

# Permit Writing in Litigation

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**T**he National Pollutant Discharge Elimination System (NPDES) permitting program—the key component of the Clean Water Act (CWA) for regulating point source pollution—is broken. NPDES permits are supposed to protect the receiving water quality by providing specific directives to dischargers in the form of water quality-based effluent limitations (WQBELs). These WQBELs provide dischargers, regulators, and the public with clear notice of what a discharger must do (or may not do) in order to protect water quality in receiving waters: They must either set numeric limits or prescribe best management practices (BMPs). Writing concrete, discharger-specific WQBELs into permits has the further benefit of keeping courts out of the business of making after-the-fact, ad hoc judgments about whether a discharge adversely impacts water quality to a degree that violates the CWA.

WQBELs are a critical feature of the NPDES program and reflect Congress's broader objectives when it passed the CWA in 1972. Congress created the NPDES program specifically so dischargers' compliance obligations would be clearly defined. EPA has structured the permit writing process, including its implementing regulations and the *Permit Writers' Manual*, consistent with this objective. As anyone attending an EPA permit writing class will learn, the regulations and the *Manual* direct permit writers to create discharger-specific limits derived from the applicable water quality standards, as well as effluent and receiving water quality.

Yet across the country, permit writers routinely stray from this prescribed approach by writing into permits generic narrative requirements not to violate or cause or contribute to violations of water quality standards (referred to in the remainder of this article as Generic Prohibitions). These Generic Prohibitions provide dischargers (and enforcers) with no guidance on how to comply with water quality standards, a key defect identified in the 2013 Vessel General Permit that led the

Second Circuit, in its 2015 *NRDC v. EPA* decision, to invalidate and remand the permit to EPA. 808 F.3d 556 (2d Cir. 2015). EPA and state permitting agencies have, however, failed to heed the Second Circuit's rejection of Generic Prohibitions and continue to include them in NPDES permits nationwide.

The enforcement of Generic Prohibitions in litigation illustrates how they undermine the NPDES program's central goal: to provide dischargers with clear compliance standards. These cases reveal how Generic Prohibitions shift permit writing functions, like the assessment of effluent and receiving water quality, away from expert agencies and into courts' hands. This shift results in *post hoc* judicial determinations of permittees' water quality-based obligations, depriving permittees of opportunities to change their operations to protect receiving waters and stave off enforcement. This outcome also makes courts responsible for addressing technical issues that fall outside their core expertise.

This article discusses Generic Prohibitions' inconsistency with the CWA, its policies, and the process for writing WQBELs. It then addresses *NRDC v. EPA* and how the Second Circuit found Generic Prohibitions to be inconsistent with the CWA and its regulations. Finally, it shows how the Second Circuit was correct to be concerned about the lack of guidance that Generic Prohibitions provide to permittees and enforcers alike. Experience shows that enforcing these provisions requires courts to engage in after-the-fact permit writing, to the detriment of dischargers, the public, and water quality.

Permit writers' inclusion of Generic Prohibitions in permits effectively revives aspects of the flawed regulatory system the Congress intended the NPDES program to replace. Congress passed the CWA to address a number of specific deficiencies in the Water Quality Act of 1965. That statute relied solely on states setting "ambient water quality standards specifying the acceptable levels of pollution in a State's waters" and generally

prohibiting dischargers from causing impairment of these standards. *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202 (1976). Defining compliance by reference to receiving water quality proved to be unworkable because the statute provided no “standards to govern the conduct of individual polluters.” *Id.*

Congress, by passing the CWA in 1972, replaced this framework—dependent on a generic requirement not to violate water quality standards—with the NPDES program. Congress intended this permitting scheme to provide dischargers end-of-pipe effluent limits to provide “clear and identifiable discharge standards.” *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 496 (1987) (internal quote and citation omitted). The CWA’s drafters, moreover, intended these effluent limits to apply at the point of discharge, rather than to define compliance by reference to receiving water quality. See H. Rep. No. 92-911, at 102 (1972). By envisioning the use of end-of-pipe, discharger-specific limits, Congress sought to avoid subjecting dischargers to disparate “court-developed definition[s] of water quality” that would be developed after the fact in enforcement proceedings. S. Rep. No. 92-414, at 79 (1971).

The Act prescribes two types of effluent limits to define dischargers’ obligations. The first, technology-based effluent limitations (TBELs), set a floor for a facility’s discharge quality. See 33 U.S.C. § 1311(b). These TBELs are based on levels of effluent quality that can be achieved by certain treatment technologies. Permit writers set these limits either by reference to effluent limitations guidelines or, when no applicable guideline exists, using best professional judgment.

The second type of limit, WQBELs, are included in permits when permit writers have reason to believe that a TBEL alone will not be sufficient to protect water quality. EPA’s regulations for developing WQBELs require permit writers to use water quality standards “as the basis for specific effluent limitations in NPDES permits.” *Am. Paper Inst., Inc. v. EPA*, 996 F.2d 346, 350 (D.C. Cir. 1993). Permit writers first determine if a WQBEL is even necessary by assessing whether a discharge “will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard. . . .” 40 C.F.R. § 122.44(d)(1)(i). At the outset of this first phase of developing WQBELs, a permit writer must identify applicable water quality standards and then characterize effluent and receiving water quality.

This initial characterization phase involves (1) identifying pollutants of concern in the effluent (i.e., pollutants for which further analysis is needed); (2) determining whether applicable water quality standards allow consideration of a dilution allowance or mixing zone; (3) selecting an approach to model effluent and receiving water interactions; (4) identifying effluent and receiving water critical conditions, such as effluent flow and pollutant concentrations, and receiving water flow and background pollutant concentrations; and (5) establishing appropriate dilution allowances or mixing zones. See EPA, *NPDES Permit Writers’ Manual* §§ 6.1–6.2 (Sept. 2010).

Upon completing these characterization steps, “a permit writer determines whether WQBELs are needed” by assessing “whether a discharge, alone or in combination with other

sources of pollutants . . . could lead to an excursion above an applicable water quality standard.” *Id.* § 6.3, at 6-22 to 6-23.

When a permit writer finds that such an excursion could occur because of a particular pollutant, they then develop a WQBEL for that pollutant. The NPDES regulations demand that each WQBEL be developed so that it is “derived from, and complies with all applicable water quality standards.” 40 C.F.R. § 122.44(d)(1)(vii)(A). EPA understands deriving these limits to require substantial analysis based on the relevant water quality standards, and the Agency’s guidance demands that permit writers provide both the “applicant and the public a transparent, reproducible, and defensible description of how the permit writer” derived a permit’s WQBELs. *NPDES Permit Writers’ Manual* § 6.4.1.5.

Although WQBELs ordinarily are expressed in numeric discharge requirements, the regulations allow limited exceptions to set BMPs. For instance, a permit writer may impose BMPs for controlling storm water discharges, and when it is infeasible to set a numeric limit. 40 C.F.R. § 122.44(k). Although many practitioners refer to this exemption as an authorization to set a broad range of “narrative” permit terms, the regulations only allow the prescription of BMPs—specific activities or procedures that a discharger must implement.

These terms—contemplated by neither Congress nor the NPDES regulations—have long created enforcement challenges for facilities in multiple sectors, particularly municipal dischargers.

Despite Congress’s best intentions and the foregoing regulatory directives to set discharger- and pollutant-specific limits to define compliance with water quality standards, permit writers routinely jettison this process. They instead incorporate Generic Prohibitions in permits issued across the country. These terms—contemplated by neither Congress nor the NPDES regulations—have long created enforcement challenges for facilities in multiple sectors, particularly municipal dischargers. *E.g.*, *NRDC v. Metro. Water Reclamation Dist. of Greater Chi.*, 175 F. Supp. 3d 1041 (N.D. Ill. 2016) (permit prohibited discharges that “cause a violation of any applicable water quality standards”); *Nw. Env’t Advocs. v. City of Portland*, 56 F.3d 979 (9th Cir. 1995) (permit prohibited discharges “which will violate Water Quality Standards”).

Despite these terms’ ubiquity, they have not held up well when challenged. In *NRDC v. EPA*, the Second Circuit invalidated a provision in the 2013 Vessel General Permit that

provided, “Your discharge must be controlled as necessary to meet applicable water quality standards in the receiving water body or another water body impacted by your discharges.” 808 F.3d at 578. The Second Circuit found that this broad, narrative requirement does not actually achieve EPA’s mandate to ensure compliance with water quality standards. *Id.* at 578, 580. The court observed that a generic requirement to comply with water quality standards was patently insufficient to “give a shipowner guidance as to what is expected or to allow any permitting authority to determine whether a shipowner is violating water quality standards.” *Id.* at 578. The court further recognized that, “[b]y requiring shipowners to control discharges as necessary to meet applicable water quality standards without giving specific guidance on the discharge limits,” EPA failed to fulfill its duty to regulate in fact. *Id.* (internal citations omitted).

## In engaging in these analyses, the courts performed the functions that should be part of the permit writing process, not judicial enforcement.

Citing *American Paper Institute, Inc. v. EPA*, the court rejected EPA’s argument that difficulty in writing WQBELs did not allow permit writers to “just thr[o]w up their hands and, contrary to the Act, simply ignore[ ] water quality standards including narrative criteria altogether when deciding upon permit limitations.” *Id.* (internal citations omitted). The court also rejected EPA’s argument that Generic Prohibitions provided sufficient protection for water quality because they allowed for after-the-fact corrective actions in enforcement actions, observing that “[t]he point of a permit is to prevent discharges that violate water quality standards *before* they happen.” *Id.* at 579. In short, the Second Circuit struck down the Vessel General Permit’s generic compliance requirement because it was not fit for its purpose—ensuring actual compliance with water quality standards. *Id.* at 580.

The Second Circuit, moreover, rejected EPA’s argument that Generic Prohibitions are authorized by the NPDES regulations’ allowance of BMPs when numeric limits are infeasible. The court observed that both EPA’s regulations and experience implementing the NPDES program contemplate that BMPs entail specific activities, procedures, or plans. A general requirement not to impair water quality standards, according to the court, lacked this specificity needed to be considered proper BMPs.

Experience shows that the Second Circuit was right. Generic Prohibitions fail to provide guidance to dischargers and result only in findings of violations and definition of water

quality-based obligations after a discharge has already commenced. Two cases—*Ohio Valley Environmental Coalition, Inc. v. Fola Coal Co.*, 82 F. Supp. 3d 673 (S.D. W. Va. 2015), and *Ohio Valley Environmental Coalition, Inc. v. Elk Run Coal Co., Inc.*, 24 F. Supp. 3d 532 (S.D. W. Va. 2015)—illustrate how Generic Prohibitions fail to provide guidance to dischargers and force courts to conduct water quality assessments that should be conducted by permit writing agencies before a permit even gets issued.

In both of these cases, West Virginia federal courts applied permit provisions—found in all West Virginia NPDES permits for coal mines at the time—incorporating by reference a regulation requiring discharges “to be of such quality so as not to cause violation of applicable water quality standards. . . .” In each instance, plaintiff environmental organizations brought actions alleging that the mine discharged excessive ionic pollution, which caused or materially contributed to the biological impairment of the mine’s receiving waters. After trials on liability issues, the court found in both cases that the mine’s ionic discharges caused a violation of the narrative water quality standard, as the plaintiffs’ alleged.

In *Fola Coal*, the court reached this conclusion based on expert testimony, which relied on an EPA scientific benchmark, among other scientific studies, indicating high conductivity in streams could cause biological impairment. 82 F. Supp. 3d at 686–96. The court also considered the quality of the mine’s discharges, as demonstrated by the permitting agency’s sampling. *Id.* at 696–98. In *Elk Run*, the court likewise based its findings on expert testimony relying upon scientific studies, including the EPA scientific benchmark, peer-reviewed articles on the benchmark, and West Virginia Department of Environmental Protection (WVDEP) guidance on stream condition index scores. 24 F. Supp.3d at 556–79.

In engaging in these analyses, the courts performed the functions that should be part of the permit writing process, not judicial enforcement. The courts assessed the applicable water quality standards, identified the pollutant of concern, and determined whether the discharge of the pollutant led to a violation of the standard. These processes mirror what the *NPDES Permit Writers’ Manual* demands of EPA and other permit-issuing authorities. *See, e.g.*, § 6.3 at 6-22 to 6-23.


This analysis could—and should—have been done by WVDEP when it was writing the mines’ permits. As the Second Circuit held in *Waterkeeper Alliance, Inc. v. EPA*, NPDES permits should be issued where such permits “ensure that every discharge of pollutants will comply with all applicable effluent limitations and standards.” 399 F.3d 489, 498 (2d Cir. 2005). By imposing Generic Prohibitions instead of engaging in the analysis required by the statute, regulations, and the *NPDES Permit Writers’ Manual*, permit writers abdicate their responsibility under the CWA. This leaves questions that expert agencies are better suited and better positioned to answer than courts, which do not have the same scientific or technical expertise.

Transferring permit writing functions into enforcement benefits no one. Dischargers operating under permits that contain Generic Prohibitions have minimal guidance on what

their water quality-based compliance obligations are. They are forced to invest in pollution controls without any assurance—contrary to the CWA's goals—that doing so will actually result in compliance.

These stakes are particularly high for municipal dischargers operating combined sewer systems. For them, water quality-based controls often entail the development and construction of capital projects costing into the hundreds of millions of dollars. Generic Prohibitions create the risk that these public entities will have to spend yet more ratepayer money on capital-intensive controls imposed in litigation. In a lawsuit, Generic Prohibitions would empower a judge—rather than an expert agency that must receive and consider public comments during the permitting process—to define how municipalities spend their public money on water quality compliance for decades to come.

Dischargers, however, are not the only ones adversely affected. Generic Prohibitions force the public and regulators to fly blind. These permit provisions provide no clear benchmarks against which to grade dischargers' performance.

This shift of permit writing functions to courts also harms water quality. Courts can only address water quality questions and compliance with Generic Prohibitions in enforcement cases—after pollution has already started to impact receiving waters. Protecting water quality demands that permit writers do what the Act and EPA's regulations demand of them: writing discharger-specific limits to protect water quality standards. 

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