "needs of the people" of Alabama will be better served by placing upper limits upon the costs of permit applicants' industrial plants and equipment than by requiring massive and inefficient expenditures from those applicants in order to achieve marginal improvements in water quality.

Id.

116. *Id.*

C. *Public Outcry Cannot Prevent Degradation of Lake Michigan and U.S. Waters*

The CWA has served to preclude¹¹⁷ the public from legally challenging¹¹⁸ BP's renewal permit because BP has not actually violated the CWA or Indiana environmental law.¹¹⁹ While reports of BP's renewal permit (containing Lake Michigan degradation approval) were at their height in early August 2007, the EPA insisted it had no authority to rescind the permit.¹²⁰ People, including Congressional members, celebrities, and the general public, attempted to persuade IDEM and the EPA to reconsider the permit.¹²¹ The result was that BP agreed it would comply with the previous, more stringent permit limits.¹²²

The fact is that BP's renewal permit remains effective. "Frequently, some environmental mishap serves [the] function" of convincing regulators that statutory and regulatory reform is necessary.¹²³ Here, BP itself, not regulators, agreed to comply with previous, more stringent permit limits in response to public dissatisfaction and fortunately did not do so because of some environmental mishap.

117. Contrary to the CWA's application in the BP situation, Congress intended that the public voice be heard loudly and clearly in its efforts to ensure CWA compliance. "Congress also turned to ordinary citizens to help ensure that the EPA would have the motivation necessary to establish a credible and vigorous enforcement program." Andreen, *supra* note 15, at 260.

118. See 33 U.S.C. § 1365 (listing situations in which a citizen suit may commence).

119. Indiana provided notice and hearing prior to its and the EPA's approval of BP's renewal permit. 33 U.S.C. § 1342(b)(3); see also BP Refinery Fact Sheet, *supra* note 832 (listing notice, hearing, comment, final permit issuance, and appeal period termination dates); Easterly's Comments, *supra* note 58 (explaining that Indiana cooperated with the EPA during BP's NPDES permit renewal application process to ensure compliance with the CWA).

120. Hawthorne, *supra* note 11, at 1.

121. See Michael Hawthorne, *BP Says It Won't Increase Pollution*, CHI. TRIB., Aug. 24, 2007, § 1, at 1 (explaining that City of Chicago Mayor Richard Daley and Eddie Vedder of Pearl Jam were among those voicing their opposition to BP's renewal permit and its attendant Lake Michigan degradation allowance).

122. *Id.*

123. Murchison, *supra* note 16, at 585. The author states:

In the United States, neither an organized environmental movement nor a gradually worsening environmental problem has been sufficient to produce significant statutory and regulatory reform. This seems to require some external event to convince the relevant political groups that change is required.

Id.

IV. CLOSING THE ANTIDegradATION POLICY'S LOOPHOLE

The CWA's ultimate goal of clean water is undercut by its own antidegradation policy.¹²⁴ This policy plays an essential role in the overall scheme of the CWA;¹²⁵ it prohibits water quality degradation absent certain conditions.¹²⁶ Rather than allowing for degradation when "necessary to accommodate important economic or social development,"¹²⁷ social considerations must be balanced directly against economic considerations.

A. *Expand Notice to a Greater Portion of the Public so that Social Considerations are Adequately Accounted For*

Throughout the CWA, beginning with its very first section, the public is encouraged, directed, and expected to take an active role under it.¹²⁸ Furthermore, Section 1365 authorizes, and in part depends upon, citizen lawsuits in a number of situations in order to achieve the CWA's ultimate goals.¹²⁹

BP's situation, however, represents the way in which the public notice and hearing requirements under the CWA are unsatisfactory. Title 40, Section 124.10 provides a list of ways in which public notice of permit actions can be achieved, and Indiana likely complied with those suggestions.¹³⁰ Yet, the public's response to Indiana's approval of BP's renewal NPDES permit shows that a greater portion of the public must receive notice and an opportunity for hearing than did in that situation.

Lake Michigan is not confined to Northwest Indiana where

124. *Contra* Gaba, *supra* note 113, at 693 (explaining that the tools available for achieving success under the CWA are the same today as they were when the CWA was first enacted and that fault lies with the people and not with the statute).

125. The EPA has acknowledged this, stating that the "antidegradation policy is significantly underused as a tool to attain and maintain water quality and plan for and channel important economic and social development that can impact water quality." *Id.* at 671 (quoting Water Quality Standards Regulation, 63 Fed. Reg. 36,742, 36,780 (July 7, 1998) (to be codified at 40 C.F.R. pt. 131)).

126. Those conditions being, of course, "important economic or social development in the area in which the waters are located." 40 C.F.R. § 131.12 (2007).

127. *Id.*

128. 33 U.S.C. § 1251(e). When it comes to NPDES permits specifically, Section 1342 reiterates that the public is to be given "notice of each application for a permit" and provided "an opportunity for public hearing before a ruling on each such application." 33 U.S.C. § 1342(b)(3).

129. 33 U.S.C. § 1365.

130. *See* 40 C.F.R. 124.10 (2007) (explaining how a state agency should compile a mailing list and how to notify people as to whether they wish to be on the mailing list in order for the state agency to comply with notice requirement). IDEM provided notice and hearing in March and April of 2007 respectively. BP Refinery Fact Sheet, *supra* note 83, at 1.

BP's facility stands. Those that use Lake Michigan are not just those within that area. The city of Chicago is a few miles away from BP's facility and uses Lake Michigan for numerous things, including drinking water.¹³¹ At the very least, the "public" that should have been notified of BP's renewal NPDES application should have consisted of Whiting, Indiana¹³² residents, as well as Chicago residents.¹³³

Given the nature of U.S. waters, the public that will be affected by any adverse actions taken will consist of more people than those local to the pollutant dischargers. Given the nature of the CWA's goals, public notice and hearing must be expanded in order for those goals to have an increased likelihood of success.

B. Reduce Excessive Deference to Economic Considerations

By balancing social considerations directly against economic ones, economic considerations will still be adequately measured while not to the exclusion of social ones. As evidenced by *Alabama Department of Environmental Management*,¹³⁴ courts remain very deferential to economic considerations and the context of environmental legislation provides no exception.¹³⁵

It should be presumed that when contemplating a proposed NPDES permit application, the public and state environmental officials should consider economic benefits and detriments as part of their "social" consideration. In doing so, it will be more difficult for state environmental officials to ultimately determine that economic considerations outweigh social ones.

The apparent willingness courts and state environmental officials have to find adequate economic considerations, in order to degrade water quality, stems from their focus on economic benefits

131. See *supra* notes 3-4 and accompanying text (discussing the many states that benefit from Lake Michigan).

132. The BP refinery is located there. BP Fact Sheet, *supra* note 341, at 1.

133. Hawthorne, *supra* note 10, at 1. The public in the City of Chicago was notified too late. They voiced their opposition once it was reported that BP's application for renewal had been approved. *Id.* See Gaba, *supra* note 113, at 684 (noting that there is nothing more frightening to a pollutant discharger than the possibility of public hearing); Hawthorne, *supra* note 1, at 1 (reporting that renewal NPDES permit was approved and in effect).

134. 922 So. 2d at 113. See *supra* notes 115-16 and accompanying text (discussing the Alabama court's deference towards economic policy within the context of the CWA).

135. The Alabama court emphasized that:

In enacting the [Alabama Environmental Management Act], the Legislature charged ADEM with the responsibility not only of 'administering environmental legislation,' but also of 'promoting economy and efficiency in the operation and management of environmental programs.'

Ala. Dep't of Envtl. Mgmt., 922 So. 2d at 113 (quoting ALA. CODE § 22-22A-2(1)(1975)).

to the exclusion of economic detriments.¹³⁶ Closer scrutiny of the economic detriments that follow from water pollution, however, reveal that the CWA's antidegradation policy serves an important role economically and socially in restricting water quality degradation.¹³⁷ This highlights the need to restrict the deference accorded *positive* economic determinations when it comes to allowing degradation under the CWA.

It cannot be denied that economic considerations must be made when granting or denying pollutant dischargers NPDES permits.¹³⁸ However, extreme deference towards economic determinations, particularly positive economic determinations, often forecloses adequate consideration of social factors. Directly balancing social considerations against economic ones minimizes the opportunity for courts and state environmental officials to determine that sufficient economic considerations in favor of degradation have been shown.

C. Fully Define "Important Economic or Social Development"

The antidegradation policy's exception, allowing for lower water quality when "necessary to accommodate important economic or social development,"¹³⁹ remains unclear in its

136. The Alabama court discusses the "massive and inefficient expenditures" that would have to be made by NPDES permit applicants to ensure antidegradation and the "marginal improvements in water quality" if antidegradation policy was enforced. *Id.* Yet, the court fails to consider what the situation may be once those initial expenditures have been made by the applicant and whether marginal improvements in water quality may have eventually added up to significant improvements given time. *Id.* By seemingly limiting its review of ADEM's decision to allow or prevent degradation to the immediate future, the court may have overlooked the possibility that economic losses may eventually follow degradation.

In BP's situation, the focus was on the temporary construction jobs and eighty permanent jobs that would result from refinery facility expansion. Hawthorne, *supra* note 1, at 1. The economic losses that may eventually follow from allowing water quality degradation were not made known. See BP Fact Sheet, *supra* note 31, at 16-17 (summarizing that economic and social benefits would follow allowing facility expansion and attendant water quality degradation).

137. The most obvious economic losses as a result of water pollution are experienced by commercial fisheries. ADLER, *supra* note 36, at 97. Contamination of drinking water supplies means increased treatment costs. *Id.* at 98. The economic losses resulting from lost recreational opportunities due to water pollution are hard to quantify. *Id.* at 100. And finally, human illnesses suffered as a result of polluted waters means healthcare costs and loss of work force productivity. *Id.* at 97.

138. It has even been suggested that experimentation with economic incentives may be a way in which to persuade parties to comply with water quality standards so that they will refrain from seeking out approval for water quality degradation. Murchison, *supra* note 16, at 597.

139. 40 C.F.R. § 131.12 (2007).

application on a case-by-case basis. In order to properly balance social factors against economic factors, there must be better guidance available as to how to consider each part of that phrase.

In BP's situation, IDEM did not specifically report how BP met its burden under the antidegradation policy, only that it did in fact do so.¹⁴⁰ The provision of the Indiana Administrative Code, which IDEM likely used to determine whether BP set forth sufficient justification for water quality degradation, contains a long list of criteria to consider.¹⁴¹ Regardless of how thorough that list of criteria may be, the public fallout following IDEM's approval of BP's renewal permit, and degradation permission, illustrates that the list of criteria must be further defined.

Throughout the decades, attention has been paid to the uncertain phrase allowing water degradation when "necessary to accommodate important economic or social development."¹⁴² The focus has often been upon the term "important."¹⁴³ But, it has been further suggested that the substantive elements of that phrase also remain unclear.¹⁴⁴ The antidegradation policy means that "[i]n no case may water quality be degraded without adequate justification in countervailing societal and economic interests that outweigh the degradation."¹⁴⁵ But, that sentence lacks conviction

140. See BP Fact Sheet, *supra* note 31, at 16-17 (summarizing that BP showed economic and social benefits to be derived from increased discharge limits). The Chicago Tribune reported that BP met its burden under the antidegradation policy, in order to be granted an exemption from that policy, because its refinery facility expansion would "create more jobs and 'increase the diversity and security of oil supplies to the Midwestern United States.'" Hawthorne, *supra* note 1, at 23.

141. See 327 IND. ADMIN. CODE 5-2-11.3 (2007) (directing consideration of the unemployment rate in the area, the increase in employment at the facility following degradation allowance, the increased tax revenues if degradation is allowed, and the increased risk to human health as a result of degradation allowance, among other criteria).

142. 40 C.F.R. § 131.12(a)(2) (2007).

143. See *Columbus & Franklin County Metro. Park Dist.*, 600 N.E. 2d at 1075 (discussing the EPA's decision to change "significant" to "important" in the antidegradation policy's exception in order to strengthen the intent of protecting higher quality waters). *But see* Van Putten & Jackson, *supra* note 10, at 899 (explaining that the EPA intended "important" to be a relative term and that the "significance" of degradation should be considered in defining the term).

144. See Gaba, *supra* note 113, at 692 (advocating that the substantive elements justifying degradation need clarification). This suggestion is in response to confusion and controversy created by the antidegradation policy. *Id.* One noted option, rather extreme, that is available to the EPA is to "abandon any pretense that the antidegradation policy imposes a substantive limit on a state's ability to allow degradation of water quality." *Id.* at 692-93. To do so, however, would remove the obstacle pollutant dischargers must overcome in order to degrade water quality. In other words, to abandon the "pretense" would be to nullify the antidegradation policy. *Id.*

145. Van Putten & Jackson, *supra* note 10, at 899.

without further elaboration of parts of the policy. In the end, the antidegradation policy, "important . . . in implementing the [CWA's] goal of continued progress towards eliminating pollutant discharges,"¹⁴⁶ is written too generally.

V. CONCLUSION

The CWA was enacted initially because of an overriding interest the U.S. had in the protection and preservation of its waters. Its antidegradation policy is a further safeguard of that overriding interest. The policy's exception as it now exists, therefore, seriously threatens the progress towards the CWA's ultimate goals. The antidegradation policy, specifically its exception, must be altered and further defined for it to have its intended effect upon pollutant dischargers and U.S. waters. BP's situation is only one example of the way in which the antidegradation policy may not suffice. This begs the question: has the CWA's antidegradation policy, in fact, been dumped?

146. *Id.*