

1-1-2003

Building on Individual Strengths: Achieving Greater Success in Stormwater Pollution Prevention Through Collaboration

Christine Chestnut

Follow this and additional works at: https://repository.uchastings.edu/hastings_environmental_law_journal



Part of the [Environmental Law Commons](#)

Recommended Citation

Christine Chestnut, *Building on Individual Strengths: Achieving Greater Success in Stormwater Pollution Prevention Through Collaboration*, 9 *Hastings West Northwest J. of Env'tl. L. & Pol'y* 123 (2003)

Available at: https://repository.uchastings.edu/hastings_environmental_law_journal/vol9/iss2/3

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in *Hastings Environmental Law Journal* by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

**Building on Individual Strengths:
Achieving Greater Success in
Stormwater Pollution Prevention
Through Collaboration**

By Christine Chestnut

In the three decades since Congress enacted the Federal Water Pollution Control Act, commonly known as the Clean Water Act (Act), tremendous progress has been made in water pollution prevention and control. As this progress curtails certain water pollution sources, previously overlooked sources emerge as high priorities. One such previously overlooked source of water pollution is stormwater. Stormwater pollution has emerged as one of the most egregious, prevalent, and complex problems in water pollution control. At the time this article was written, stormwater in the United States had been cited as the source of impairment of 34,871 miles of rivers and streams, 7.7 million acres of lakes, and 5,045 square miles of estuaries.¹ Although stormwater can come from residential and municipal sources, the focus of this article is industrial stormwater pollution.

This note begins by briefly describing the evolution of stormwater regulation in

* Ms. Chestnut is a J.D. Candidate at University of California, Hastings College of the Law, graduating in 2004. She received a B.S. degree in Environmental Studies from the University of California, Santa Barbara in 1999. She wishes to thank Professor Brian Gray of UC Hastings for his inspiration and guidance. Many of the themes and ideas in this note developed as a direct result of a panel discussion held at Hastings on January 14, 2003. The panelists - Hugh Barroll, Shana Lazerow, Don Reh, and Professor Cliff Rechtshaffen from Golden Gate University School of Law - deserve recognition and many thanks for their priceless contributions.

1. G. Tracy Mehan III, Assistant Administrator for Water, United States Environmental Protection Agency, Remarks before the Subcommittee on Fisheries, Wildlife, and Water of the Committee on Environmental and Public Works, United States Senate (Sept. 16, 2003).

the United States and more specifically, in California. The roles of the three major players in the current world of industrial stormwater management are addressed, followed by a discussion of how each player's strengths can be combined into a collaborative process to increase efficiency and effectiveness.

The discussion will then turn to two major barriers to effective stormwater enforcement: the lack of resources and the perception of the process as unfair. Analysis of these barriers is essential to improving enforcement. A collaborative system will work only if the participants have incentives to act collaboratively, and these barriers deter rather than encourage collaboration. The analysis suggests that a strict division of labor and the use of industry groups will allocate resources most effectively. Adding numerical standards to California's industrial permit, adequately following up permit violations, and issuing permits to unpermitted facilities will reduce uncertainties that lead to perceptions of unfairness.

I. Introduction

Congress enacted the Clean Water Act in 1972 to improve water quality.² The Act addresses water pollution through the regulation of point sources by water quality based effluent limitations set by the Environmental Protection Agency (EPA) and by technology-based discharge management practices. Since the Act's incep-

tion, water quality in the United States has greatly improved. However, stormwater runoff remains widely recognized as the most intractable and egregious source of industrial water pollution.

In 1987, Congress amended the Act to address point source pollution from stormwater runoff.³ With regulations in place, enforcement of the regulations became a major concern. Three distinct players have emerged: agencies, citizen enforcement organizations, and industrial dischargers. Each player possesses specific strengths. These strengths are insufficiently emphasized in the current system, with each player striving to tackle multiple aspects of stormwater pollution enforcement while operating within the constraints of finite resources. Thus, the situation is ripe for the development of a collaborative stormwater management effort.

II. The Clean Water Act

Congress enacted the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act, on October 22, 1972.⁴ The Act embodied the new environmental awareness emerging in the United States as a result of such events as the massive oil spill off the Santa Barbara coast, the release of Rachel Carson's shocking expose *Silent Spring*, and the first Earth Day.

Previous water pollution regulations relied on ambient water quality stan-

2. Federal Water Pollution Control Act (hereinafter the Clean Water Act in footnotes) § 101 et seq., § 1251 et seq. (2003).

3. *Id.*

4. See Michael Lozeau, Tailoring Citizen Enforcement to an Expanding Clean Water Act: The San Francisco BayKeeper Model, 28 GOLDEN GATE U. L. REV. 429, (1998) for a comprehensive look at the evolution of Clean Water Act enforcement and the emergence of stormwater enforcement.

dards.⁵ However, this process of regulating individual dischargers under general standards was burdensome and inefficient.⁶ The Act responded to the inadequacies of the previous regulations by instituting the National Pollutant Discharge Elimination System ("NPDES").⁷ NPDES regulates individual "point sources" at the point of discharge, instead of attempting to discern the dischargers' contributions to the receiving waters.⁸ Under the Act, any addition of a pollutant from a point source into the nation's waters must operate under NPDES permits.⁹ The Act further emphasizes the dischargers' responsibility by holding them strictly liable for compliance with their NPDES permit.¹⁰ Thus, good faith efforts to control pollution discharges are irrelevant if they prove inadequate. Actual compliance with effluent limitations must occur.

The Act assigns responsibility for administering the NPDES program to EPA.¹¹ Although EPA may delegate permitting authority to state agencies, EPA promulgates the rules that establish the

framework for these permits and that interpret how protective permits must be to comply with the Clean Water Act.¹² EPA exercised this rulemaking authority by publishing numerical effluent limitations, applicable nationwide, to certain categories of industry specified in the Act.¹³ The limitations are technology-based, requiring that industrial facilities use "best available demonstrated control technology" to reduce water pollution as much as possible with what is available at that time.¹⁴ The Act also directs EPA and states to apply stricter controls to permitting as necessary to maintain acceptable water quality objectives.¹⁵ These directions address the foreseeable need for tougher regulations and allows for increased protection without the daunting statutory amendment process.

Congress effected another important change to water quality regulation by including a citizen suit provision in the Act.¹⁶ This provision offers citizens the opportunity to perform a vital role in enforcement. In the Act's early stages, EPA

5. *Id.* See Oliver A. Houck, *The Clean Water Act TMDL Program V: Aftershock and Prelude*, 32 ENVTL. L. REP. 10385, 10386 (2002) which states, "Ambient-based management has not worked well in any media - air, water, or waste. It requires enormous amounts of data. It requires analysis that is rarely definitive and nearly always litigable. It launches a process that never ends."

6. *Id.* at 10385.

7. Clean Water Act § 301, 402, 33 U.S.C. § 1311, 1342 (2002-2003).

8. Clean Water Act § 502, 33 U.S.C. § 1362 (2002-2003) provides definitions including point source, discharge of pollutant(s), effluent limitation and industrial waste.

9. *Id.*

10. Clean Water Act § 301(k), 33 U.S.C. § 1311(a) (2002-2003).

11. Steve M. Neugeboren, *Clean Water Act Overview*,

Address at the American Law Institute - American Bar Association Continuing Legal Education *Clean Water Act: Law and Regulation* (Oct. 23, 2002) (transcript available on Westlaw at SH041 ALI-ABA 1 at 3).

12. *Id.*

13. *Id.* at 3-4. See Clean Water Act § 301, 304, 306(b)(1)(A), 33 U.S.C. § 1311, 1314, 1316(b)(1)(A) (2002-2003); see also 40 CFR 401.10 (2002).

14. Clean Water Act, § 306(a)(1), 33 U.S.C. § 1316(a)(1) (2002-2003).

15. Neugeboren, *supra* note 8, at 14. See also Clean Water Act § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (2002-2003).

16. Clean Water Act § 505, 33 U.S.C. § 1365 (2002-2003) authorizes citizens to bring suit in the federal district courts against "any person who is alleged to be in violation of (A) an effluent standard or limitation ... or (B) an order issued by the [EPA] Administrator or a State with respect to such a standard or limitation"

had its hands full with permitting dischargers and setting effluent limitations by the deadlines mandated by the Act.¹⁷ Thus, citizen suits became “the dominantly used federal judicial enforcement mechanism.”¹⁸ National organizations, such as Natural Resources Defense Council and Atlantic States Legal Foundation brought the first enforcement actions.¹⁹ These actions focused mainly on large dischargers.²⁰ Large corporations, discharging large amounts of notorious pollutants and possessing money to pay penalties, were an obvious starting point. Victory in court on several enforcement actions reinforced the importance and the impact of citizen involvement.²¹

Recently, local environmental organizations have embraced the mechanism of citizen enforcement.²² As water quality regulation moves toward a watershed approach, local groups with knowledge of the regulated area and a personal stake in enforcement have taken charge.²³ While larger national groups focused on larger dischargers to best utilize their funds, the localized approach better addresses the spectrum of dischargers in a certain area:

17. Lozeau, *supra* note 1, at 439-440.

18. *Id.* at 440, n. 44 (quoting Jeffrey G. Miller, Private Enforcement of Federal Pollution Control Laws (Part I), 13 ELR 10309, 10314 (1983)).

19. Lozeau, *supra* note 1, at 440.

20. *Id.*

21. Many early enforcement actions were brought against EPA to compel EPA to set the guidelines mandated by the Clean Water Act. See Natural Resources Defense Council, Inc. v. Train, 545 F.2d 320 (C.A.N.Y. 1976). However, a study by Environmental Law Institute showed almost 200 enforcement actions were filed between 1978 and 1984. NRDC and similar groups brought many of these actions. See Jeffrey G. Miller, Private Enforcement of Federal Pollution Control Laws Part III, 14 ELR 10407 (1984).

22. See Lozeau, *supra* note 1, at 442-443.

from small “mom and pop” facilities to large industrial complexes. Analysis of water quality issues from a watershed perspective acknowledges the importance of the affect that smaller facilities in the aggregate can have on water quality. Applying this watershed approach to a stormwater regulation scheme, considering not only large-scale dischargers but all those contributing to the pollution problem, will increase the effectiveness of the scheme.²⁴

III. Stormwater Emerges as a Significant Point Source

The Act shifted the focus of water pollution enforcement to specific point sources. In the thirty-one years since the Act's inception, this focus has resulted in measurable improvements in water pollution control.²⁵ For example, in 1970, only thirty-six percent of the nation's rivers and lakes were safe to swim in.²⁶ Today, that percentage has increased to nearly two-thirds.²⁷ Progress in certain areas brings attention to previously overlooked issues. These new issues demand new regulation and enforcement strategies. Point source

23. <http://www.swrcb.ca.gov/stormwtr/docs/induspmt.doc> at XIV (containing California's general permit, which states that the goal of a watershed approach is managing water pollution).

24. Clean Water Act § 301, 33 U.S.C. §1311(2002-2003) states that “all discharges of any pollutants by any person shall be unlawful.” See also Matthew Zinn, Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits, 21 STAN. ENVTL. L.J. 81, 86, (2002) (discussing action by all involved, including those “alienated by the policy-making process” as a benefit of adding a cooperation component to an enforcement scheme).

25. <http://www.sierraclub.org/cleanwater/overview/>

26. http://www.sierraclub.org/cleanwater/cleanwater_act/.

27. *Id.*

pollution from stormwater poses such a challenge.

“Stormwater discharges are generated by precipitation and runoff from land, pavements, building rooftops, and other surfaces.”²⁸ This runoff flows into storm drains and then into the nation’s waters. Paved or otherwise impervious areas do not allow water to percolate through to the ground below.²⁹ Thus, hazardous materials can accumulate and are washed into storm drains. Discharges can include arsenic, copper, zinc, chromium, mercury, and lead.³⁰ The amount of stormwater runoff varies according to the frequency and duration of precipitation among other factors.³¹ The runoff does not adhere to jurisdictional or political boundaries and does not respect property rights.³² These facts frustrate effective pollution enforcement and necessitate regulating the initial point sources of the runoff, rather than waiting until the discharges have migrated into national waters.

Polluted runoff can cause a multitude

of problems. Environmental problems range from toxin bioaccumulation in aquatic flora and fauna to stream bed erosion.³³ Contaminated drinking water supplies and recreation areas raise public health concerns, and human health risks can result from ingestion of the aforementioned contaminated flora and fauna.³⁴ Another significant concern is wetland health.³⁵ California has lost ninety percent of its wetland areas.³⁶ These areas are very important because wetlands naturally filter water, control floods, and preserve biodiversity.³⁷ Unpolluted stormwater discharge can provide a valuable fresh water supply to wetlands.³⁸ However, polluted stormwater can degrade wetlands and impede their functioning.³⁹ Wetlands are usually categorized as part of the nation’s waters and therefore the Clean Water Act guidelines apply to pollutant discharges into wetlands.⁴⁰ As with oceans, bays, and rivers, wetlands will benefit from effective stormwater management. Wetland protection requires preventative solutions to stormwater pollution because once pollu-

28. <http://www.epa.gov/ebtpages/watestormwater.html>. Wash water, the runoff occurring when an impervious area is washed, is technically not considered stormwater. However, wash water is regulated along with stormwater under industrial permits, and is therefore part of this discussion of stormwater management. The difference between wash water and stormwater is not important for this article

29. *Id.*

30. <http://www.tulane.edu/~mrbc/UrbanToxins.html>. See also <http://www.epa.gov/ednrm-rl/publish/book/handbook/chp1.pdf> (providing a table of stormwater toxicants and the potential sources of these toxicants).

31. Joel B. Eisen, *Toward a Sustainable Urbanism: Lessons from Federal Regulation of Urban Stormwater Runoff*, 48 WASH. U. J. URB. & CONTEMP. L. 1, 18-19 (1995).

32. *Id.*

33. <http://tis.eh.doe.gov/oepa>. This is the home-

page for the Department of Energy Office of Environmental Policy and Guidance. The “Regulation of Storm Water Discharges Under the National Pollution Discharge Elimination System” brief can only be accessed by using the search function on the home page to search for the term “storm- water”.

34. *Id.*

35. Hugh Barroll, Remarks at UC Hastings College of the Law panel discussion (Jan. 14, 2003).

36. <http://ceres.ca.gov/wetlands/introduction/values.html>. (stating the percentage of wetlands lost relates to the since the time of European settlement in California).

37. See <http://epa.gov/owow/wetlands/regs/quality.html#6.0%20Implementation>.

38. <http://epa.gov/owow/wetlands/regs/quality.html#6.0%20Implementation>, at § 6.22.

39. *Id.*

40. *Id.* at § 6.0.

tants flow into wetland areas irreparable damage to their viability and utility occurs.⁴¹ Thus, a point-source approach employing technology-based standards will be beneficial because pollution will be curtailed before it enters wetland areas. A better approach would involve water quality based regulations, utilizing numerical standards. This more aggressive enforcement scheme would not permit industrial facilities to claim that they are allowed to pollute because they are employing the best technology available to them. With numerical standards based on acceptable levels of water quality, facilities either control discharges that exceed the water quality standards or they violate the standards (water quality would be measured at the source of the discharge for previously mentioned reasons). Numerical standards are discussed later in the article because the approach would improve stormwater enforcement in general, not simply with regard to wetlands.

In 1990, EPA released stormwater regulations called the "National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges."⁴² In these regulations, EPA declared urban runoff to be a significant cause of water pollution.⁴³ EPA also reported that a survey of thirty-seven states called the "National Water Quality Inventory 1988 Report to Congress" designated pollution from diffuse sources, including urban runoff (stormwater) as the main cause of impaired water quality.⁴⁴

Today, regulators generally recognize stormwater as a leading cause of water pollution.⁴⁵ Stormwater runoff from residential, commercial, and industrial areas is responsible for twenty-one percent of impaired lakes and forty-six percent of impaired estuaries in the United States.⁴⁶ This article focuses on industrial sources of water pollution, leaving other sources of runoff to separate, thorough examinations.

41. <http://cfpub.epa.gov/npdes/stormwater/menuofbmps/post.cfm>. This document states that non-structural best management practices that set preventative policies from a project's inception will protect sensitive areas such as wetlands.

42. 40 C.F.R. § 122-124 (2002).

43. *Id.*

44. *Id.*

45. <http://www.epa.gov/OWOW/NPS/facts/point7.htm>.

46. <http://www.epa.gov/earth1r6/6en/w/sw/home.htm>. The text from the section of this webpage, entitled "Impact of Polluted Storm Water Runoff," is as follows:

According to the Report to Congress on The Phase I Storm Water Regulations, February 2000, urban stormwater runoff contributes to 13 percent of impaired rivers and streams, 21 percent of impaired lakes, 4 percent of the impaired Great Lakes Shoreline, 55 percent of impaired ocean shorelines, and 46 percent of impaired estuaries. Stormwater runoff not only poses a threat to

ecological health (e.g., shellfish bed closures, elimination of habitat, stream bank erosion, flooding, channelization) but can also substantially affect human health. In 1998, more than 1,500 beach closings and advisories were associated with stormwater runoff according to the Natural Resource Defense Counsel's *A Guide to Water Quality on Vacation Beach*, 1999. A study conducted in Santa Monica Bay, California, concluded that there was a 57-percent higher rate of illness in swimmers who swim adjacent to storm drains than in swimmers who swim more than 400 yards away from storm drains. In addition, the study documented a relationship between gastrointestinal illness in swimmers and water quality (Haile, R.W., et al 1996, *An Epidemiological Study of Possible Adverse Health Effects of Swimming in Santa Monica Bay*) (citation format left unaltered). See also Avi Brisman, *Considerations in Establishing a Stormwater Utility* 26 S. ILL. U. L.J. 505, 505 (Spring 2002), which restates EPA's declaration of urban stormwater runoff as the fourth largest cause of impairment to lakes in the United States and the second largest cause of impairment to the nation's estuaries.

Why is industrial stormwater runoff such an intractable problem? Because stormwater pollution amounts to “a death by a thousand cuts.”⁴⁷ With stormwater pollution, there is not a discernable pipe at each facility dripping a measurable quantity of pollutant clearly attributable to that pipe.⁴⁸ Instead, a huge number of different types and sizes of conveyances exist, sometimes accumulating into a large discharge made up of stormwater that has flown through many facilities. Consider, for example, an industrial park.⁴⁹ A management company owns the property and leases out small areas to independent businesses. Runoff from one facility runs through the other parts of the property, or onto separate properties. The runoff ends up in a common storm drain, mixing with discharge from other facilities. The problem lies in determining who contributed to the runoff, and how much they contributed. The sheer number of dischargers creates a regulatory nightmare.

In 1987, Congress responded to this egregious threat to water quality by passing the Water Quality Act of 1987.⁵⁰ The Water Quality Act amended the Clean Water Act to include section 402(p).⁵¹ The

amendments instituted an NPDES stormwater program much like the program for traditional point sources outlined in section 402 of the Clean Water Act.⁵² The 1987 amendments established a framework for regulation and authorized EPA to implement that framework.⁵³ Although stormwater was not a priority for EPA prior to 1987, EPA responded to the amendments by developing a two-phase regulation strategy targeting industrial dischargers and municipalities. On November 16, 1990, EPA published regulations requiring that all stormwater dischargers in eleven specified categories obtain an NPDES permit.⁵⁴ The categories aimed to encompass most new and existing dischargers with few exceptions. The regulations directed dischargers to utilize best available technologies to manage their stormwater.⁵⁵ These technology-based standards serve as proactive measures, concentrating pollution control efforts on keeping pollutants out of runoff. EPA also set numerical effluent limitations for ten industrial categories.⁵⁶ Facilities are encouraged to implement the technologies initially, rather than waiting until their runoff exceeds a certain numerical standard.

47. Shana Lazerow, Remarks at UC Hastings College of the Law panel discussion (Jan. 14, 2003).

48. *Id.*

49. This example was inspired by a section in Lozeau, *supra* note 1, at 460-467. The section described San Francisco BayKeeper's enforcement strategy for a property located at 716 McCosker Street in Richmond, California.

50. <http://tis.eh.doe.gov/oepa/>. Choose "Clean Water Act" in the "Subject Area Listing" drop-down menu. Then choose the guidance entitled "Regulation of Storm Water Discharges under the National Pollutant Discharge Elimination System."

This document gives a wonderful history of the evolution of the Clean Water Act that resulted in amendments addressing stormwater management.

51. *Id.*

52. Lozeau, *supra* note 1, at 446. See also Clean Water Act § 402, 33 U.S.C. § 1342 (2002-2003).

53. Lozeau, *supra* note 1, at 446.

54. <http://www.swrcb.ca.gov/stormwtr/docs/induspmtdoc>. See also 40 CFR § 122.26(b)(14) (2002).

55. Clean Water Act § 402, 33 U.S.C. § 1342 (2002-2003).

56. 40 C.F.R. § 122, App. A (2002).

A. Stormwater Permitting

EPA's regulations authorize states to govern day-to-day administration of stormwater management through individual or general permits that regulate stormwater discharges.⁵⁷ Individual permits demand distinct assessments. Thus, the regulatory agency bears the burden of constructing an individual plan for each applicant.⁵⁸ Conversely, under a general permitting scheme, each facility is measured against a common set of criteria. General permitting allows agencies to concentrate on enforcement rather than assessing each facility to create unique permits. Enforcement under a common standard requires less energy than working with a multitude of individual permits and the subsequent multitude of standards. Thus, a general permit provides a more efficient process for agencies.

General permits ease the regulated community's burden as well, especially for smaller facilities with severely limited resources. Applying for an individual permit requires a tremendous amount of time and attention to detail.⁵⁹ Under a general permit the discharger simply files a notice of intent to comply with the permit, pays a fee, and files an annual report

with the designated authority.⁶⁰ This less arduous process may persuade some facilities to comply. The general permit also represents a common standard applicable to every discharger. This increases certainty among dischargers, who often feel unfairly singled out or unjustly burdened by water quality regulation.

B. California's Permit

In California, the State Water Resources Control Board ("SWRCB") assumed permitting responsibility.⁶¹ SWRCB chose a general permit to avoid the onerous process of individual permitting. In 1991, SWRCB issued the general statewide industrial discharge permit. The permit requires all facilities falling under one of EPA's eleven industrial categories to file a notice of intent to comply with the permit (NOI).⁶² Each facility must also pay a \$700 annual permit fee.⁶³

The permit incorporates EPA's numerical effluent limitations for the ten categories specified in the Code of Federal Regulations.⁶⁴ Facilities conducting business in one of the ten regulated areas must abide by these numerical limitations.⁶⁵ The permit considers this level of compliance sufficient for the pollutants

57. 40 C.F.R. § 123.25 (2002). See also <http://www.swrcb.ca.gov/stormwtr/docs/induspmt.doc>.

58. <http://www.epa.gov/npdes/pubs/3510-2F.pdf>. See also Shana Lazerow, Remarks at UC Hastings College of the Law panel discussion (Jan. 14, 2003).

59. Shana Lazerow, Remarks at UC Hastings College of the Law panel discussion (Jan. 14, 2003). See also <http://www.swrcb.ca.gov/sbforms/form200.pdf>. The document, the California Water Discharge Requirement and Individual NPDES Permit Application, is eight pages long and requires a complete characterization of discharges, including a map that identifying surface water that may be discharged and a listing of Best Management Practices.

60. *Id.*

61. <http://www.swrcb.ca.gov/stormwtr/whatis-sw.html>.

62. 40 C.F.R. § 122.26(b)(14) (2002).

63. CAL. CODE REGS. tit. 23 § 2200(2)(B)(2003).

64. 40 C.F.R. 411, 412, 418, 419, 422, 423, 434, 436, 440, 443 (2002).

65. <http://www.swrcb.ca.gov/stormwtr/docs/induspmt.doc> at VIII-IX. See also *id.* at IV, which lists the ten categories with EPA numerical effluent standards. The permit states that these effluent standards must be adhered to and that the permit provides "additional requirements."

specified in the limitations. Facilities falling outside of these categories must employ best management practices ("BMP") to control discharges. BMPs are stormwater management mechanisms representing non-numeric effluent limitations.⁶⁶ BMPs constitute compliance with the technology-based standards mandated by the Act.⁶⁷ Facilities within EPA's ten categories must still institute BMPs for all discharges of pollutants not covered by a numeric effluent limitation.

The permit requires BMPs to comply with water quality standards for receiving waters, as well as with point source regulations.⁶⁸ Thus, the permit anticipates situations where facilities utilize BMPs and receiving waters still exceed pollution limits, thereby requiring additional control measures.⁶⁹ These additional controls reflect the Act's main goal, which is to maintain the integrity of the nation's waters by expending whatever effort necessary.⁷⁰ SWRCB's general permit industrial stormwater controls echo the foresight of the Act.

The general permit's strategy is threefold: develop and implement a Stormwater Pollution Prevention Plan (SWPPP), monitor discharges and report

monitoring results annually to the Regional Water Quality Control Board (a regional branch of the SWRCB), and implement BMPs to keep pollution from migrating offsite in stormwater runoff.⁷¹ Facilities must keep copies of all documents on site and provide them to SWRCB upon demand.⁷² All documents produced in accordance with the permit are public documents.⁷³

In the current system, everyone involved has a defined role. Industry must assess its discharges, develop and implement a plan to reduce pollutants, monitor its performance, and report to SWRCB. SWRCB, and occasionally EPA,⁷⁴ monitor industry's progress. Citizen groups make sure that SWRCB and industry are doing their job. However, the system can be streamlined even more.

IV. Barriers to Effective Enforcement

The Act has improved the state of the nation's waters.⁷⁵ However, sixteen years after the stormwater amendments, stormwater remains one of the most egregious threats to water quality. All involved in the process expresses opinions about what they see as barriers to effective enforcement in this area. Two barriers seem to generate a consensus: a lack of

66. Interim Permitting Approach to Water Quality Based Effluent Limitations in Storm Water Permits EPA Office of Water document EPA 883-D-96-001 (September 1996), also found at <http://www.epa.gov/cgi-bin/claritgw>. See also *Natural Resources Defense Council v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977).

67. <http://www.swrcb.ca.gov/stormwtr/docs/induspmt.doc>, at IX.

68. *Id.*

69. Lozeau, *supra* note 1, at 443.

70. Clean Water Act §101, 33 U.S.C. § 1251(a) (2002-2003).

71. <http://www.swrcb.ca.gov/stormwtr/docs/induspmt.doc>, at II.

72. *Id.*

73. *Id.* at XIV.

74. Hugh Barroll, Remarks at UC Hastings College of Law panel discussion (Jan. 14, 2003).

75. William L. Andreen, *The Evolution of Water Pollution Control in the United States - State, Local, and Federal Efforts 1789-1972: PART I*, 22 STAN. ENVTL. L.J. 145, 200 n.5 (2003): "Between 1973 and 1987, for example, the amount of oxygen-consuming organic material directly discharged by industry fell 93 percent. See U.S.

resources and a perception of an uneven process.⁷⁶

A. Lack of Resources

Stores in a Washington State logging town once sold bumper stickers emblazoned with the question "Are You an Environmentalist, or Do You Work for a Living?"⁷⁷ The question provides a fitting starting point for this section because it speaks to the fundamental reason behind inefficient allocation of resources. A common view exists that the relationship between those who want to protect water quality and those whose work results in pollutant discharge is an adversarial one.⁷⁸ Adversarial situations, by definition, do not foster cooperation between participants in the process. Rather, they produce systems comprised of individual actors, unwilling to share responsibility. This defensive behavior can lead to a situation where each participant struggles to use her finite resource pool to affect all areas of the system, instead of focusing on her strengths.

The environmentalist v. industry view is a simplistic one, classifying all industrial employees as anti-environment and all

enforcement agencies and organizations as anti-business. Reality is not nearly as black and white. For instance, many industrial facilities do work to comply with stormwater regulations. The Regional Water Quality Control Board (RWQCB) receives numerous annual reports from facilities last year.⁷⁹ Industry groups, who advise facilities on stormwater issues, derive their business from dischargers' compliance efforts. For example, NEST Environmental in Mountain View, California, counsels about 150-250 clients in their group program in addition to 50-60 individual facilities.⁸⁰ Negotiation between agencies and dischargers to extend deadlines in exchange for a promise of compliance by the dischargers provides another example. The extensions can reflect an acknowledgment by the agency of discharger's realistic need for more time to implement BMPs. It is important to note however that failure by the agencies to impose fines when even these extended deadlines are exceeded does not further compliance goals. This failure to enforce leads citizen groups to distrust agencies and promotes the perception of agencies as pro-industry.

Envtl. Prot. Agency, Office of Policy, Planning, and Evaluation, *Environmental Investments: The Cost of a Clean Environment: A Summary Report to Congress 5-4 to 5-5* (Dec. 1990). Much of this decline was due to the fact that many companies have chosen to divert wastewater to municipal treatment facilities rather than build their own treatment capacity. Industry, in fact, directs approximately 73 percent of its organic waste to publicly owned treatment plants. See *Id.* Despite an increase of 35 percent in the amount of organic material sent to municipal treatment facilities between 1972 and 1996, these municipal plants have succeeded in reducing their discharge of organic material by 43 percent. See Andrew Stoddard et al., *Progress in Water Quality: An Evaluation of the Environmental and Economic Benefits of the 1972, Clean Water Act in Proceedings of the Water Environment Federation 83* (May 3-6, 1998, Denver)."

76. Hugh Barroll, Shana Lazerow, and Don Reh, Remarks at UC Hastings College of the Law panel discussion (Jan. 14, 2003). See also Lozeau, *supra* note 1, at 463; see also Zinn, *supra* note 21, (consistently citing scarce resources as a reason for a more collaborative approach to regulation).

77. Richard White, *Are You an Environmentalist or Do You Work For a Living?*, in *ON COMMON GROUND 171* (William Cronon ed., W.W. Norton & Company, Inc., 1996).

78. Zinn, *supra* note 21, at 88.

79. See generally www.swrcb.ca.gov.

80. Don Reh, Remarks at UC Hastings College of the Law panel discussion (Jan. 14, 2003).

Collaboration will only succeed if all sides trust the others to do their part.

Good faith efforts notwithstanding, participants in stormwater management approach the overall issue in a traditional, adversarial way. This approach ignores the beneficial aspects of collaborative enforcement.⁸¹ Through collaboration, participants can focus their resources on specific tasks, while trusting others to work on other tasks.

Industry, state and federal agencies, and environmental organizations have varied individual goals. Businesses want to make profits and pay the bills. Agencies want to make sure Congress' intentions are adequately implemented. Environmental groups want to protect natural resources. However, all of the players are united by the Clean Water Act's federally mandated objective: restoration and maintenance of the integrity of our nation's waters.⁸² Each plays a role in stormwater management that is assigned to them by federal law. Thus, the question is not whether you are an environmentalist or you work for a living, but rather how you will share the burden of stormwater pollution control while still pursuing individual goals. A more collaborative process could be the answer.⁸³

Each player brings strengths and weaknesses to the table. Using one's strengths to compensate for another's weaknesses increases efficiency. An adver-

sarial "good guy v. bad guy" scenario does not. A collaborative effort will ease the burden on everyone, allowing the players to focus more on their individual goals. Resources are scarce. Therefore, it is important to identify areas of enforcement that could be better handled using another's resources. If everyone is maximizing the use of his or her resources, scarcity notwithstanding, efficiency will improve. This premise assumes, of course, that each player exerts an honest effort to adhere to the collaborative strategy. Many feel this is a pipe dream, no pun intended. However, with a system of checks and balances each side might have incentives to comply with the collaborative effort.

The Clean Water Act mandates that EPA regulate stormwater runoff. Although EPA employs around 18,000 people, its staff is responsible for all fifty states, as well as U.S. territories as far away as Guam. Even on a regional level, the EPA office responsible for California is also responsible for three other states and a group of U.S. territories.⁸⁴ In addition to a large service area, EPA also tackles a diverse spectrum of environmental problems from water quality to endangered species to global warming.⁸⁵

EPA does not have time to manage stormwater runoff at a local level.⁸⁶ Instead, EPA assumes two dominant regulatory roles that drive stormwater protections. First, EPA sets standards.⁸⁷ EPA writes regulations that apply nationwide.

(2002-2003).

83. Zinn, *supra* note 21, at 86.

84. <http://www.epa.gov/epahome/wheretheyoulive.htm>.

85. <http://www.epa.gov/epahome/topics.html>.

86. Hugh Barroll, at Remarks at UC Hastings College of Law panel discussion (Jan. 14, 2003).

87. *Id.*

81. Zinn, *supra* note 21, at 99 (discussing four benefits of collaborative enforcement strategies: possibility of lower administrative costs, increasing perception of fairness, greater potential for investment in new environmentally beneficial technology, and more flexibility to "trade" for more compliance in area where needed).

82. Clean Water Act § 101, 33 U.S.C. § 1251

The regulations provide a uniform set of rules that guide state and local enforcement. The rule that EPA promulgated for stormwater pollution control can be found in the Code of Federal Regulations.⁸⁸ 40 C.F.R. § 122.26 (2003)[industry at § 122.26(a)(4). Through regulations, EPA identified categories of industry that must obtain an NPDES permit, set effluent guidelines for certain categories, and outlined the role of BMP in permit compliance. These regulations are a product of EPA's experience and its direct accountability to Congress to implement the 1987 Clean Water Act Amendments. EPA creates the framework for stormwater enforcement.

Second, EPA serves as a "backstop."⁸⁹ When no other party attacks an environmental issue, EPA steps in. EPA has delegated authority to the SWRCB.⁹⁰ Subsequently, the SWRCB authorized the RWQCBs to manage the process on a local level.⁹¹ With state and regional water boards involved, as well as active citizen enforcement and industry groups, EPA is justified in shifting its focus to other problems while remaining an important check on the stormwater enforcement process.

The shift from national to local citizen enforcement organizations increased agency-citizen group cooperation.⁹² Both

RWQCB and local groups in a certain geographic area have knowledge of the area and experience with the unique local situation.⁹³ Local groups often focus their attention on local issues. These groups often send representatives to RWQCB meetings and maintain constant contact with the agency.⁹⁴

Although RWQCB and citizen groups maintain a relationship, the two players act in separate spheres. Both sides acknowledge the lack of time, money, and manpower to uniformly address the magnitude of discharges and dischargers.⁹⁵ However, the process remains disjointed. Both try to tackle all areas of stormwater enforcement.⁹⁶ There simply are not enough resources on either side to individually regulate everyone all the time. The result fuels arguments from industry that enforcement is arbitrary and unfair. Industry's distrust of the enforcement methods used by agencies and citizen groups then deters industry from collaboration. Industry noncompliance then creates more enforcement problems for citizen groups and agencies. The situation feeds itself.

B. Collaboration and Division of Labor

Industrial dischargers in California can be divided into two groups: those dischargers who have filed a notice of intent

88. 40 C.F.R. § 122.26 (2003). See *id.*, at § 122.26(a)(4) for regulations specific to industrial stormwater.

89. Hugh Barroll, Remarks at UC Hastings College of the Law panel discussion (Jan. 14, 2003).

90. <http://www.swrcb.ca.gov/stormwtr/docs/induspmt.doc>, at II.

91. <http://www.swrcb.ca.gov/stormwtr/docs/induspmt.doc> (discussing the enforcement authority of both SWRCB and RWQCB). See also <http://www.swrcb.ca.gov/stormwtr/whatissw.html>,

which describes the enforcement and monitoring function of the RWQCBs.

92. Lozeau, *supra* note 1, at 452.

93. *Id.*

94. *Id.* at 456-457.

95. Shana Lazerow, Remarks at UC Hastings College of Law panel discussion (Jan. 14, 2003).

96. <http://www.sfbaykeeper.org/html/baykeeper.html>. See also <http://www.swrcb.ca.gov/index.html>.

to comply with the industrial general permit and those who have not. All facilities currently operating under the general industrial permit are required to file an annual report containing monitoring data by July 1 of each year.⁹⁷ Last year, SWRCB received 8736 reports for the entire state.⁹⁸ Eighty-one facilities required to file a report did not file.⁹⁹ Some facilities submitted only partially complete reports. During that same time period, SWRCB records show that 1273 facilities failed to pay their annual dues.¹⁰⁰ Some facilities have outstanding dues dating back as far as 1993.¹⁰¹ Consequently, many permitted facilities are in direct violation of the permit for failure to report and/or pay dues and can be fined.

The current fining process provides incentives for industry noncompliance. Agencies often delay notifying facilities of permit violations. After notification, agencies then often delay fines. In a 1999 report on state agency enforcement of water pollution laws, the EPA inspector general found that state agencies failed to collect data from many facilities and let twenty-five percent of major water polluters' discharge permits expire without noticing.¹⁰² The inspector general went on to report that when finally imposed, the fines were inadequate deterrents, collected well after the violation occurred, or not collected at

all.¹⁰³ California was cited as one of three states that routinely takes over a year to penalize water pollution violators.¹⁰⁴ The inspector general also cited California specifically for failure to collect fines for stormwater violations.¹⁰⁵

This inadequate follow-up undoubtedly results from the limited resources available to the SWRCB. Regardless, many industrial dischargers hear a two-fold message. One, that SWRCB is not genuinely concerned with fair and effective stormwater pollution control.¹⁰⁶ Two, the more profitable avenue is noncompliance because fines occur later, if at all. If fines are promptly imposed and the violator does not pay, follow-up can be delayed once again. During these interims between the discovery of noncompliance and collection of penalties, many violators are operating without having to expend money and manpower. They are not paying fines or instituting adequate BMPs to control their discharges.

SWRCB has delegated authority to RWQCBs to bring these rogue permitted facilities into compliance. The SWRCB compiles annual reports and dues information obtained from RWQCBs in a database. The database information could be separated by geographic area and distributed to RWQCBs to tackle in manageable

97. www.swrcb.ca.gov/stormwtr/docs/annrpt02_03.doc

98. *Id.* This data is from 2001-2002. The data from 2002-2003 is not yet available on the website.

99. *Id.*

100. *Id.*

101. *Id.*

102. Seth Bornstein, *States Let Polluters Off Easy*, EPA *says*, INQUIRER WASHINGTON BUREAU, Aug. 24,

2001 available at http://www.talkinternational.com/news_environment_august_24a_01.htm.

103. *Id.*

104. *Id.* The other two states are Utah and North Carolina. As for California, the report claims that 50% of all water pollution violations in San Francisco were enforced one year or more after the violation occurred.

105. *Id.*

106. Don Reh, Remarks at UC Hastings College of Law panel discussion (Jan. 14, 2003).

chunks. This division of labor will effectuate consistent enforcement because each RWQCB will be accountable for its own geographic area.

The usual multiple rounds of notice letters could be replaced with a single notice to comply. Prompt follow-up, issuance of fines by a stated deadline, and the promise of more fines if dues and annual reports are not received by RWQCB in a timely manner will create essential incentives to comply. The key is to make compliance more profitable to dischargers than noncompliance. RWQCB's persistence will create an inconvenience remedied only by dischargers' adherence to their SWPPPs and adequate BMPs. Dischargers will also recognize state agencies' serious commitment to improving water quality. Also, enforcing regulations will generate more funds for increased regulation. SWRCB will get compensation for its regulation effort only if it actually collects the fines it imposes. Again, by dividing up enforcement between each RWQCB, with SWRCB supervising the work, this process will result in more efficient enforcement.

If RWQCBs focus their efforts on permitted noncompliance cases, local citizen groups can then focus on unpermitted facilities. RWQCBs already compile information on permitted facilities and already send notices to those facilities not in compliance. Citizen groups have staff, volunteers and concerned citizens willing to search for unpermitted facilities.¹⁰⁷ Thus, they have a unique and already established strength and should concentrate their efforts there.

C. Administrative Hearing

Some members of the regulated community show their disappointment with stormwater enforcement through noncompliance. This mechanism does not convey the specific concerns of industry nor does it promote collaboration to affect change. Also, due to the current inefficient allocation of resources, the voice of noncompliance goes largely unheard. Many noncompliant facilities fly below the radar for years, causing no stir in the SWRCB. An effective way to engage the regulated community in the enforcement system is essential to the success of the system. However, the present avenues available to industry are inadequate.

Citizen groups have attempted to hold educational events on stormwater pollution to increase effective awareness of the problem within the community. However, this is not the most effective enforcement tool for the regulated community. For example, a few years ago a California citizen enforcement group called DeltaKeeper tried to hold a workshop on stormwater compliance to provide a forum for industry in the town of Stockton to express its concerns.¹⁰⁸ For whatever the reason, be it a perception of unfairness or adversity, or simply a lack of time or interest, attendance was minimal. However, when DeltaKeeper instead sent sixty-day notices expressing intent to bring enforcement actions, dischargers filed for permits. The threat of litigation brought about the positive result of compliance. However, there is a spiraling negative effect of this tactic: industry fails to voluntarily comply with stormwater regulations, citizen groups have no other

107. Shana Lazerow, Remarks at UC Hastings College of Law panel discussion (Jan. 14, 2003).

108. *Id.*

recourse but to file lawsuits, and industry then responds by not complying. Both sides distrust the other, and have no incentive to work with each other. Any potential for collaboration is lost in the resulting adversarial legal process.

Court provides the alternative to education and community involvement. Court is problematic as well. Agencies and citizen groups expend valuable resources on litigation. Their goal of effective stormwater management is dampened by the energy expended during a few drawn out lawsuits. Larger industries can use this to their advantage by using their large resource base to draw out litigation until it becomes unbeneficial to the regulator. Conversely, smaller dischargers do not have the resources to express their concerns in court. Attorney fees and court costs can exceed the cost of noncompliance, especially with delays in permit enforcement. These high costs result in out of court settlements. Although such a settlement is better than evading compliance altogether, the concerns of the regulated community are still not expressed. Collaboration will only occur if everyone involved feels that they play an active role in the system.

Another problem with litigation exists. Fines imposed by the court go to the United States Treasury, not the citizen group, the SWRCB, or even the community where the violation occurred. Thus, everyone involved spends resources and the community receives no direct remedial benefit. Apart from lack of monetary benefit to local agencies and citizen groups, this aspect of the enforcement process may fuel industry's concern that the system exists for interests other than

improving water quality.

In his article *Tailoring Citizen Enforcement to an Expanding Clean Water Act*, Michael Lozeau recommends implementing an administrative hearing process to hear citizen enforcement issues. An administrative process at the local level, either at RWQCB's office or at EPA's regional office, would provide a forum for all participants to make their case. No exorbitant attorney fees or outrageous court costs would be involved. If an acceptable agreement is reached, any money paid by dischargers could go directly to local compliance efforts.

The atmosphere would be more informal than a courtroom. Thus, this forum may prove to be a less contentious environment, possibly forging collaborative relationships between all participating groups. At the very least, representatives from each camp will get to know each other on a personal level that is not achieved through summonses and court appearances. The local agencies will hear the concerns of the regulated community and the citizen enforcement organizations and be able to make adjustments in their enforcement strategies accordingly.

The administrative hearing option should be open to anyone involved in stormwater management. Again, uniformity will hopefully quell unfairness arguments. The risk that all facilities will pursue and overwhelm this option if available is rather small. Some larger facilities will continue to opt for traditional, drawn-out litigation. This is a prudent strategy for a company that has more resources than the citizen group or agency bringing the action. A bet on the rare occurrence of a judge

imposing an adequately deterrent penalty seems wise when weighed against predictably large compliance costs.¹⁰⁹ Additionally, the administrative procedure represents a more collaborative approach. Court can be reserved for extreme cases of noncompliance: a last resort.

D. The Perception of an Unfair Process

A collaborative process will focus the strengths of agencies, citizen groups, and the regulated community on specific tasks. However, collaboration will never improve the efficiency of the present system unless each participant agrees to truly work within the collaborative framework. For example, if citizen groups do not trust agencies to be strict with permitted facilities, the citizen group will shift some of its attention back to its original individual strategy to assure that the work gets done. This undermines the process. Also, if facilities continue to skirt the permitting process, collaboration on the part of agencies and citizen groups will not be as effective.

This mistrust is understandable given the players' past adversarial interactions, their diverse ideas about enforcement strategies, what each feels are causes of inadequacies in the present system, and failure to agree on what constitutes adequate stormwater controls to protect our waterway. However, a collaborative process does not terminate those enforcement ideas and does not amount to blind faith in the other participants. In fact, each participant can act

109. Clean Water Act § 309(d), 33 U.S.C. § 1319 (d) (2002-2003) states the maximum per diem penalty as \$25,000 per violation. However, the judge has discretion and may weigh many factors before rendering a penalty decision. These factors include the seriousness of the violation, the economic benefit to the discharger derived because

as a check on the others. For example, citizen groups can still bring actions against agencies and dischargers. Citizen groups can also intervene in agency actions against dischargers. EPA can utilize its rule-making and back-stop functions to set precedents and promote regulatory uniformity. EPA also reviews settlements made by dischargers to citizen groups to prevent sham settlements.¹¹⁰

So long as we operate from a capitalist perspective, there will never be a truly fair stormwater enforcement system.¹¹¹ Any process operating within a free market system with finite resources and a wide range of competing businesses possesses inherently unfair qualities. Thus, there will always be those in the regulated community who feel that they were unfairly singled out for enforcement action. The reality is that regardless of fairness, the Act requires facilities to control their discharges. The Act is not concerned with who gets regulated or how. Recognizing that complete fairness is unattainable should not end all discussion of fairness factors when evaluating improvements to the system. Perceptions of unfairness impede enforcement efforts and stop collaboration dead in its tracks. Thus, fairness remains an important factor in stormwater enforcement's evolution.

Participants in stormwater management will only invest their precious time, money, and energy in a somewhat defined and comprehensible system that pro-

they were allowed to operate in violation of their permit, and the economic hardship penalties will impose upon the dischargers.

110. Hugh Barroll, Remarks at UC Hastings College of Law panel discussion (Jan. 14, 2003).

111. Shana Lazerow, Remarks at UC Hastings College of Law panel discussion (Jan. 14, 2003).

duces somewhat foreseeable outcomes. The lack of these conditions hinders the current enforcement system. The lack of numeric standards in the general industrial permit, inconsistent follow-up by agencies, and a large number of facilities evading the permit process result in uncertainty about the process and its effects. Industry does not know what to expect and therefore has no incentive to consistently be predictable themselves. Citizen groups struggle to compel facilities to comply with permits that contain arguably vague restrictions.

Feelings of unfairness in the system can develop from this uncertainty. Ambiguous regulations open the door to allegations of favoritism. Larger facilities claim that they are being singled out and discriminated against. Smaller facilities claim that uniform penalties and fees leave them bankrupt while not deterring large corporations in the least. Facilities with pending actions against them wonder why they are targets when facilities all around them are operating free of such legal complications. The delays in enforcement of legal judgments against facilities destroy any incentive to voluntarily pay early. Reservations exist about working within a permitting system that allows many dischargers to remain unpermitted. Collaboration will require improvements to the certainty and fairness of the current system.

E. Numerical Standards

California's general industrial permit is ambiguous. It lacks numerical standards, instead relying on the concept of BMPs. Although BMPs provide flexibility to accommodate unique industrial operations, which management practices are

"best" and how do facilities know when they are sufficiently utilizing them? The permit refers to the Act's regulations and to EPA's numeric effluent limitations. These references create uncertainty about which standards apply to a particular facility or to particular components of that facility's discharge, and about what components make up an adequate monitoring system. Actual numbers do not appear in the general permit, adding another layer of inconvenience and possibility for misinterpretation to industry's duties. Facilities must monitor and report on their discharges without adequate knowledge of what they are monitoring or reporting. Not surprisingly though, many dischargers argue against adding numeric standards to the general permit. Without hard numbers, compliance issues can be debated. With numerical standards, violators can no longer plead ignorance and can no longer rely on the possibility of a court interpreting vague standards in their favor.

F. Leveling the Playing Field

As previously discussed, a limited amount of enforcement resources allows many unpermitted facilities to go undetected and to evade penalties. Agencies and citizen groups simply do not have the manpower to regulate everyone under the present system. This lack of uniform enforcement creates an incentive for facilities to fly below everyone's radar. When a facility is caught violating their permit, or without a permit, it can easily make the argument that it is being unfairly singled out.

The auto dismantling industry in California provides an example of permitting uncertainty. There are 1,500 licensed

vehicle dismantlers in California.¹¹² However, of the 1,500 dismantlers licensed to operate in California, only about 600 have filed notice of intent to comply with the general industrial permit.¹¹³ Nine-hundred facilities opted not to apply for permit coverage. Sixty to sixty-five percent of the vehicles bought by vehicle dismantlers at auctions are thought to be purchased by these unpermitted businesses.¹¹⁴

Thus, facilities choosing to get permits are at a disadvantage. They spend \$700 for permit fees annually. Implementing BMPs and joining industry groups add costs. These costs greatly burden smaller facilities. Unpermitted facilities operate without these costs. Given SWRCB's and citizen groups' limited resources, the chance that they will be singled out for disciplinary action is slim. There is a tremendous incentive to get lost in the large pool of unpermitted and non-compliant facilities.

Permitted facilities also expose themselves to a phenomenon called "Shoot the Volunteer."¹¹⁵ When a facility applies to RWQCB for permit coverage, RWQCB enters its name, address, phone number, and other information into an easily accessible database.¹¹⁶ Each permitted facility is required to submit annual reports to RWQCB. RWQCB updates the database with annual report data. The public has access to this data.¹¹⁷ Thus, the task of discovering non-compliant permitted facilities is markedly easier than finding unpermitted facilities. RWQCB or citi-

zen groups can simply peruse the database. The facilities that try to abide by the rules become the first to be scrutinized because they offer their information. This is the "Shoot the Volunteer" theory.

A collaborative approach to this uncertainty seems best. As previously discussed, RWQCBs should focus their efforts on bringing permitted facilities into compliance. RWQCBs already have a database of compliance information for permitted facilities. In fact, they expend the needed energy to create and update the database. By focusing solely on permitted facilities, RWQCBs can direct their attention to enforcement of strict notice and fine periods. Prompt warning letter distribution followed by imposing fines by fixed deadlines will deter permitted facilities from noncompliance. Prompt follow-up will also reassure the regulated community that RWQCB cares about improving water quality. The approach must be rigid and must be applied to all permitted facilities in order to convey the seriousness of the stormwater enforcement process. Uniform permitting and enforcement will motivate businesses to comply with the permit because they will not feel as though they are operating within an unfair system. As certainty in the system increases, the willingness of industry to collaborate will increase. A resource-intensive burst of enforcement will generate compliance and hopefully result in less work in the future for SWRCB and citizen groups. This strategy will also lend credibility to agencies and citizen groups by fostering a reputation for timely and

113. Don Reh, Remarks at UC Hastings College of Law panel discussion (Jan. 14, 2003).

114. *Id.*

115. *Id.*

116. Hugh Barroll, Remarks at UC Hastings

College of Law panel discussion (Jan. 14, 2003).

117. www.swrcb.ca.gov.

118. Hugh Barroll, Remarks at UC Hastings College of Law panel discussion (Jan. 14, 2003).

strong enforcement action.

With the RWQCBs focused on one category of facilities, citizen groups can focus on the other - the unpermitted. Citizen groups already enlist the help of volunteers in the community, lawyers, local citizen groups, skippers, and whoever else is willing to help. These people investigate pollution sources and find violators by going into the community and looking for them. Some unpermitted facilities can be found simply by flipping through the phonebook or contacting statewide associations such as State of California Auto Dismantler Association ("SCADA"). However, some facilities are not as obvious.

Twenty-two percent of the previously mentioned 1500 auto dismantlers belong to SCADA.¹¹⁸ SCADA's code of ethics compels its members to "strive and maintain a clean and non-polluted environment in [their] places of business." However, the organization does not enforce this creed. Divulging permit data would be both useful to agencies and citizen groups and work toward forwarding SCADA's goal.

V. Conclusion

Sixteen years after Congress added stormwater management to the Clean Water Act's goals, stormwater is still an egregious problem. Barriers to effective enforcement include a lack of resources and uncertainty about the process. Increased collaboration is the answer.

Resources are scarce across the board. The economic climate in California does not seem ready to expand these resources anytime soon. Therefore, the

most efficient use of resources will produce the most effective enforcement. Each participant in stormwater management must play a specific role. EPA can continue to serve rule-making and "back-stop" functions. SWRCB can regulate permitted facilities. RWQCBs can tackle localized groups of permit-violators. Citizen groups can focus on finding unpermitted facilities, creating a situation where operating within the permit system is more attractive than operating outside it. Industry can utilize industry groups and the administrative hearing forum to develop realistic and successful compliance strategies. These specific roles utilize everyone's limited resources efficiently.

Participants will still initiate litigation, but only when necessary to bring the non-cooperative into compliance. Administrative hearings should replace court appearances. In these hearings, relationships between participants will be formed and concerns can be raised without incurring the enormous costs and adhering to burdensome formalities of court. Also, money from settlements in this forum can fund local compliance efforts, rather than the U.S. Treasury.

The participants must believe in the collaborative process for it to work. Uncertainty forms a considerable barrier to collaborative enforcement because uncertainty creates disincentives for industry to apply and comply with the general permit. These disincentives complicate the other participants' enforcement efforts.

The lack of numerical standards in California's general industrial permit,

inadequate follow-up, and a perceived uneven playing field among the regulated community all contribute to uncertainty within the regulated community. EPA should either set numeric standards for all industrial dischargers or direct the task to SWRCB. Industry will then have numbers to compare their monitoring results to. They will know where their SWPPPs are deficient and institute adequate BMPs to ensure compliance with numerical discharge limits. SWRCB, focusing solely on permitted facilities, can then establish and abide by rigid compliance deadlines based on these numeric standards. By consistently following-up and promptly fining violators, SWRCB will project continuity, reliability, and a genuine desire to improve water quality.

Improving uncertainty will also address industry's unfairness argument. Consistency will show the regulated community that no one is being unfairly sin-

gled out. Consistency provides the much needed incentive to facilities to apply for a permit

There will never be a truly fair system. Uncertainty will always persist on some level. Resources will undoubtedly continue to dwindle. However, the goal of the Clean Water Act to restore and maintain the integrity of the nation's waters remains a federally mandated objective. Stormwater enforcement can progress toward this objective if participants divide the work, create and enforce rigid procedures and numeric standards, and work within a more informal administrative forum when possible. The resulting enforcement system will not immediately end stormwater pollution. However, it will be a giant step in the right direction.

Stormwater Resource Guide

1. NPDES Stormwater Program
http://cfpub1.epa.gov/npdes/home.cfm?program_id=6
Overview of the Environmental Protection Agency's National Pollutant Discharge Elimination System (NPDES). Contains technical and regulatory information about the NPDEs stormwater program.
2. Puget Soundkeeper Alliance
www.pugetsoundkeeperalliance.org/enforcement/stormwater.html
Website for the Puget Soundkeeper Alliance, with a page on the stormwater program affecting Puget Sound.
3. California Department of Transportation
www.dot.ca.gov/hq/env/stormwater/
California's Department of Transportation website. Provides information on California's programs to reduce stormwater pollution, including bulletins, studies, and links.
4. National Association of Flood & Stormwater Management Agencies
www.nafsma.org
Website for National Association of Flood & Stormwater Management Agencies, an organization of public agencies whose function is the protection of lives, property, and economic activity from the adverse impacts of storm and flood waters.

