

ELR

NEWS & ANALYSIS

Antibacksliding: Understanding One of the Most Misunderstood Provisions of the Clean Water Act

by Melissa A. Thorme

Under the Clean Water Act (CWA), point source dischargers are required to obtain federal discharge permits and to comply with permit limits sufficient to make progress toward the achievement of water quality standards or goals. As water quality standards become increasingly stringent, industrial and municipal dischargers are being pressured to accept permit limits that are difficult, if not impossible, to meet. Since a discharge permit is equivalent to a contract between the discharger and the regulatory agency, permit holders must be increasingly wary of the contract terms and must carefully evaluate the effluent limitations agreed to in discharge permits. Such caution is especially warranted in light of the “antibacksliding” provisions contained in the CWA. Unknowingly, dischargers may be agreeing to permit limits that are not reasonably attainable yet may not be relaxed.

The CWA provides that the discharge of any pollutant into the waters of the United States by any person is unlawful except when these discharges are subject to a national pollutant discharge elimination system (NPDES) permit or some other statutory exception.¹ In order to make strides toward achieving the Act’s goal of eliminating the discharge of all pollutants,² point source dischargers are issued NPDES permits that contain conditions whereby publicly owned treatment works (POTWs) and industrial dischargers must meet minimum technology-based requirements. The applicable treatment technologies for these dischargers are secondary treatment and best available technology (BAT), respectively.³

Where the congressionally prescribed technology-based treatment was not adequate to meet promulgated state water quality standards by the statutory July 1, 1977 cutoff date, states could choose to include more stringent water quality-based effluent limitations⁴ in NPDES permits that would

be sufficient to achieve the applicable water quality standards.⁵ A water quality standard defines the water quality goals of a water body by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses.⁶

After July 1, 1977, water quality-based effluent limitations (WQBELs) for individual dischargers are to be established pursuant to §302, a state’s continuing planning process under §303(e), or based on the waste load allocation (WLA)⁷

stituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

Id. §1362(11), ELR STAT. FWPCA §502(11) (emphasis added).

5. *Id.* §1311(b)(1)(C), ELR STAT. FWPCA §301(b)(1)(C). CWA §301(b)(1)(C) plainly states that requirements necessary to meet water quality standards must be placed in permits “not later than July 1, 1977.” *Id.* (emphasis added). Post-1977 exceedances of water quality standards were to be dealt with through CWA §§302, 303(d) and (e), and 304(l). *See* 33 U.S.C. §1312(a), ELR STAT. FWPCA §302(a) (water quality-related effluent limitations); *id.* §1313(d), ELR STAT. FWPCA §303(d) (maximum daily load); *id.* §1313(e), ELR STAT. FWPCA §303(e) (continuing planning process); *id.* §1314(l), ELR STAT. FWPCA §304(l) (individual control strategies for toxic pollutants). Thus, more stringent limits based on §301(b)(1)(C) had to be in place by 1977. *See* Natural Resources Defense Council v. Train, 510 F.2d 692, 707, 5 ELR 20046, 20053 (D.C. Cir. 1977) (“Section 301(b) contains a broad description of *phase one* and *phase two* effluent limitations, to be achieved by July 1, 1977 and July 1, 1983, respectively.”) (emphasis added).

Because Congress amended the 1972 CWA three times (in 1977, 1981, and 1987) and failed to extend or remove this 1977 date, Congress meant what it said. Attempts by regulatory agencies to read this language out of the Act is contrary to fundamental precepts of statutory construction. *See, e.g.,* Brown v. Superior Court, 37 Cal. 3d 477, 484 (1984) (“A construction rendering statutory language surplusage ‘is to be avoided.’”); People v. Sylvester, 58 Cal. App. 4th 1493, 1496 (1997) (“[E]ach word and phrase in the statute should be interpreted to ‘give meaning to every word and phrase in the statute.’”). Thus, after July 1, 1977, more stringent water quality-based effluent limitations (WQBELs) are not properly based on 33 U.S.C. §1311(b)(1)(C), ELR STAT. FWPCA §301(b)(1)(C). The one exception to this rule was contained in *id.* §1311(i)(1), ELR STAT. FWPCA §301(i)(1) related to municipal time extensions, which allowed an extension of this 1977 date until 1988.

Where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under subsection (b)(1)(B) [secondary treatment] or (b)(1)(C) of this section, but (A) construction cannot be completed within the *time required in such subsection*, or (B) the United States has failed to make financial assistance under this chapter available in time to achieve such limitations by the *time specified in such subsection* [a POTW may request that the time for compliance be extended.]

Id. (emphasis added).

6. 33 U.S.C. §1313(c)(2)(A), ELR STAT. FWPCA §303(c)(2)(A).
7. A WLA is defined as the portion of a receiving water’s loading capacity that is allocated to one of its existing or future point sources of pollution. 40 C.F.R. §130.2(h).

Melissa A. Thorme is Counsel for the law firm of Downey, Brand, Seymour & Rohwer LLP, Sacramento. She specializes in municipal wastewater and stormwater permitting and regulatory assistance. Her educational background includes B.S., Environmental Biology (Cal. Polytechnic State University, San Luis Obispo 1985); M.S., Ecology (U.C. Davis 1988); J.D. (U.C. Davis 1990); and LL.M., Masters in Energy and Environmental Law (Tulane University 1992). The views represented herein do not necessarily reflect those of Ms. Thorme’s firm or clients.

- 33 U.S.C. §1311(a), ELR STAT. FWPCA §301(a).
- Id.* §1251(a)(1), ELR STAT. FWPCA §101(a)(1).
- Id.* §1311(b)(1)(B), (2)(A), ELR STAT. FWPCA §301(b)(1)(B), (2)(A).
-

The term “effluent limitation” means any restriction established by a [state or the U.S. Environmental Protection Agency (EPA)] Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other con-

and total maximum daily load (TMDL)⁸ processes required under §303(d) of the Act. The TMDL-setting process involves the assessment of significant sources of specific pollutants within a water body, and the allocation of the total allowable pollutant load among the individual sources in a manner that will result in the achievement of the applicable water quality standard.

In reality, however, the CWA's continuing planning and TMDL processes have not been widely utilized until recently.⁹ Instead, the U.S. Environmental Protection Agency (EPA) and many state regulatory agencies calculate WQBELs on a discharger-by-discharger basis using a simple mixing equation that does not address other sources. This process, often called a "reasonable potential analysis," is intended to ensure that a specific discharge does not cause or contribute to a violation of water quality standards at the point of discharge.¹⁰ This approach may result in more stringent limitations than the TMDL approach, which is designed to consider all dischargers (both point and nonpoint sources) to a water body.

Regardless of the basis or method of calculation, WQBELs are eventually incorporated into NPDES permits. Upon permit reissuance, modification, or renewal, a discharger may seek a relaxation of these permit limits. However, according to the CWA, relaxation of WQBELs is permissible only if the requirements of the antibacksliding rule¹¹ are met.

History of the Antibacksliding Provision

The concept of antibacksliding as it relates to effluent limitations had its genesis in the congressional record from the 1977 CWA Amendments.¹² This concept was then incorpo-

rated into EPA regulations enacted under the CWA in 1979.¹³ Later, in 1982, EPA proposed to remove the antibacksliding provisions from its regulations during the regulatory revision process.¹⁴ However, the revised regulations, which EPA adopted in final form on September 26, 1984, ultimately retained the antibacksliding rules.¹⁵ Generally, the antibacksliding regulations prohibit EPA from reissuing NPDES permits containing interim effluent limitations, standards or conditions less stringent than the final limits contained in the previous permit, with limited exceptions.¹⁶ These regulations also prohibit, with some exceptions, the reissuance of permits originally based on best professional judgment (BPJ) to incorporate the effluent guidelines promulgated under CWA §304(b), which would result in limits less stringent than those in the previous BPJ-based permit.¹⁷

EPA's antibacksliding regulations were legally challenged by both industrial and environmental groups in the U.S. Court of Appeals for the District of Columbia Circuit,¹⁸ and were judicially upheld. To avoid further controversy over the legality of the regulations, Congress statutorily ratified the general prohibition against backsliding by enacting §§402(o) and 303(d)(4) under the 1987 Amendments to the CWA. The intent of these statutory amendments was to preserve present pollution control levels achieved by dischargers by prohibiting the adoption of less stringent effluent limitations¹⁹ than those already con-

8. TMDLs are calculated so as to assure that in-stream concentrations for the various criteria are not exceeded by the cumulative discharges to the stream segment, or, in other words, to meet water quality standards in the receiving water bodies. U.S. EPA, WATER QUALITY STANDARDS HANDBOOK: SECOND EDITION 7-1 (1994) (available from the ELR Document Service, Order No. AD-1171) [hereinafter STANDARDS HANDBOOK]; AMSA, TOXIC SUBSTANCES IN MUNICIPAL WASTEWATER: A GUIDANCE MANUAL FOR NEGOTIATING PERMITS 4-2 (1991); see also U.S. EPA, GUIDANCE FOR WATER QUALITY-BASED DECISIONS: THE TMDL PROCESS (1991) (available from the ELR Document Service, Order No. AD-3550) [hereinafter TMDL PROCESS].

9. Until numerous lawsuits alleging the failure of states and EPA to adopt impaired water bodies lists and to develop and implement TMDLs were filed and won by environmental organizations, the TMDL provisions of §303(d) were virtually ignored. The history of the TMDL program, and the litigation that resulted in the implementation of §303(d), are discussed in depth in OLIVER A. HOUCK, THE CLEAN WATER ACT TMDL PROGRAM: LAW, POLICY, AND IMPLEMENTATION (Env'tl. L. Inst. Monograph 1999). See, e.g., Sierra Club v. Hankinson, 939 F. Supp. 865, 27 ELR 20280 (N.D. Ga. 1996); Natural Resources Defense Council v. Fox, 30 F. Supp. 2d 369, 29 ELR 20592 (S.D.N.Y. 1998); San Francisco BayKeeper v. Browner, No. C000132 (N.D. Cal. filed Jan. 12, 2000).

10. See 40 C.F.R. §122.44(d).

11. 33 U.S.C. §1342(o), ELR STAT. FWPCA §402(o).

12.

The committee intends that current effluent limitations, i.e., those represented by [Best Practicable Control Technology] BPT and any more stringent requirements of the first round of NPDES permits, should represent a "floor" or minimum requirement of the modifications authorized by this section. Current levels of discharge must not be relaxed by this provision because that would imply additional treatment requirements on other point or nonpoint source dischargers.

See S. REP. NO. 95-370 (1977), reprinted in 1977 U.S.C.C.A.N. 4326.

13. 40 C.F.R. §122.15(i) (1979).

14. EPA Consolidated Permit Regulations, 47 Fed. Reg. 52072, 52084-86, 52089 (Nov. 18, 1982). EPA's revisions were proposed for two reasons: first, EPA sought to apply effluent guidelines in a nationally consistent manner so that companies operating under less stringent, subsequently promulgated guidelines would not have an unfair advantage over companies with more stringent permits based on best professional judgment (BPJ). *Id.* at 52084. Second, EPA feared that the limit on backsliding might encourage dischargers to challenge second-round permits containing BPJ limits in order to avoid being locked into more stringent limits that might ultimately be contained in effluent guidelines. Such challenges, EPA contemplated, would result in a drain on EPA's resources. *Id.*; see also *Natural Resources Defense Council v. EPA*, 859 F.2d 156, 203, 19 ELR 20016, 20040 (D.C. Cir. 1988).

15. 49 Fed. Reg. 37998 (Sept. 26, 1984). In its final rule, EPA maintained the antibacksliding prohibition, concluding that sufficient justification did not exist to change the policy. *Id.* at 38021.

16. 40 C.F.R. §122.44(l)(1). One exception is where the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance under 40 C.F.R. §122.62. *Id.* The remainder of the exceptions are found in 40 C.F.R. §122.44(l)(2)(i) as limited by 40 C.F.R. §122.44(l)(2)(ii).

17. *Id.* §122.44(l)(2). EPA observes that its regulations allow for equitable considerations, permitting the agency to relieve BPJ permittees of any undue burden in two situations: first, where a permit holder can show that the BPJ limits are unattainable despite installation and proper operation of necessary treatment equipment; and second, where compliance with permit limits would result in costs wholly disproportionate to those considered in the subsequently promulgated effluent limitations guidelines. *Id.* §§122.44(l)(2)(i), 122.62(a)(16); see also *Natural Resources Defense Council*, 859 F.2d at 199 n.96, 19 ELR at 20038 n.96.

18. See *Natural Resources Defense Council*, 859 F.2d at 195-204, 19 ELR at 20016-41 (industry attacked the regulations on three grounds: that the Agency lacked statutory authority for such rules, that EPA failed to adequately explain its retention of the rule after its proposal to abolish the rule in 1982, and that the Agency had no authority to prohibit backsliding from new source performance standards (NSPS) permits).

19. The Senate and Conference Reports from the 99th Congress clearly stated that these additions were intended to "clarify the Clean Water

tained in their discharge permits, except in certain narrowly defined circumstances.²⁰

Synopsis of the Act's Antibacksliding Rule

Section 402(o) of the CWA sets forth the general rule prohibiting backsliding from effluent limitations contained in previously issued permits that were based on §§402(a)(1)(B), 301(b)(1)(C), 303(d), or 303(e).²¹ The main thrust of §402(o) is to bar EPA from allowing permit holders to “backslide” or weaken BPJ-based limits or WQBELs contained in an NPDES permit except under very limited circumstances.²² Thus, permits issued with these types of limitations may not be reissued, renewed, or modified to contain less stringent effluent limitations than the previous permit *unless* the proposed new limitations comply with the antidegradation rule contained in §303(d)(4), or the permit falls into one of the statutory exceptions to this ban on backsliding.²³

Nevertheless, backsliding from BPJ-based permits is ultimately restricted to permit limits that are not less stringent than the effluent limitation guidelines in effect at the time of the relaxation.²⁴ Furthermore, when attempting to backslide

from WQBELs under either the antidegradation rule or an exception to the antibacksliding rule, *relaxed permit limits must not result in a violation of the applicable water quality standard.*²⁵ This final provision is probably the most important part of the antibacksliding rule.

To understand the effect of the antibacksliding rule on NPDES permit relaxation, it is necessary to examine permit relaxation requirements both under the antidegradation rule and under the exceptions to the antibacksliding rule. An analysis of each is set forth below.

Backsliding Under the Antidegradation Rule

Under the exceptions to the antibacksliding rule contained in §402(o), the first way a discharger may relax the effluent limitations contained in its NPDES permit is to demonstrate compliance with an antidegradation rule found in CWA §303(d)(4).²⁶ The Act's antidegradation rule is two-pronged depending on whether or not applicable water quality standards have been met in the receiving waters.²⁷

Where Water Quality Standards Have Not Been Attained

Where the applicable water quality standard has not yet been attained, §303(d)(4)(A) provides that any effluent limitation based on a TMDL or other WLA may be revised in one of two ways. This section allows permit limits to be relaxed if the cumulative effect of all revised effluent limitations based on the TMDL or WLA will assure the attainment of the applicable water quality standard.²⁸ This scenario could occur if EPA or a designated state agency were to perform a new TMDL analysis, which would allow for resetting WLAs and effluent limitations due to decreased loading by other pollutant sources, such as nonpoint source dischargers.

As stated previously, post-1977 WQBELs are properly based on TMDLs.²⁹ The current regulatory definition of a TMDL is “the sum of the individual WLAs for point sources and [load allocations (LAs)] for nonpoint sources and natural background.”³⁰ This definition goes on to state that if

Act's prohibition of backsliding on *effluent limitations*.” See H.R. CONF. REP. NO. 99-1004 (1986) (emphasis added); *see also* S. REP. NO. 99-50, at 45 (1985). The EPA regulations are not as narrow and apply to permit conditions in addition to effluent limitations. 40 C.F.R. §122.44(l). However, CWA §402(o) is silent on the issue of permit *conditions*, and only addresses backsliding from effluent *limitations*.

20. Joint Explanatory Statement of the Committee of Conference, H.R. CONF. REP. NO. 99-1004, at 153 (1986).
21. As previously stated, CWA §301(b)(1)(C) is no longer a valid basis for the incorporation of WQBELs into NPDES permits. *See supra* note 5. Interestingly, water quality-related effluent limitations adopted pursuant to §302 do not seem to be subject to the prohibition on backsliding, unless they are specifically determined to be “necessary to carry out the provisions of this chapter” pursuant to §402(a)(1)(B). *See* 33 U.S.C. §1342(o)(1), ELR STAT. FWPCA §402(o)(1). Furthermore, restrictions on backsliding do not apply to challenged permit limits that have been stayed pending final agency action. *See* EPA Memorandum from James R. Elder, Director, Office of Water Enforcement and Permits, to Water Management Division Directors, Regions I-X, NPDES State Directors re: Interim Guidance on Implementation of Section 402(o) Anti-Backsliding Rules for Water Quality-Based Permits 3 (1989) [hereinafter 1989 EPA Memo].
22. 33 U.S.C. §1342(o)(2), ELR STAT. FWPCA §402(o)(2). EPA contends that its existing antibacksliding regulations continue to apply to effluent limitations not covered by CWA §402(o), e.g., permit limits based on the effluent guidelines or on NSPS. *See* 1989 EPA Memo, *supra* note 21, at 2.
23. 33 U.S.C. §1342(o)(1), (o)(2), ELR STAT. FWPCA §402(o)(1), (o)(2). EPA guidance states that §§402(o)(2) and 303(d)(4) of the CWA “constitute independent exceptions to the prohibition against relaxation of permit limits. If either is met, relaxation is permissible.” U.S. EPA, TECHNICAL SUPPORT DOCUMENT FOR WATER QUALITY-BASED TOXICS CONTROL 113 (1991) [hereinafter TECHNICAL SUPPORT DOCUMENT]. Thus, according to EPA, dischargers must only meet the requirements of one of these statutory provisions in order to relax their permit limits. *See* U.S. EPA Region IX Memorandum, Antibacksliding—Effect on Water Quality-Based Effluent Limitations 1 (Aug. 8, 1994); *see also* American Iron & Steel Inst. v. EPA, 115 F.3d 979, 993 n.6, 27 ELR 21241, 21246 n.6 (D.C. Cir. 1997) (citing 58 Fed. Reg. 20802, 20837 (Apr. 16, 1993)) (“§402(o) allows relaxation of water quality-based limits if the requirements of either §402(o)(2) or §303(d)(4) are met.”).
24. “Effluent limitation guidelines” are defined as the regulations published by the Administrator under §304(b) of CWA to adopt or revise effluent limitations. 40 C.F.R. §122.2. The effluent limitation guideline regulations are published at 40 C.F.R. pts. 401-471. Generally, the effluent limitation guidelines identify, in terms of amounts of

constituents and chemical, physical, and biological characteristics of pollutants, the degree of pollution reduction available through the application of control measures and treatment technologies for a particular industry.

25. 33 U.S.C. §1342(o)(3), ELR STAT. FWPCA §402(o)(3).
26. *See id.* §1342(o)(1), ELR STAT. FWPCA §402(o)(1). *See* Mark C. Van Putten & Bradley D. Jackson, *The Dilution of the Clean Water Act*, 19 U. MICH. J.L. REFORM 863, 900 (1986) (citing S. REP. 99-1128 (1986)). The antidegradation rule had its inception in a report first issued by the U.S. Department of the Interior in 1966. *Id.* at 895, n.133-34 (citing U.S. DEP'T OF THE INTERIOR, FEDERAL WATER POLLUTION CONTROL ADMIN., GUIDELINES FOR ESTABLISHING WATER QUALITY STANDARDS FOR INTERSTATE WATERS (1966)).
27. 33 U.S.C. §1313(d)(4)(A), (B), ELR STAT. FWPCA §303(d)(4)(A), (B). Congress added subsections (4)(A) and (B) to CWA §303(d) with the 1987 Amendments to ensure consistency with the water quality standards process and with the NPDES antibacksliding requirements. TMDL PROCESS, *supra* note 8, at 6.
28. 33 U.S.C. §1313(d)(4)(A)(i), ELR STAT. FWPCA §303(d)(4)(A)(i).
29. *Id.* §1313(d)(2), (e)(3)(c), ELR STAT. FWPCA §303(d)(2), (e)(3)(c).
30. 40 C.F.R. §130.2(i). New TMDL regulations, including a new definition of a TMDL, were promulgated on July 13, 2000. 65 Fed. Reg. 43586 (July 13, 2000). The new definition of a TMDL is “a written, quantitative plan and analysis for attaining and maintaining water quality standards in all seasons for a specific waterbody and pollutant

best management practices (BMPs) or other nonpoint source pollution controls make more stringent LAs practicable, then WLAs (and effluent limitations based upon WLAs) can be made less stringent.³¹ Thus, as the current definition concludes, the TMDL process provides for point/nonpoint source control trade offs.³²

Accordingly, if a planned nonpoint source control program or watershed management plan would assuredly result in the attainment of a water quality standard, effluent limitations for point sources may be able to be relaxed accordingly. However, compliance problems relating to antibacksliding may still occur if the new TMDLs and WLAs produce effluent limitations that still cannot be met by the discharger despite the level of relaxation allowed. This is because backsliding is only allowed to a level that will not result in a violation of water quality standards. Conversely, for a given water quality standard, if the new WLAs produce effluent limitations greater or equal to the effluent concentration or mass being discharged, no backsliding problem occurs.

Section 303(d)(4)(ii) allows permit limits to be relaxed if the designated use, which is not being attained, is removed in accordance with EPA regulations.³³ The downgrading or removal of uses may lead to a revised water quality standard that is more readily attainable. However, states may not remove designated uses if they are *existing* uses, or if the uses could be attained through the implementation of effluent limitations on point sources and of cost-effective and reasonable BMPs on nonpoint sources.³⁴ States may remove a use that is *not* an existing use, if the state can demonstrate that attaining the designated use is not feasible because, inter alia, naturally occurring pollutant concentrations prevent the attainment of the use, human-caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place, or more stringent technology controls would result in substantial and widespread economic and social impacts.³⁵ Although this option may at face value appear to be an easy remedy, many difficult regulatory hoops must be jumped through in order to downgrade or de-designate a use. Furthermore, past attempts at de-designation or removal of uses has not been well received by the public, environmental organizations, regulatory agencies, or the press.

In summary, if the water quality standards (including standards revised as a result of use de-designation) have not been attained and no reasonable assurance exists that

the standard will be achieved, no backsliding would be allowed.³⁶

Where Water Quality Standards Have Been Attained

Where the quality of the receiving waters exceed levels necessary to protect the designated use for such waters or otherwise meet the applicable water quality standards,³⁷ effluent limitations may be revised only if such revision is subject to and consistent with the state's antidegradation policy.³⁸ EPA regulations require each state to adopt an antidegradation policy, which must contain certain minimum requirements.³⁹

A state antidegradation policy, and its accompanying implementation procedures, must specify how a state will determine on a case-by-case basis whether, and to what extent, water quality levels may be lowered.⁴⁰ Often state policies require that water quality levels may be lowered only upon a showing that such a lowering is "necessary to accommodate important economic or social development."⁴¹ However, even upon such a showing, state antidegradation policies must, at a minimum, protect existing uses.⁴² In addition, state antidegradation policies must strive to maintain high quality waters by promoting the "fishable/swimmable" goals of the Act and protecting the water quality in Outstanding National Resource Waters, such as those found in national parks, wildlife refuges, and wilderness areas.⁴³

Since each state's antidegradation policy is different, it is difficult to identify the specific requirements for backsliding under these policies. It is enough to state that a discharger must meet the requirements of the applicable state antidegradation policy before its effluent limitations for discharges into high quality waters, i.e., waters that meet or exceed the water quality standards, may be relaxed.⁴⁴ Without

ant." *Id.* at 43662. However, these new regulations do not take effect until Oct. 1, 2001, the beginning of fiscal year 2001. See H.R. 4425 (2000). See Robert W. Adler, *Controlling Nonpoint Source Water Pollution: Is Help on the Way (From the Courts or EPA)?*, 31 ELR 10270 (Mar. 2001).

31. 40 C.F.R. §130.3(i). However, EPA guidance states that all WLAs, LAs, and TMDLs must meet the state antidegradation provisions and the federal requirements under §131.12. See TECHNICAL SUPPORT DOCUMENT, *supra* note 23, at 68.

32. *Id.*

33. 33 U.S.C. §1313(d)(4)(A)(ii), ELR STAT. FWPCA §303(d)(4)(A)(ii); 40 C.F.R. §131.10(g).

34. 40 C.F.R. §131.10(h).

35. *Id.* §131.10(g)(1), (3), and (6); see also STANDARDS HANDBOOK, *supra* note 8, at 2-6 through 2-9.

36. EPA notes that while CWA §303(d)(4)(A) clearly allows for the relaxation of WQBELs based on a revision of water quality standards, CWA §402(o) would not allow this relaxation since the new information exception excludes revised regulations. See 1989 EPA Memo, *supra* note 21, at 5.

37. A revision of water quality standards may result in a situation where the new standards are now being attained, thus allowing the analysis to proceed under CWA §303(d)(4)(B).

38. 33 U.S.C. §1313(d)(4)(B), ELR STAT. FWPCA §303(d)(4)(B).

39. 40 C.F.R. §131.12(a). Once formally adopted, EPA regulations assert that a state's antidegradation policy as well as any implementing procedures, become a part of the state's water quality standards, and are subject to EPA review and approval. 40 C.F.R. §§131.12-131.21. However, the statutory definition of water quality standards does not include antidegradation policies or implementation procedures. See 33 U.S.C. §1313(c)(2)(A), ELR STAT. FWPCA §303(c)(2)(A) (standards made up of uses and criteria).

40. See STANDARDS HANDBOOK, *supra* note 8, at 4-2.

41. 40 C.F.R. §131.12(a)(2).

42. *Id.* §131.12(a)(1). Thus, relaxation of effluent limitations might be justified upon a showing that new limits protect existing uses, e.g., through a use attainability analysis (UAA) process as defined in 40 C.F.R. §131.3(g). "Existing uses" are defined as those uses actually attained in the water body on or after Nov. 28, 1975, whether or not these uses are contained in the water quality standards. *Id.* §131.3(e).

43. *Id.* §131.12(a)(2), (a)(3).

44. In areas in which water quality standards are being met and where there is no reasonable potential for a discharger's effluent to cause or contribute to an excursion above those standards, dischargers should attempt to avoid having numeric effluent limitations placed in their permits altogether. See *accord id.* §122.44(d)(1). If the discharger can convince EPA or the designated state agency to issue the permit without rigid numeric effluent limits, backsliding will not be a concern.

a demonstration of compliance with the state antidegradation policy, no backsliding would be allowed under this exception despite the fact that the water quality exceeds the applicable standards.

Backsliding Under the Statutory Exceptions to the Antibacksliding Rule

The general prohibition against backsliding found in §402(o)(1) of the Act contains several exceptions. Specifically, under §402(o)(2), a permit may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant *if*:

(A) material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)(i) information is available which was not available at the time of permit issuance (other than revised regulations,⁴⁵ guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance⁴⁶; or

(ii) the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B) of this section;

(C) a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy [(e.g., Acts of God)];

(D) the permittee has received a permit modification under section 1311(c), 1311(g), 1311(h), 1311(i), 1311(k), 1311(n), or 1326(a) of this title; or

(E) the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit, and has properly operated and maintained the facilities, but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).⁴⁷

The most likely way for a discharger to fall under an exception to the antibacksliding rule is in the case where a discharger has been unable to meet the effluent limits in its *previous* permit despite the installation and maintenance of the required pollution control technology. For example, assume that a discharger's effluent concentration of mercury exceeds the WQBEL for mercury contained in its NPDES per-

mit. Although the discharger has installed the required level of treatment technology and has implemented mercury source control measures, it is still unable to meet its permit limit for mercury. Under CWA §402(o)(2)(E), a new mercury permit limit may be issued to reflect the effluent concentration actually being achieved by the discharger as long as this revised limit is not less stringent than the applicable effluent guidelines (such guidelines do not exist for POTWs).

The Act's Ultimate Limit on Backsliding

Even if a discharger can meet either the requirements of the antidegradation rule under §303(d)(4) or one of the statutory exceptions listed in §402(o)(2), there are still limitations as to how far a permit may be allowed to backslide.⁴⁸ Section 402(o)(3) acts as a *floor* to restrict the extent to which BPJ and water quality-based permit limitations may be relaxed under the antibacksliding rule. Under this subsection, even if EPA allows a permit to backslide from its previous permit requirements, EPA may *never* allow the reissued permit to contain effluent limitations which are less stringent than the current effluent limitation guidelines for that pollutant, or which would cause the receiving waters to violate the applicable state water quality standard adopted under the authority of §303.⁴⁹

These apparently inviolable restrictions are the hidden trap of the antibacksliding rule. Many regulators and dischargers assume that if a discharger qualifies for one of the exceptions to the antibacksliding rule, then backsliding is allowable. However, even if the requirements for an exception to the rule can be met, the lower limits on relaxation set forth under CWA §402(o)(3) may prevent the incorporation of less stringent effluent limitations. Effluent limits may not be relaxed if the proposed new permit limits are predicted to result in a violation of either the applicable effluent limitation guidelines or the applicable water quality standards through EPA effluent limitation derivation methods, TMDLs, or other means.

The scenario becomes more complicated when the permit limits were not based upon a TMDL/WLA but instead were derived for an individual discharger from the water quality standard itself. When the regulatory agency calculates backwards from the water quality standard using EPA calculation methods to obtain a permit limit that will not violate the standard, it is hard to imagine a situation in which the effluent limitation would or could be relaxed unless the water quality standard itself is relaxed.⁵⁰

45. As previously noted, EPA contends that revised water quality standards would fall under the definition of "revised regulations" and thus not be subject to this exception. *See supra* note 36.

46. It should be noted, however, that §402(o)(2)(B) of the Act does not allow permits to be adjusted to require less stringent effluent limitations based on any revised WLAs unless the cumulative effect of the revised WLAs results in a decrease of the amount of pollutants being discharged. The Act further states that these revised WLAs cannot be due to a discharger reducing or eliminating its discharge due to compliance with the Act (e.g., point source discharger finally meeting permit limits), or due to some other nonwater quality-related reason (e.g., discharger terminates its operation and discontinues discharging). 33 U.S.C. §1342(o)(2), ELR STAT. FWPCA §402(o)(2); *see also* John P.C. Fogarty, *A Short History of Federal Water Pollution Control Law*, in CLEAN WATER DESKBOOK 38 (Env'tl. L. Inst. 1991).

47. Arguably, if an industry has installed the required treatment technologies under BAT or if a POTW has installed secondary treatment and limits cannot be attained, this exception would apply.

48. *See* 33 U.S.C. §1342(o)(3), ELR STAT. FWPCA §402(o)(3).

49. *See* Crown Simpson Pulp Co. v. Costle, 642 F.2d 323, 11 ELR 20450 (9th Cir. 1981). In this case, the court stated:

[I]f we were to permit companies to seek variances from these guidelines on the basis of water quality at particular sites, we would be returning water pollution control to its ineffective pre-1972 status in defiance of Congress's desire "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

Id. at 328, 11 ELR at 20453; *see also* TECHNICAL SUPPORT DOCUMENT, *supra* note 23, at 114; EPA Region IX Memorandum, *supra* note 23.

50. The more likely situation is that, as science progresses and detection limits decrease, water quality standards will continue to become more stringent, thus requiring permits, upon renewal, to contain more stringent effluent limitations to ensure attainment and maintenance of these more stringent standards.

The provisions of §402(o)(3) become even more onerous when it has become clear that some of the current water quality standards for toxics may be unattainable. For example, most states adopt EPA-recommended water quality criteria developed under §304(a) verbatim as the state's water quality standards for toxic pollutants.⁵¹ Certain of these EPA criteria, e.g., mercury, lead, copper, are very stringent and may cause widespread attainability problems. If the water quality standards are per se unattainable, then relaxation of permit limits for those substances may be unallowable, irrespective of whether the discharger qualifies for one of the statutory exceptions.

Unless a discharger is able to demonstrate its ability to backslide, the Act seems to require dischargers to implement source control measures to lower the pollutant loading in its effluent in order to meet the currently imposed effluent limitations. Dischargers may even be required to install additional pollution control measures and practices, even possibly high-cost pollution control technologies such as reverse osmosis, if source controls are ineffective in meeting effluent limitations.⁵² Once the new technology is installed and effluent limitations are being met, a discharger is then locked into effluent limitations at least as stringent as those being achieved, even if the water quality standards are subsequently altered in a way that would potentially allow lower effluent limitations for a particular pollutant.⁵³

Other Antibacksliding Issues

Effect of Compliance Schedules

One question that has arisen is whether the CWA's antibacksliding provisions prohibit the relaxation of WQBELs when a compliance schedule has not yet expired. Compliance schedules are often included in permits to allow dischargers time to phase in new pollution control technologies or to implement source control programs. Generally, compliance schedules include interim limits during the phase-in period, and final effluent limitations that go into effect at the expiration of the schedule.

EPA contends that prior to the expiration of the compliance schedule, effluent limitations may be relaxed without concern for antibacksliding. The Agency's most recent interpretation of the CWA is that the antibacksliding requirements of §402(o) do not apply to revisions to effluent limitations made before the scheduled date of compliance for those limitations.⁵⁴ The presumed reason for this interpretation would be that these effluent limitations have not become enforceable, and thus, can be changed prior to becoming enforceable limits.⁵⁵

While EPA's current interpretation is beneficial to dischargers, others could contend that the Agency has exceeded its administrative authority by stating that final permit limits delayed by a compliance schedule are not affected by CWA §402(o)'s antibacksliding provisions, and that EPA cannot by regulation overrule a congressional mandate. Since EPA's interpretation arguably conflicts with the terms of the CWA as described above, a judicial challenge could render EPA's interpretation of the antibacksliding rules unenforceable. Therefore, dischargers should be aware that EPA's contention, which allows relaxation of final or interim effluent limitations prior to the expiration of a compliance schedule without concern for antibacksliding, is not bulletproof.⁵⁶ It should also be remembered that, in situations in which the standards have not been met, backsliding prior to the expiration of a compliance date, even if legally possible, would not provide much relief.

Another question is whether schedules of compliance, which are included in the definition of "effluent limitation,"⁵⁷ are themselves subject to the backsliding prohibi-

51. Such verbatim adoption of standards set in a laboratory with no consideration of economic or technological feasibility or local water quality conditions, while encouraged by EPA, may not realistically be attainable given the actual water quality characteristics of each state or each water body. States are required to biennially determine the cost and environmental impact of meeting EPA's §304(a) criteria, and should adjust these criteria accordingly to meet site-specific conditions. 33 U.S.C. §1315(b)(1)(A)-(E), ELR STAT. FWPCA §305(b)(1)(A)-(E); see also Melissa Thorne, *Clean Water Act Section 305(b): A Potential Vehicle for Incorporating Economics Into the "TMDL" and Water Quality Standards-Setting Processes*, 13 TUL. ENVTL. L.J. 71 (1999).

52. *Columbus and Franklin County Metropolitan Park District v. Shank*, Director of EPA, 65 Ohio St. 3d 86, 111, 600 N.E.2d 1042, 1065 (Ohio 1992) (incorporation of the best available demonstrated control technology (BADCT) may be required when a discharge would violate the water quality standards even with the utilization of generally applicable technological controls). Although the BADCT standard applies primarily to new industrial sources, an argument could be made that any available, demonstrated control technology that would allow dischargers to achieve their effluent limitations is required under the Act. However, these technologies may create other environmental impacts that should be explored prior to implementation. For example, reverse osmosis creates brines containing the pollutants that have been removed from the waste stream. The concentrated brines must be disposed of somewhere, and may create pollution problems in other media (e.g., air impacts from trucking the wastes, land impacts for landfilling the wastes), or water quality impacts in other waters (e.g., brine is disposed of in the ocean, instead of inland surface waters).

53. Although seemingly harsh in its application, Congress' prohibition on the relaxation of permit limits where a discharger has demonstrated its ability to meet existing limits could be construed as being consistent with the Act's stated goal of eventually achieving zero discharge of pollutants. Van Putten & Jackson, *supra* note 26, at 894. "EPA's antibacksliding approach obviously results in the discharge of fewer pollutants in conformity with the overriding goal of the CWA." Natural Resources Defense Council v. EPA, 859 F.2d 156, 201, 19 ELR 20016, 20039 (D.C. Cir. 1988) (citing *American Frozen Food Inst. v. Train*, 539 F.2d 107, 124, 6 ELR 20485 (D.C. Cir. 1976) ("The principal purpose of the Act is to achieve complete elimination of all discharges of pollutants into the nation's waters . . .")).

54. See U.S. EPA, *Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants for the State of California; Rule* (also known as the California Toxics Rule (CTR)), 65 Fed. Reg. 31682, 31704 (May 18, 2000); see also Preamble to the Great Lakes Water Quality Initiative, 50 Fed. Reg. 20837, 20981 (Apr. 16, 1993) ("anti-backsliding requirements do not apply to changes made in an effluent limitation prior to its compliance date"); but see 1989 EPA Memo, *supra* note 21, at 3 ("The restrictions on backsliding do apply to limits with a delayed implementation date which have not been challenged.") (emphasis added).

55. This interpretation seems to be more consistent with EPA's guidance regarding the inapplicability of backsliding prohibitions to appealed limits that have not yet become legally valid. See 1989 EPA Memo, *supra* note 21, at 3.

56. However, until successfully challenged, EPA's current interpretation stands. For added protection, dischargers with compliance schedules of more than one permit term should encourage the permit writer to include the final effluent limitations in the nonenforceable findings section of the permit instead of within the enforceable order section of the permit. If not included in the enforceable section of the permit, these final effluent limitations may then be altered truly without concern for antibacksliding.

57. See *supra* note 4.

tion. It could be argued that compliance schedules may not be made less stringent, i.e., extended, without complying with the antibacksliding rule. However, the better argument is that, since compliance schedules are merely a *part* of an effluent limitation and do not themselves constitute restrictions on pollutants discharged from point sources, changing a compliance schedule does not make the underlying restriction “less stringent,” but merely delays compliance with that restriction.

Enforcement Issues

Dischargers may not be aware of, or may have chosen to ignore, the problems that can result from the antibacksliding provisions of the Act because regulators often assure them that no enforcement actions will be taken to enforce unattained effluent limitations as long as the dischargers make reasonable efforts to attain the limits. Some regulators have given assurances to dischargers that effluent limitations will subsequently be relaxed or that enforcement will not be pursued if such limits prove to be unattainable. As to the assurances not to pursue enforcement actions against any discharger not achieving compliance with the permit effluent limitations, the Act does not allow such inaction. There are no “de minimus” violation theories contained in the CWA.⁵⁸ EPA and the states are obligated to enforce these limitations and any related compliance schedules.⁵⁹

If the state fails to enforce the applicable requirements, EPA may seek a judicial order preventing any additional sources from discharging into the POTW,⁶⁰ or imposing civil or criminal penalties on a discharger in violation of its NPDES permit.⁶¹ Furthermore, private citizens have the right to require dischargers to comply with the effluent limitations contained in their discharge permits through the citizen suit provisions of the Act.⁶²

Additionally, if a regulatory agency were to go back on its assurances not to enforce the limits against a discharger or if a citizen suit was filed, penalties could be imposed upon that discharger for violation of the applicable effluent limitations. Violators are subject to any number of civil or criminal penalties depending on state law.⁶³ Under federal law, permit noncompliance is grounds for an enforcement action, imposition of civil penalties, permit termination or revocation, or denial of a permit renewal application.⁶⁴

Ultimately, the only way to avoid enforcement actions for a failure to meet permit limits is to implement source control

actions, install additional available control technologies, or change the NPDES permit limits to limits that are actually attainable. Any attempt to relax a BPJ or WQBEL triggers the application of the CWA’s antibacksliding rule. If the provisions of the antibacksliding rule cannot be met and stringent source control programs do not result in compliance with the permit limits, dischargers must install additional control technologies to avoid becoming the target of an enforcement action or citizen suit.

Conclusion

The antibacksliding and antidegradation rules bring into conflict two competing interests: the interest of Congress in achieving the CWA’s goal of continued progress toward eliminating all pollutant discharges,⁶⁵ and the interest of dischargers in avoiding expensive, and possibly unnecessary, end-of-pipe water pollution control requirements. Congress seems to have statutorily forsaken the discharger’s economic interest in favor of an overriding environmental interest in clean water through discharge reduction.⁶⁶ Congress made its choice clear through its imposition of technological controls and often more stringent effluent limitations based upon water quality, and its adoption of a rule against relaxation of these limitations.

If effluent limitations will not be achieved by a discharger, the regulatory agencies ultimately have no choice but to pursue enforcement. The only ways for dischargers to avoid enforcement is to either stop discharging altogether (which is not an option for POTWs), to reduce pollutants by adding additional pollution control devices or by implementing more stringent source controls (which may be hampered by technological limitations), or to modify permit effluent limitations to levels that are achievable, i.e., backslide. Permit modification clearly appears to be the most economical choice, but for the reasons provided above, may not necessarily be the easiest.

Unfortunately for dischargers with attainability problems, backsliding from existing permit effluent limits is no easy task. Besides the difficult task of maneuvering through the regulatory hoops, dischargers must face another difficult task of persuading the public that it should be allowed to “weaken” its permit limits.⁶⁷ A more expedient means of influencing the permit limits incorporated into a discharge permit is by participating in the water quality standards setting and TMDL/WLA adoption processes.⁶⁸ Early partici-

58. *Oklahoma v. EPA*, 908 F.2d 595, 632 n.53, 21 ELR 20206, 20225 n.53 (10th Cir. 1990).

59. 33 U.S.C. §1319(a), ELR STAT. FWPCA §309(a).

60. *Id.* §1342(h), ELR STAT. FWPCA §402(h). Where the EPA Administrator determines that the state “has not commenced appropriate enforcement action with respect to such permit, [she] may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.” *Id.*

61. *Id.* §1319(b)-(d), ELR STAT. FWPCA §309(b)-(d).

62. *Id.* §1365(a)(1), ELR STAT. FWPCA §505(a)(1) (“any citizen may commence a civil action on his own behalf against any person . . . who is alleged to be in violation of [an] effluent standard or limitation. . . . The district courts shall have jurisdiction . . . to enforce such an effluent standard or limitation. . . .”)

63. *See, e.g., CAL. WATER CODE* §13385 (West 1999).

64. 33 U.S.C. §1319, ELR STAT. FWPCA §309; 40 C.F.R. §122.41(a).

65. “The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters. In order to achieve this objective it is hereby declared that . . . (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated . . .” 33 U.S.C. §1251(a), ELR STAT. FWPCA §101(a) (emphasis added).

66. However, Congress has also recognized that “technology for the sake of technology where no water quality gains will result is an unconscionable waste of the Nation’s resources.” *See Additional Views of Mr. James A. McClure, S. REP. NO. 95-370 (1977), reprinted in 1977 U.S.C.C.A.N. 4326.*

67. The public becomes involved because permit modifications must be publicly noticed unless classified as “minor modifications.” 40 C.F.R. §122.62; *id.* pt. 124.

68. For a discussion of the importance of participation in the regulatory development process and tips and techniques for developing and submitting effective comments to environmental agencies, see ELIZABETH D. MULLIN, *THE ART OF COMMENTING* (Env’tl. L. Inst. Monograph 2000).

pation in state standard and WLA setting may assist in the incorporation of more reasonable and attainable effluent limitations in discharge permits.

The bottom line on antibacksliding is awareness. Many dischargers are unaware of the dangers that lurk in the terms of the Act's antibacksliding provisions. Dischargers must be aware that this provision exists and understand that it will likely be difficult, if not impossible, to backslide from unattainable permit limits. This information will make it less

likely that dischargers will accept well-intentioned promises made by regulatory agencies regarding future enforcement or future modification of permit limits. Additionally, with this knowledge, dischargers will be in a much better position when renewing or modifying the terms of their NPDES permit. Dischargers should be careful not to accept permit limits that cannot be met. Since the NPDES permit is equivalent to a contract, dischargers would be wise to carefully negotiate, and where necessary even litigate, the terms rather than suffer the consequences.