

# SPARE THE ROD AND SPOIL THE LAW: WHY THE CLEAN WATER ACT HAS NEVER GROWN UP

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## I. INTRODUCTION

In many ways, laws can be like children. They are sometimes created in a burst of optimism, sometimes in the dark of a back room. They may be aborted before birth, their ending either forgotten or mourned or sometimes becoming the spur to try again. Just like newborn babies, all of the information needed to form the fully functioning adult is in place. But also like newborn babies, the presence of “coding” alone, in this case from the U.S. Code instead of a DNA strand, needed to form the fully realized law, is not enough to produce the fully functioning miracle of a law that lives up to its potential. Just as the raw DNA genetic code cannot teach a child how to function successfully in a complex modern world, the best statutory provisions alone can never bring about the desired results. After their birth, laws must be administered, just as children. If they are not administered properly, they may become weak over time, disappointing their creators and failing to make the contribution which was expected of them.

In the world of environmental laws, indeed in the world of all laws, there could not be a finer or clearer set of genes than exist for the Clean Water Act (“CWA”). Its modern incarnation, whose anniversary we observe, states that “the objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>1</sup> The entire discharge of pollutants into the national waterways was to be “eliminated by 1985.”<sup>2</sup> Yet it is clear that the CWA has not met these explicit requirements, nor is it anywhere near meeting them. As noted by Robert Adler in his observations about the CWA, “trends in ambient water quality . . . remain ambiguous and inconsistent.”<sup>3</sup> Many water bodies are still impaired by chemicals and pathogens and are likely harmful to human health and aquatic ecosystems.<sup>4</sup>

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1. Federal Water Pollution Control Act, 33 U.S.C. § 1251(a) (1994).

2. *Id.* § 1251(a)(1).

3. Robert Adler, *The Two Lost Books in the Water Quality Trilogy: The Elusive Objectives of Physical and Biological Integrity*, 33 ENVTL. L. 29, 49 (2003) (citations omitted).

4. *Id.*

Perhaps even worse, there is no general trust from the public that our water is getting any better. Though the general public may not know the difference between the CWA, the Safe Drinking Water Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response, Compensation, and Liability Act, nor what roles each of them has in assuring that the water that comes to our tap is clean, there is widespread disillusionment with the state of our nation's waters.<sup>5</sup> The growth of bottled water for drinking has exploded in the last ten years.<sup>6</sup> Though it is possible that some of this is induced demand, there must be some traction with which to spur that demand. The mere "fear" that water pollution is harming us is an actual injury, enough to create standing in a recent case.<sup>7</sup> The CWA at thirty therefore also illustrates a problem with all of the laws that have not been "brought up" well. Our water is not only failing to improve, but the CWA is also an example of the ongoing distrust and fear of government to actually take care of people's needs to restore and protect our ecosystems and health.

What went wrong? The answer is simple. The law may not have been "born bad," but it has certainly been brought up that way. The problem is that the good genes of the CWA have not really been tested. For all of the great language in the CWA, a law is only as good as its enforcement, and there have been across-the-board difficulties with the enforcement of the CWA.<sup>8</sup> Neither the CWA, nor other environmental laws, are alone in failing to grow up properly, but they do vividly illustrate the problems which occur when the government fails to enforce its laws adequately. It is important to examine the failures of the CWA and show why they can be traced to enforcement. It is not only important for understanding the past and future of the CWA, but it is also important in order to challenge current propositions that would continue to undercut the CWA and other environmental laws.

## II. WHAT IS WRONG AND WHY?

The problems with our nation's waters have been set out in great detail in recent articles, including many in this issue of the *Alabama Law Review*.<sup>9</sup> The litany of facts is startling. The most recent survey by our own federal government shows that a large portion of our nation's waters remain unfit for all uses to which they are put.<sup>10</sup> Our coastal areas and bays are routinely

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5. See Natural Resources Defense Council, *Bottled Water: Pure Drink or Pure Hype?* (Mar. 1999) (implying that the growth in demand for bottled water stems in part from the lack of confidence in the safety of the nation's drinking water supplies), available at <http://www.nrdc.org/water/drinking/bw/chap2.asp>.

6. See *id.*

7. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167 (2000).

8. Adler, *supra* note 3, at 29.

9. See generally Adler, *supra* note 3.

10. United States Geological Survey, *Selected Findings and Current Perspectives on Urban and Agricultural Water Quality by the National Water-Quality Assessment Program*, available at <http://water.usgs.gov/pubs/FS/fs-047-01> (last updated Aug. 10, 2001).

polluted by varying amounts during the course of the year.<sup>11</sup> This, some eighteen years after all man-made pollutants into waterways were to be eliminated.<sup>12</sup> The important question is why.

It is possible that this goal was just too ambitious, but the fact that many waterways have been cleaned up and that many pollutants have been brought under control suggests that the answer is more complex. And indeed, a critical examination of the disparity in our waters indicates that the problem is not related to the scientific complexity of environment management but may be related to the ease of enforcement of the various provisions of the CWA. This is a crucial observation, as it suggests that attaining clean water is within our control and could be in our grasp with better and more consistent enforcement of our laws. What is the evidence of this fact?

The continuing problems with pollution are mostly associated with non-point source control.<sup>13</sup> But this is unrelated to the complexity of solving the problem. It is true that pollution from non-point sources is less geographically compact than from point sources,<sup>14</sup> but the sources of non-point pollutants are well understood,<sup>15</sup> and the mechanism for controlling most of such pollution, i.e., land use controls, have long been recognized in the CWA itself.<sup>16</sup> Moreover, pollution from non-point sources is, in theory, definitively regulated through the Total Maximum Daily Load ("TMDL") program, which tellingly has been one of the biggest failures in the CWA.<sup>17</sup> Rather than the scientific complexity of the problem involved, the difference in the effectiveness of the various parts of the CWA is more a function of how likely and whether the rules are enforced. An examination of the parts of the CWA and how likely they are to be vigorously enforced illus-

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11. See, e.g., Craig Welch, *Pollution Threatens Shellfish; Fecal Contamination Puts 20 Tideflats in 12 Counties in Danger of Not Meeting State Water-Quality Standards*, SEATTLE TIMES, July 8, 2003, at B1.

12. See 33 U.S.C. § 1251(a)(1).

13. Paula J. Lebowitz, *Land Use, Land Abuse and Land Re-Use: A Framework for the Implementation of TMDLS for Nonpoint Source Polluted Waterbodies*, 19 PACE ENVTL. L. REV. 97, 98 (2001) ("Nonpoint source pollution is the main cause of forty percent or more of the remaining water quality problems in the United States." (quoting Joe Cannon, *Choices and Institutions in Watershed Management*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 379, 388 (2000))).

14. Steven Hipfel, *Enforcement of Nonpoint Source Water Pollution Control and Abatement Measures Applicable to Federal Facilities, Activities and Land Management Practices Under Federal and State Law*, 8 ENVTL. LAW. 75, 84 (2001) ("Point sources are by definition discrete outlets that lend themselves to technological controls and monitoring. Nonpoint source or runoff water pollution, on the other hand, is caused by a variety of activities occurring over dispersed areas." (citing George A. Gould, *Agriculture, Nonpoint Source Pollution, and Federal Law*, 23 U.C. DAVIS L. REV. 461, 472 (1990))).

15. Lebowitz, *supra* note 13, at 97 ("Nonpoint sources of pollution include such categories as urban runoff, sedimentation from natural runoff and poor land management activities, heat due to vegetative removal, fertilizers and pesticides carried off by precipitation or watering after application, and residues and runoff from roads and highways." (citing 33 U.S.C. § 1314(f)(A)-(F) (1994))).

16. *Id.* at 98 (recognizing that nonpoint source pollution is inextricably linked to land use activities and also recognizing that land use control is a well-protected province of state and local governments, the CWA created a planning approach for the states to address nonpoint source pollution control).

17. Debbie Shosteck, *Pronsolino v. Marcus*, 28 ECOLOGY L.Q. 327 (2001) (citing 33 U.S.C. § 1329(b)-(h) (1994)).

trates this proposition well because parts of the CWA require enforcement while other parts only request it.

If one were to examine how much ink is devoted to specific requirements under the CWA, one would assume that the primary thrust of the CWA is to limit and, ultimately, to eliminate point source discharges into U.S. waterways.<sup>18</sup> The CWA directs the EPA Administrator (the “Administrator”) to create effluent guidelines limiting the discharge of pollutants from point sources.<sup>19</sup> The Administrator is then to set the actual performance limitations themselves using the latest scientific process, while considering technological standards and the cost of compliance to the industry.<sup>20</sup>

These requirements are then enforced through the National Pollutant Discharge Elimination System (“NPDES”) permit system.<sup>21</sup> Each party that wishes to discharge into the waters of the United States must obtain one of these permits to do so.<sup>22</sup> The permits incorporate all technology and receiving water quality standards with limits on the specific sources.<sup>23</sup> The permits then require the applicants to monitor their discharges.<sup>24</sup> The permits specify the control technology applicable to each pollutant, the effluent limitations a discharger must meet, and the deadline for compliance.<sup>25</sup>

It is notable that the process is very specific and allows very little discretion on the part of the Administrator or the regulated entity.<sup>26</sup> When the standards are in place, in theory at least, every regulated entity will install the equipment necessary for the process control.

Contrast this with the provisions for non-point sources. Non-point sources include pollution resulting from run-off attributable to agriculture, silviculture, mining activities, and construction.<sup>27</sup> Here, the federal role is essentially one of advice and encouragement.<sup>28</sup> Nevertheless, technically the law is supposed to identify problems with non-point pollution sources and have them corrected.<sup>29</sup> However, there is no discipline in the CWA that en-

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18. Victor B. Flatt, *A Dirty River Runs Through It (The Failure of Enforcement in the Clean Water Act)*, 25 B.C. ENVTL. AFF. L. REV. 1, 8 (1997) (citing 33 U.S.C. § 1362(14) (1994) and 40 C.F.R. § 401.11(d) (1994)).

19. *Id.* at 8 (citing 33 U.S.C. § 1362(6)).

20. *Id.* at 9 (citing 33 U.S.C. §§ 1311(b)(2)(F), 1314(b)(2)(B), 1316(b)(1)(B) (1994)).

21. 33 U.S.C. § 1342(a) (1994).

22. Roger Fleming, *Does the Clean Water Act Protect Endangered Species? The Case of Maine's Wild Atlantic Salmon*, 7 OCEAN & COASTAL L.J. 259, 270-71 (2002) (citing 33 U.S.C. §§ 1311(a), 1342(a)); Stacy D. Harrop, *Municipal Separate Storm Sewer Systems: Is Compliance with State Water Quality Standards Only a Pipe Dream?*, 31 ENVTL. L. 767, 770 (2001) (citing 33 U.S.C. § 1342); Charles P. Lord et al., *Natural Cities: Urban Ecology and the Restoration of Urban Ecosystems*, 21 VA. ENVTL. L.J. 317, 365 (2003) (citing 33 U.S.C. § 1311(a)).

23. Flatt, *supra* note 18, at 11 (citing § 1342(a)(1)-(2)).

24. *Id.* at 11-12 (citing 40 C.F.R. § 122 app. d (1996)).

25. Fleming, *supra* note 22, at 271.

26. See James Boyd, *The New Face of the Clean Water Act: A Critical Review of the EPA's New TMDL Rules*, 11 DUKE ENVTL. L. & POL'Y F. 39 (2000); see also Robin Kundis Craig & Sarah Miller, *Ocean Discharge Criteria and Marine Protected Areas: Ocean Water Quality Protection Under the Clean Water Act*, 29 B.C. ENVTL. AFF. L. REV. 1, 14-16 (2001).

27. Craig & Miller, *supra* note 26, at 38 (citing 33 U.S.C. § 1288(b)).

28. See *id.* at 38-39 (citing 33 U.S.C. § 1288(a)).

29. *Id.* at 39.

sure that this clean-up enforcement of non-point sources will or must occur. The Administrator identifies areas in need of control and evaluates state plans designed to control them.<sup>30</sup> Each state is supposed to develop and implement an area-wide waste treatment management plan for each area having substantial water quality control problems relating to non-point source pollution.<sup>31</sup> Many have not, and there are no specific penalties for failing to do so. There are also the overall water quality requirements enforced by the TMDL process that also might be used to control non-point source pollution.<sup>32</sup> However, while the TMDL program requires that “impaired” water bodies be cleaned up, the only timetables for developing TMDL programs have been imposed by court order.<sup>33</sup> Thus, for non-point sources, there is great discretion and no particular requirements that can be looked at for measuring compliance.

Therefore, the parts of the CWA without specific direction—the ones that have more administrative flexibility—are the parts that still give us trouble thirty years later. Tellingly, the NPDES program is called the CWA’s enforcement program,<sup>34</sup> yet it only covers part of the causes of water pollution. Moreover, there is also evidence of a decline in at least compliance, if not in actual water quality, when the NPDES enforcement itself is lax.<sup>35</sup>

Thus, the most basic problem with the CWA at maturity is the failure of adequate enforcement. This is a problem from the top down and at all levels. Like an unruly child, the CWA needs constant vigilance to ensure its successes. For a variety of reasons, without enforcement, the true goal of the CWA, that is, clean water, will not occur. Since the need for any kind of enforcement in environmental laws is still hotly debated, it is important to explain why a certain kind of enforcement of this law is needed.

### III. WHY PERFORMANCE-BASED ENFORCEMENT IS NEEDED IN THE CLEAN WATER ACT AND OTHER ENVIRONMENTAL LAWS

To understand the role enforcement plays at all levels of the CWA and other environmental laws, one must start with two basic assumptions: (1) humans, as do all living creatures, operate from a position of enlightened self-interest; and (2) because of the nature of environmental harms, acting from such self-interest will invariably cause harm to others.<sup>36</sup> Of course, environmental commentators have been saying much the same thing for

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30. See 33 U.S.C. § 1288(a)(1), (b)(1)(A).

31. Craig & Miller, *supra* note 26, at 39.

32. See Boyd, *supra* note 26.

33. See, e.g., Order, *Sierra Club v. Hankinson*, 939 F. Supp. 872 (N.D. Ga. 1996).

34. Flatt, *supra* note 18, at 11 (citing 33 U.S.C. § 1342).

35. See *id.* at 23-24.

36. See Garret Hardin, *Tragedy of the Commons*, 162 *SCIENCE* 1243, 1243-48 (1968), reprinted in ROBERT L. GLICKSMAN ET AL., *ENVIRONMENTAL PROTECTION LAW AND POLICY* 47, 49 (Erwin Chemerinsky et al. eds., 4th ed. 2003).

years, if in a different language.<sup>37</sup> The presumption for the need of statutory environmental law has often been explained as necessary to correct the tragedy of the commons and general commons ruination that comes from everyone acting in her own self-interest.<sup>38</sup> Despite the acceptance of this fact as an almost universal truism, often the administration of the CWA and other environmental laws does not reflect this knowledge. In the analogy of the child, it is as if parents all say that their children need love and discipline, but then the same parents fail to provide either. If, in fact, there are certain truisms about the environment and how it can be regulated, to ignore or bury those is foolish and doomed to failure. Because there is much rhetoric about how vastly different kinds of environmental enforcement can succeed, the time has come to review the tenets and underpinnings of the special case of environmental regulation.

Let us first examine the role that humans acting in their own enlightened self-interest play. In the aggregate, human behavior will lead to personal wealth accumulation to the detriment of others as long as this behavior is allowed.<sup>39</sup> Indeed, even things that are explicitly forbidden will occur when there is no system to prevent this from occurring.<sup>40</sup> This has been starkly illustrated with respect to “commons tragedies” which presuppose that no amount of coaxing or moralizing will stop people from acting in their own self-interest, even when everyone is hurt in the long run. As stated by Carol Rose:

Why does everyone overfish, even to the detriment of the body of water and its living stocks? According to the economic account, everyone does so because each user knows that, even if any particular individual refrains from fishing so intensely, everyone else will continue to fish, and in fact the others might just fish a little bit more, to take up the slack left by any moderate fisher. *The moderate fisher, in short, would just be a sucker . . .*<sup>41</sup>

As I recounted in a recent article examining the collapse of Enron, this suggests that enforcement regimes must be clear and/or mandatory to work and that voluntary or self-enforcement will not work if there is an incentive not to meet the requirements.<sup>42</sup>

We all know that people tend to “cheat” for their own advantage, but we have formal and informal systems that work to preserve rules against that.

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37. See, e.g., Laurent R. Hourcle, *Environmental Law of War*, 25 VT. L. REV. 653, 659 (2001) (stating that “over the centuries humans have continued to harm the environment as they undertake armed conflict”).

38. See GLICKSMAN ET AL., *supra* note 36, at 54.

39. Victor B. Flatt, *The Enron Story and Environmental Policy*, 33 ENVTL. L. REP. (ENVTL. L. INST.) 10,485, 10,491 (2003).

40. *Id.*

41. Carol M. Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 DUKE L.J. 1, 3 (1991) (citation omitted) (emphasis added).

42. See Flatt, *supra* note 39.

In small communities, persons may rely on informal agreements, through ostracization and loss of social capital for those who break the rules.<sup>43</sup> But with large numbers of people, other incentives and punishments come into play. Thus, modern property law provides an incentive to owners to be vigilant about protecting their own property and a method to avail themselves of enforcement authorities when their rights are threatened.<sup>44</sup> The call of “stop thief” is a simple reflection of this incentive and expectation of enforcement. Commons properties, however, allow for no such incentives in large groups.<sup>45</sup> First, there is no “property interest” in the commons and no way to use the common law to protect them.<sup>46</sup> However, we and other societies have stepped into the breach with statutory protections, but we have forgotten that having the rule of law alone will not protect the resource; the law must be backed up by incentives and enforcement.<sup>47</sup>

We also tend to forget that complex systems respond to incentives in the same way. Thus, a government or association will not act if there are incentives not to and no absolute requirement to do so. Our states have an incentive not to unilaterally restrict business development through land use controls, yet the non-point source protections in the CWA would seem to assume that they will comply with this provision.

With private property, ownership provides an important incentive to enforce laws.<sup>48</sup> Without that, there must be something to step into the breach of ensuring that laws are followed, and that “something” is enforcement. Moreover, this enforcement must be clear or mandated because it will not occur on its own.

In examining how enforcement systems worked, Professor Rose noted that enforcement is “difficult” and costly when there are complex monitoring requirements and schemes that are variable and not clear.<sup>49</sup> Though not stated explicitly, the assumption is that environmental protection systems will not regulate themselves. Without a system that ensures everyone has an incentive to follow the requirements (such as the incentive of avoiding getting caught and prosecuted which is more likely with clear and transparent requirements), the requirements will not be followed.<sup>50</sup>

The CWA itself, along with the Clean Air Act, provides an example of the problems with voluntary and cooperative enforcement in environmental protection. Earlier versions of both the CWA<sup>51</sup> and the Clean Air Act<sup>52</sup> only

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43. See Rose, *supra* note 41, at 3-5.

44. O. Lee Reed, *Nationbuilding 101: Reductionism in Property, Liberty, and Corporate Governance*, 36 VAND. J. TRANSNAT'L L. 673, 684-90 (2003).

45. See Rose, *supra* note 41, at 3-5.

46. GLICKSMAN ET AL., *supra* note 36, at 49.

47. See, e.g., 33 U.S.C. § 1319 (1994) (“Enforcement”).

48. GLICKSMAN ET AL., *supra* note 36, at 49.

49. See Rose, *supra* note 41, at 22.

50. See, e.g., Flatt, *supra* note 18, at 34 (explaining that without the threat of EPA intervention the “statutes alone will not compel consistent and effective environmental protection”).

51. E.g., Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903.

52. E.g., Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485.

required the maintenance of an ideal standard of cleanliness or a background ambient standard.<sup>53</sup> The states were supposed to ensure that this level was met.<sup>54</sup> But without any mechanisms for compliance (and perhaps indeed with incentives not to comply)<sup>55</sup> and without any capacity to monitor or any standards to govern, both provisions failed miserably.<sup>56</sup> In 1972, a new part of the CWA was added that had specific, enforceable, performance-based standards.<sup>57</sup> However, only parts of the enforceable standards were actually enforced—those parts where the government had no choice but enforcement.<sup>58</sup> When we examine the positive changes to our nation's lakes and rivers, almost all of the improvement has come from that part that was enforced.<sup>59</sup> While the overall picture remains uneven, there has been “significant progress in reducing the discharge of pollutants from municipal and industrial point source dischargers.”<sup>60</sup> The part of the CWA that required the states to control non-point source pollution has not achieved that result.<sup>61</sup> Moreover, that part of the modern CWA that supposedly required states to take action based on overall water quality and that allows “trading off” of polluting resources, the TMDL program, has lain unenforced for decades.<sup>62</sup>

With respect to the Clean Air Act, the failure of enforcing aspirational goals without any tangible requirements as a strategy was recognized by Congress as recently as 1990.<sup>63</sup> Part of the 1990 Clean Air Act amendments altered the requirements for regulating hazardous air pollutants.<sup>64</sup> Prior to 1990, the Administrator was supposed to set emissions limitations at the place that would adequately protect public health.<sup>65</sup> But in the case of hazardous air pollutants, many of which were carcinogenic, this was difficult to do in any principled manner.<sup>66</sup> The administration was bogged down and only listed eight pollutants in a twenty-year period, even though thousands

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53. FREDERICK R. ANDERSON ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 375-76, 589-90 (Aspen Law & Business 3d ed. 1999).

54. William L. Andreen, *Beyond Words of Exhortation: The Congressional Prescription for Vigorous Federal Enforcement of the Clean Water Act*, 55 GEO. WASH. L. REV. 202, 211 (1987) (citing Water Pollution Control Act § 2(d)(4)); Flatt, *supra* note 18, at 7.

55. See Flatt, *supra* note 18, at 7 (citing S. Rep. No. 92-414 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3674).

56. See Andreen, *supra* note 54, at 213.

57. See *id.* at 216; Flatt, *supra* note 18, at 7.

58. See generally Flatt, *supra* note 18 (arguing that state enforcement of the CWA was lax in the absence of strong federal enforcement).

59. See Hipfel, *supra* note 14, at 80.

60. Adler, *supra* note 3, at 49.

61. See *id.*

62. See, e.g., Order, *Sierra Club v. Hankinson*, 939 F. Supp. 865, 871 (N.D. Ga. 1996) (stating that Georgia developed only two TMDLs in sixteen years despite having identified over 340 water quality limited segments).

63. See Clean Air Act Amendments, Pub. L. No. 101-549, §§ 401-416, 104 Stat. 2399, 2584-2631 (1990) (codified as amended at 42 U.S.C. § 7651 (2000)).

64. *Id.*

65. GLICKSMAN ET AL., *supra* note 36, at 449.

66. *Id.*



more were clearly at issue.<sup>67</sup> Again, the certainty that came along with command and control regulation outweighed the supposed efficiencies that could come from a standard that allowed maximum flexibility but contained no mechanism or resources to enforce this mechanism.

Malleable standards without enforcement does not eliminate inefficient regulations, it eliminates all regulation. Not because it is not necessary or required by law, but that it is impractical and difficult. This theory of environmental regulation and history of the success or failure of programs might suggest that our administrators would be wary of enforcement schemes that rely on monitoring of divergent, multiple sources simultaneously or that depend heavily on self-regulation, but this is not the case.

Instead of heeding the danger signs of enforcement methods that do not work and attempting to employ methods that do work, our government has signaled an intent to move in the opposite direction, with an attempt to enforce environmental protection in the CWA by clearly ineffective methods. For instance, there have been proposals to weaken the TMDL program as unworkable and to move toward watershed improvement as opposed to direct controls on end-of-pipe emissions.<sup>68</sup>

One justification is that environmental law is too complex and difficult and simply penalizes those who run afoul of its prohibitions.<sup>69</sup> Instead, argue the proponents of these proposals, focusing resources on cooperation and assistance will actually improve the environment.<sup>70</sup> This is a move in exactly the wrong direction. Instead of trying to discipline the recalcitrant parts of the CWA by making the reality match the law, these current proposals for the CWA and other environmental laws would instead try to replicate the schemes that have performed poorly. This is like a parent finally recognizing that some of their child's behavior is poor and encouraging the child to do more of it.

#### IV. WHITHER THE CLEAN WATER ACT?

From this discussion of the structural problems of lack of enforcement in most environmental protection schemes such as the CWA, we can make two assertions. One, we should not alter those parts of the CWA that do provide for some specific performance-based enforcement. Two, the current CWA enforcement scheme must be altered if it is to realize its potential to truly protect our nation's waters.

As noted above, the current deficiencies of the CWA and the fact that we do not currently have the clean water envisioned in 1972 can be attrib-

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67. *Id.*

68. Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation, 65 Fed. Reg. 43,586 (July 13, 2000) (to be codified at 40 C.F.R. pts. 9, 122, 123, 124, and 130) [hereinafter July 2000 Rule].

69. *Id.* at 43,590.

70. *Id.*

uted to problems of administration and enforcement. Therefore, we should not try to move from the current system of NPDES permitting, which requires specific performance-based standards and monitoring. Although trading schemes might be good in certain areas, the multitude of point sources makes the monitoring very difficult if the standards vary among otherwise similar sources. Moreover, those parts of the NPDES program that are weak due to lax enforcement should be strengthened. Though states are supposedly acting to vigorously enforce the NPDES permit standards, recent studies have suggested otherwise.<sup>71</sup> Under the terms of the CWA itself, evidence of lax enforcement could allow the federal government to take back programs from the states.<sup>72</sup> However, this has not happened because the federal government has inadequate funding to do so.<sup>73</sup> The EPA must be funded in a manner sufficient to allow it to have oversight of the states and take back programs when they are not enforced properly. Unlike the states, the EPA does not have a “race to the bottom” incentive to be lax with enforcement.<sup>74</sup> It is in the interest of some persons to hope that government can be run with less money by using cooperative enforcement. But without natural incentives, this will just not work.

The evidence from the performance of the past thirty years also indicates that certain parts of the CWA are in need of an overhaul. Specifically, if we really want non-point source control to improve, there must be some enforceable measurements associated with the aspirational and ambient goals. A successful example of this is the addition of stormwater run-off to the NPDES permit program.<sup>75</sup> By court order, the EPA was forced to regulate stormwater run-off from construction sites.<sup>76</sup> The pollution from stormwater run-off is similar to non-point source pollution in that it cannot be controlled by an “end-of-pipe” process but rather must be controlled by changes in activities or physical barriers. Similarly, new enforceable controls on Confined Animal Feeding Operations (“CAFOs”) demonstrate the feasibility of using physical barriers or requiring certain practices or buffers between the activities and the water.<sup>77</sup> Although the EPA does not have the direct statutory authority to require particular land use practices for non-

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71. See Flatt, *supra* note 18, at 17.

72. *Id.* at 15 (citing 33 U.S.C. § 1342(c)-(d)). See also *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 206-08 (1975).

73. Flatt, *supra* note 18, at 16 (citing *Order, Sierra Club v. Hankinson*, 939 F. Supp. 865, 867 (N.D. Ga. 1996) (finding the EPA’s oversight of Georgia’s compliance “totally inadequate”)).

74. See *id.* at 2-4.

75. Avi Brisman, *Considerations in Establishing a Stormwater Utility*, 26 S. ILL. U. L.J. 505, 508 (2002) (citing National Pollutant Discharge Elimination System-Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722 (Dec. 8, 1999) (to be codified at 40 C.F.R. pts. 9, 122, 123, and 124)).

76. *Id.* (citing National Pollutant Discharge Elimination System, 64 Fed. Reg. at 68,723). See also Chris A. Mattison, *New Storm Water Regulations Affect Municipalities and Smaller Construction Operations*, 29 COLO. LAW. 71, 72 (2000).

77. National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7176, 7209 (Feb. 12, 2003) (to be codified at 40 C.F.R. pts. 9, 122, 123, and 124).

point sources, without more, it does have the TMDL program, which arguably gives the EPA authority to revoke NPDES permitting authority from states that do not meet the standards and, in turn, meet those standards by requiring controls on non-point sources.<sup>78</sup>

Point sources themselves also provide a built-in incentive for controlling non-point sources if the TMDL program remains viable. Assuming the TMDL program is adequately enforced, then even if the CWA is interpreted as only allowing the additional pollution control to be taken from point sources, the EPA would want to encourage and possibly utilize the markets to, in turn, control the non-point sources. An example of this happened when New York City chose to buy development rights to upstate drainage for the city's water supply rather than pay more money to clean the water after it was dirtied.<sup>79</sup> If the EPA can provide assistance for such a project, perhaps through the recording and monitoring of such agreements, then this is a good way to control the non-point sources.

Of course, this depends on the TMDL program itself being rigorously enforced, and the prospects for such an outcome do not look good at the moment. Not only is the current administration trying to weaken TMDL rules,<sup>80</sup> related regulations which would prohibit the use of data from unapproved laboratories remove one of the tools for citizens' groups to monitor and enforce what is happening with water quality.<sup>81</sup> If the EPA is serious about quality and not merely enforcement, then providing citizens' groups with grants to do monitoring and making it easy to get test results from other laboratories will go a long way towards ensuring that actions taken under the TMDL are really helping to clean water. Because much water pollution is localized, many citizens' groups do have incentives to enforce the law if they are given a method to do so. But since pollution data from non-point sources is not readily available, such citizens cannot avail themselves of citizen suits to enforce requirements, as they do with the NPDES program.<sup>82</sup> Involving citizens by letting them have power to gather data about water quality that they can use to force polluters to change through the TMDL program would also serve to make the CWA more available to private citizens and give them a stake in their own clean water in their local communities.

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78. 33 U.S.C. §§ 1251(d), 1313, 1314(a)(2) (2000).

79. Katherine Ellison & Gretchen Daily, *Banking on the Earth*, BOSTON GLOBE, June 16, 2002, at E1, available at 2002 WL 4133609.

80. See Withdrawal of Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation, 67 Fed. Reg. 79,020 (proposed Dec. 27, 2002).

81. July 2000 Rule, *supra* note 68, at 43,603.

82. 33 U.S.C. § 1365(a) (1994).

## V. CONCLUSION

This is just the tip of the iceberg on programs that could be implemented to turn the CWA into a program that actually provides clean and safe water. More grants to states, model rules, best management practices, and, importantly, strengthening the citizen suit provision could all help. But simply fining those who violate the law in a reasonable manner might help more and obviate the need for more and more powerful citizen suits. What is important to realize is that the problem is not with the CWA itself. Instead, it is with the methods that have been adopted to try to make its goal a reality. Various programs and administrative ideas may work, but what must be present is a verifiable enforcement of the law that requires all of our waters to meet background levels of water quality. The CWA and other environmental laws will not work without such enforcement or incentives to follow the law because of the nature of the problems arising from commons overuse. It is time to begin again with the CWA. It may be thirty years old, but it still needs to have the discipline of enforcement to work.