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INVESTIGATING 40 C.F.R. § 124.55(B): STATE-COURT REVIEW OF NPDES PERMIT CERTIFICATIONS

Tad Macfarlan*

This Note investigates the wisdom and validity of 40 C.F.R. § 124.55(b), a Clean Water Act regulation promulgated by the U.S. Environmental Protection Agency (EPA) as part of the National Pollution Discharge Elimination System (NPDES) permitting program. The Clean Water Act provides affected states with an opportunity to certify federally administered NPDES permits before issuance by EPA. State certification is a meaningful moment in water quality regulation, and judicial review of these critical decisions takes place in state courts. Unfortunately, 40 C.F.R. § 124.55(b), designed to bring certainty and finality to permit-holders, effectively removes state courts from the process of ensuring that state certifications are legally sufficient after permit issuance. In doing so, the regulation dismantles an essential tool of the Clean Water Act. It also renders 40 C.F.R. § 124.55(b) invalid. Thus, 40 C.F.R. § 124.55(b) should be repealed by EPA or invalidated by the courts, so that environmental organizations can effectively challenge illegal state certifications. While significant legal obstacles—standing, jurisdiction, and statutes of limitations, to name a few—stand in the way of a challenge to the validity to 40 C.F.R. § 124.55(b), there is a good chance that such a challenge could ultimately find success.

INTRODUCTION

With the passage of the Clean Water Act (CWA) in 1972,1 Congress aimed to eliminate the discharge of pollutants into the navigable waters of the United States by 1985.2 A quarter of a century has passed since 1985, and water pollution remains a serious problem in our modern industrialized nation.3 To make matters worse, in the past decade the Supreme Court has significantly curtailed efforts to control water pollution through federal

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3. See PERCIVAL ET AL., supra note 1, at 638–43.
implementation of the CWA. The Court's controlling opinions in *SWANCC v. Army Corps of Engineers* and *Rapanos v. United States* successively shrunk the federal government's jurisdiction over "the waters of the United States." In each of these decisions, the Court suggested that there are constitutional limits on the power of the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers to require polluters to obtain permits for discharges into intrastate waters.

With the federal government's reach over polluting entities thus limited, it has become all the more important that the CWA pollution permits issued by EPA sufficiently protect water quality. States play a vital role in achieving this end by certifying federal permits through the process outlined in section 401 of the CWA. It is of the utmost importance that the states are able to exercise their inherent "traditional and primary power over . . . water use," to the fullest extent that Congress intended, when certifying federal permits. Unfortunately, an EPA regulation, 40 C.F.R. § 124.55(b), designed to bring certainty and finality to permit-holders, largely removes state courts from the process of ensuring that state-certified, EPA-issued permits are legally sufficient under the mandates of section 401. Such is the case even when state legislatures explicitly provide for judicial review to ensure sufficiency of state certification decisions made by state environmental agencies. This regulation has thereby stripped States of their full capacity to control water pollution within their own borders. Secondarily, it has nullified the ability of environmental organizations to fulfill their quintessential function of holding governmental agencies, in this

10. In declaring its policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources," Congress chose language signaling that it was merely codifying a pre-existing right of the States. 33 U.S.C. § 1251(b) (emphasis added). While *Rapanos* and *SWANCC* helped to protect the States' right to be free from federal regulation over purely intrastate matters, it is perhaps even more important that the States retain the ability to provide for more stringent regulation, within their borders, than a federal agency demands.
This Note argues that 40 C.F.R. § 124.55(b) should be repealed by EPA or invalidated by the courts, and investigates the means available to environmental organizations to ensure that one of the two occurs. Part I describes the statutory structure that Congress designed in relevant provisions of the CWA. Part II argues that 40 C.F.R. § 124.55(b) dismantles an essential part of this structure, and that the regulation is inconsistent with the CWA's text and purpose. Part III explores the judicial and administrative obstacles that plaintiffs must navigate to avoid the import of the regulation.

I. THE ROLE OF STATE CERTIFICATION IN THE CLEAN WATER ACT SCHEME

A. The Purposes of the Clean Water Act

When considering the appropriate role of state certification within the CWA's pollution prevention scheme, one must begin with the ambitious goals that Congress announced in section 101(a) of the CWA. Congress declared its objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and to achieve "water quality which provides for the protection and propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water." That the discharge of pollutants into the navigable waters was to be eliminated by 1985 suggests that Congress intended a virtually cost-blind scheme of pollution control. The idea of eliminating all discharges is perhaps an extreme one, but one that was nevertheless written into the statute. While the cost of implementing various levels of environmental protection do appear in later provisions, it is important to remember this starting point.

12. See PERCIVAL ET AL., supra note 1, at 648.
14. The term "navigable waters" is defined in 33 U.S.C. § 1362(7) as "the waters of the United States, including the territorial seas." The precise meaning of this language has been the subject of much litigation, including in the SWANCC and Rapanos cases. See SWANCC, 531 U.S. 159; Rapanos, 541 U.S. 715.
16. Id.
17. See id. § 1311(b)(2)(A) (requiring point sources discharging certain pollutants to apply the "best available technology economically achievable"); id. § 1314(b)(1)(B) (requiring EPA to develop guidelines for effluent limitations while taking into account the cost of achieving effluent reduction benefits); id. § 1316(b)(1)(B) (requiring EPA to establish
Second, despite the massive new federal regulatory structure that it was implementing, Congress explicitly stated its goal to preserve and protect the primary rights and responsibilities of States to make the key decisions as to their own waters in section 101(b).

**B. The Basic Structure of the Clean Water Act and Section 401**

The regulatory structure that Congress put in place is a logical outgrowth of the purposes described above. First, as a default rule, the CWA prohibits the discharge of any pollutant by any person. A person may discharge a pollutant only if compliance with the other provisions of the CWA can be established. For the purposes of this Note, this means that a person must obtain a National Pollutant Discharge Elimination System permit (NPDES permit) pursuant to section 402 of the CWA in order to discharge pollutants.

Second, the provisions of sections 401 and 402 establish broad state control over the permitting process. Under section 402(b), States are given the opportunity to directly implement the NPDES program within their borders, subject to a demonstration to the EPA Administrator that the State can satisfy the requirements listed in that section. Whatever permitting power is not absorbed by the States through their own section 402 programs remains with the EPA.

The States, however, also maintain final say over the adequacy of EPA-issued section 402 NPDES permits through the certification process established by section 401. Section 401(a) declares that "[a]ny applicant for a Federal license or permit... which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate... that any such discharge will comply with" several provisions of the CWA, including a state’s water quality standards (WQS) adopted pursuant to

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standards of performance for new sources that "take into consideration the cost of achieving... effluent reduction").

18. *Id.* § 1251(b).
19. *Id.* § 1311(a).
20. "Person" is defined expansively to mean any "individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." *Id.* § 1362(5).
21. *Id.* § 1311(a).
22. *Id.* § 1342 (establishing the NPDES permit program administered by the EPA).
Furthermore, section 401(d) demands that "[a]ny certification provided under this section shall set forth any effluent limitations and other limitations . . . necessary to assure that any applicant for a Federal license or permit will comply with" several provisions of the CWA, including a state's WQS. 

C. Water Quality Standards and Effluent Limitations in State Certification

To gain a sense of the importance of state certification in protecting water quality, it is helpful to grasp the technical meanings of the terms "water quality standard" and "effluent limitation." WQS consist of three components: (1) designated uses of the water (e.g., fishing, swimming, etc.); (2) narrative or numeric criteria necessary to protect the designated uses (e.g., no more than X amount of pollutant Y in body of water Z); and (3) a policy limiting the degradation of water quality (known as the antidegradation policy). While EPA does set some federal WQS pursuant to section 303, each State must establish WQS for intrastate waters at levels necessary to protect the "public health or welfare, enhance the quality of water and serve the purposes of [the CWA]." A State may set WQS at levels that require more environmentally protective measures than federal standards, and a state's WQS are particularized to individual bodies of water. The Supreme Court has held that a state certification can include conditions sufficient to assure compliance with not only numerical criteria, but also

23. Id. § 1341(a). Section 401 also applies to the permit program operated by the Army Corps of Engineers for the disposal of dredged or fill material. See id. § 1344. For the purposes of this Note, section 401 will be discussed only in relation to the section 402 NPDES permit program.

24. Id. § 1341(d). See PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology, 511 U.S. 700, 712-13 (1994) ("Although § 303 is not one of the statutory provisions listed in § 401(d), the statute allows States to impose limitations to ensure compliance with § 301 of the Act. Section 301 in turn incorporates § 303 by reference. . . . Moreover, limitations to assure compliance with state water-quality standards are also permitted by § 401(d)'s reference to 'any other appropriate requirement of State law.' " (internal citation omitted)).


27. See id. § 1570 (allowing states to adopt or enforce any pollution standard, limitation, or requirement, as long as it is not less stringent than the limitations and standards under the CWA).

28. See, e.g., MINN. R. 7050.0180 subpts. 1-2 (defining "outstanding resource value waters" and prohibiting new or expanded discharges into certain portions of latitudinally and longitudinally identified waters, regardless of the lack of prudent or feasible alternatives).
narrative criteria, the designated uses, and a state’s antidegradation policy.  

While WQS apply generally to entire bodies of water, effluent limitations apply directly to dischargers, restricting the amount of a pollutant that a permittee can discharge in a certain time period (e.g., no more that X pounds of pollutant Y per day).  

Effluent limitations can be either technology-based or water quality-based. Technology-based effluent limitations (TBELs) are based on the best practicable control technology available, or technological feasibility for short. Water quality-based effluent limitations (WQBELs), on the other hand, are based on what is necessary to comply with WQS. Because section 401 requires states to certify that a discharger will comply with WQS, states must introduce WQBELs if TBELs are insufficient. In non-technical terms, a State must impose whatever certification conditions are necessary to guarantee a pre-established baseline of water cleanliness, regardless of technological feasibility. Thus, a section 401 certification may be technology-forcing.

When the EPA proposes a “general” federal NPDES permit, the proposed language must be broad enough to be applicable to the entire nation. Unlike individual permits, which are written in terms specifically tailored to individual permittees and bodies of water, general permits are created so that all dischargers with a similar set of characteristics can enjoy an expedited permitting process in a defined geographic area, which can be as large as the entire nation. Individual dischargers need only file a notice of intent to be covered by the general permit to come into compliance with the permitting requirement. It is in the state certification process that

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29. *PUD No. 1*, 511 U.S. at 714–15, 719 (“[T]he State may require that a permit applicant comply with both the designated uses and the water quality criteria of the state standards.”).
34. Technology-forcing regulations create market pressure for new, cleaner technology where none would otherwise exist. *See Natural Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 209 (D.C. Cir. 1988) (“[A] water quality-based permit limit begins with the premise that a certain level of water quality will be maintained, come what may, and places upon the permittee the responsibility for realizing that goal. . . . While at first blush it seems odd to expect dischargers to go beyond the limits of extant technology, it becomes apparent that Congress had a deep respect for the sanctity of water quality standards and a firm conviction of need for technology-forcing measures.”).
35. *Id.* § 122.28 (2009).
36. *Id.* § 122.28(b)(2)(i).
a broad general permit can be tailored to each state's varied WQS, which may entail more restrictions than federal standards. This should not be taken to imply that state certification is wholly unimportant in the context of traditional individual permitting. The State, with its greater expertise and familiarity with its local waters, is still uniquely qualified to correct and strengthen EPA-issued NPDES individual permits. But the stakes are raised when a general permit is at issue, given the number of potential dischargers to be covered and the need for state-specific tailoring. Thus, the certification process is a meaningful moment in environmental regulation, when critical conditions are added to a permit to make it actually effective at protecting state water quality.

D. Section 401 Imposes an Obligation on the States

Not only does section 401 give States the discretion to impose more restrictive conditions on a federal permit through its certification process, it also imposes upon States an obligation to do so, if necessary to protect WQS, once a State decides to certify. The text, legislative history, and majority of case law interpreting section 401 support this conclusion.

While it is true that section 401 does give States discretion to issue, deny, or waive certification, once a State chooses to certify, it must do so in strict compliance with the mandates of section 401(a) and (d). This obligation is established most clearly through the use of the word “shall” in section 401(d). The certification “shall” set forth whatever limitations are necessary to assure compliance. Congress could have used the word “may” in place of “shall,” but it chose not to. The Senate report on the 1972 amendments to the CWA support this reading, noting that “[t]he certification provided by a State ... must set forth effluent limitations and monitoring

37. See National Pollutant Discharge Elimination System, Revision of Regulations, 44 Fed. Reg. 32,854, 32,880 (June 7, 1979) (to be codified at 40 C.F.R. 124.21–24) ("[S]ince certification as to Federal requirements would duplicate EPA's work, EPA expects that ordinarily States will limit their certifications to requirements of State law."); see also Power Auth. of N.Y. v. Dep't of Envtl. Conservation, 379 F. Supp. 243, 249 (N.D.N.Y. 1974) (finding that "the Congressional intent is clear that the states retain the right to set more restrictive standards than those imposed by the Act" when attaching certification conditions to a federal hydroelectric power plant permit).

38. 33 U.S.C. § 1341(d) ("[A]ny certification provided under this section shall set forth any effluent limitations and other limitations ... necessary to assure that any applicant for a Federal license or permit will comply with" several provisions of the CWA, including a state's WQS. (emphasis added)).

39. Id.
requirements necessary to comply with the provisions of this Act or under State law . . . ."]

In addition, case law from several states supports the position that section 401's requirements are obligatory. For example, the Alaska Supreme Court has declared that subsections 401(a)(1) and (d) "unambiguously require states certifying draft permits to provide assurance that every NPDES permit applicant will meet state water quality standards." When the Alaska Department of Environmental Conservation failed to provide this assurance, the court reversed and remanded the agency's decision to certify. The highest courts of Virginia and Washington have similarly indicated that section 401 imposes obligatory, not discretionary, requirements. A recent decision from a Michigan circuit court stands as the lone exception to this string of precedents, holding instead that states have "essentially unfettered authority" to certify as they please. Viewed in light of the above precedents, this decision is properly viewed as an anomaly; application for leave to appeal has been filed in the case.

If section 401 does indeed impose a duty upon States to certify permits in a particular manner, judicial review of state certification decisions is necessary to enforce that obligation. If judicial review is unavailable, the obligation would be rendered meaningless.

II. 40 C.F.R. § 124.55(b)

A. The Text and Practical Effect of 40 C.F.R. § 124.55(b)

40 C.F.R. § 124.55(b) provides:

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42. Id. at 1140 & n.21.
43. See Mattaponi Indian Tribe v. Dep't of Envtl. Quality, 541 S.E.2d 920, 925 (Va. 2001) ("The federal Act requires the state § 401 certification to ensure that the proposed activity will meet state water quality standards and applicable effluent limitations." (emphasis added)); Port of Seattle v. Pollution Control Hearings Bd., 90 P.3d 659, 675–79 (Wash. 2004) (reviewing the sufficiency of conditions imposed in a state certification); see also Randolph L. Hill, State Water Quality Certification of Federal NPDES Permits, 9 Tul. Envtl. L.J. 1, 16 (1995) (explaining that section 401(d) provides the states with the responsibility to place conditions on certifications).
If there is a change in the State law or regulation upon which a certification is based, or if a court of competent jurisdiction or appropriate State board or agency stays, vacates, or remands a certification, a State which has issued a certification under [40 C.F.R.] § 124.53 may issue a modified certification or notice of waiver and forward it to EPA. If the modified certification is received before final agency action on the permit, the permit shall be consistent with the more stringent conditions which are based upon State law identified in such certification. If the certification or notice of waiver is received after final agency action on the permit, the Regional Administrator may modify the permit on request of the permittee only to the extent necessary to delete any conditions based on a condition in a certification invalidated by a court of competent jurisdiction or by an appropriate State board or agency.\(^\text{46}\)

To evaluate the effect of 40 C.F.R. § 124.55(b), one must first consider the regulation’s place within the regulatory structure that EPA has created under the CWA. The current language of 40 C.F.R. § 124.55(b) first appeared in the Federal Register in 1979,\(^\text{47}\) as a final rule originally numbered 40 C.F.R § 124.23. It has remained essentially the same ever since, save for numbering changes. The rule was promulgated through ordinary notice and comment rulemaking procedures, as part of an extensive revision of the regulations governing the NPDES permit program and in response to the 1977 amendments to the CWA.\(^\text{48}\) Section 124.55 applies only to the EPA-operated NPDES permit program, and is entitled “Effect of State Certification.”\(^\text{49}\) The proposed language was more rigid than the final form; it called for absolutely no modification after certification, whether or not a final permit had been issued, without exception.\(^\text{50}\)

While EPA has never been forced to explain in court its justification for promulgating 40 C.F.R. § 124.55(b), the best argument for EPA’s authority relies on section 402(b)(1)(C), governing permit modification. Section 402(b)(1)(C) first establishes that permits “can be terminated or modified for cause.” Sufficient “cause” is


\(^{47}\) See National Pollutant Discharge Elimination System, supra note 37, at 32,930.

\(^{48}\) Id. at 32,854.

\(^{49}\) 40 C.F.R. § 124.55. Section 124.55 falls within Chapter I of Title 40, exclusively related to the EPA, and Subpart D of Part 124, entitled “Specific Procedures Applicable to NPDES Permits.”

\(^{50}\) For the text of the rule as initially proposed, see National Pollutant Discharge Elimination System; Revision of Existing Regulations, 45 Fed. Reg. 37,078, 37,115 (Aug. 21, 1978) (to be codified at 40 C.F.R. § 124.33(c)).
then partially defined by section 402(b)(1)(C)(i)-(iii). A permit may be terminated or modified for cause “including, but not limited to”: (1) violating permit conditions; (2) fraudulently obtaining a permit; or (3) a change in any condition that requires a reduction of the permitted discharge. 51 EPA has rounded out this explicitly non-exclusive list in 40 C.F.R. § 122.62(a), filling a gap left open by Congress, an implied delegation of rulemaking power. 52 Section 124.55(b) is incorporated into this list by way of 40 C.F.R. § 122.62(a)(3)(iii), which states, “[f]or changes based upon modified State certifications of NPDES permits, see § 124.55(b).” 53 Thus read, 40 C.F.R. § 124.55(b) is a regulation defining the proper procedures for permit modification by EPA.

The first sentence of 40 C.F.R. § 124.55(b) allows for modification of a permit based on “a change in the State law or regulation upon which a certification is based, or if a court of competent jurisdiction or appropriate State board or agency stays, vacates, or remands a certification.” 54 The final sentence, however, drastically limits this allowance by placing an absolute restriction on the modification of an issued permit based on a change in a state certification that makes the permit more stringent. 55 This final sentence serves to create a one-way avenue for permit modification after permit issuance—only on request of a permittee, and only to make a permit less environmentally protective.

Thus, in promulgating 40 C.F.R. § 124.55(b), EPA has ensured that a change in a state certification after permit issuance that makes a permit more stringent cannot under any circumstances constitute cause for the EPA administrator to modify a permit. Additionally, 40 C.F.R. § 124.55(e) mandates that “[r]eview and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State.” 56 Read together, 40 C.F.R. § 124.55 mandates that judicial review of certifications take place at the state level, and then ren-

51. 33 U.S.C. § 1342(b)(1)(C) (2006). Section 402(b), which applies to state permit programs, is made applicable to the federal permit program through section 402(a)(3). Thus, federal permits must adhere to the requirements of section 402(b)(1)(C), just as state-issued permits must. See Inland Steel Co. v. EPA, 574 F.2d 367, 369 n.4 (7th Cir. 1978).
52. See Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,314 (May 19, 1980) (to be codified at 40 C.F.R. 122.15) (“The list of causes for modifying a permit is narrow; and absent cause from this list, the permit cannot be modified.”).
53. 40 C.F.R. § 122.62(a)(3)(iii). Section 122.62 is entitled “Modification or revocation and reissuance of permits.” When the original version of § 124.55(b) was promulgated in 1979, the predecessor to § 122.62 was numbered 40 C.F.R. § 122.31. Section 122.31 did not reference the original version of § 124.55(b), as section 122.62 does now.
54. 40 C.F.R. § 124.55(b) (2009).
55. See id.
56. 40 C.F.R. § 124.55(e).
ders those proceedings a nullity, to the extent that they are undertaken to correct an overly lenient certification after issuance. In fact, if a state court were to accept the validity of the regulation, any such challenge after permit issuance would arguably be rendered moot, preventing any appeal from even reaching the merits.  

If a state court remands a certification back to the state certifying agency and if the agency re-issues the certification with additional conditions before EPA issues the certified permit, judicial review of certifications at the state level can be effective. However, nothing requires EPA to await the outcome of state litigation, and EPA can—whether advertently or not—completely insulate a certification from challenges by issuing a permit immediately after an initial certification decision, before potentially aggrieved parties have had an opportunity to request a stay from a state court. EPA is typically under pressure from permittees to issue permits as quickly as possible. At the conclusion of the initial certification decision, it is unsurprising that all parties involved are anxious for a permit to issue in just this manner.

Additionally, case law has firmly established that EPA has no authority to review the sufficiency of conditions imposed in certifications. If EPA cannot review state certifications, and state courts cannot do so effectively, then state agency certification decisions are unalterable acts of unbounded discretion—perhaps not from the perspective of permittees, who are still free to challenge overly stringent certifications, but certainly from the perspective of environmental organizations, which are left without a remedy for a state agency’s alleged wrong. Section 124.55(b) thus helps guarantee that an overly permissive permit certified by a state agency in error will stand undisturbed for its duration, even when full compliance by permittees will result in blatant water quality violations.

Agency mistakes, whether procedural or substantive in nature, may occur for any number of reasons: a lack of time and resources, insufficient political will, agency capture, or even simple drafting errors. Judicial review of certification decisions is necessary to correct these mistakes, and to encourage quality agency decision making in the first place. Only in this way can it be ensured that state certifying agencies, and in turn, the States themselves, are fulfilling their vital role in the CWA permitting process. In sum, 40

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57. See infra Part III.B for a more in-depth treatment of the mootness issue.
58. See, e.g., Roosevelt Campobello Int’l Park Comm’n v. EPA, 684 F.2d 1041, 1056 (1st Cir. 1982).
C.F.R. § 124.55(b) is bad policy. As detailed below, it is also unlawful.

B. 40 C.F.R. § 124.55(b) Conflicts with the Clean Water Act

1. Defining the Inquiry

Of course, agency action must be worse than merely misguided to be set aside by a court. To ascertain whether 40 C.F.R. § 124.55(b) should be held unlawful by a reviewing court, it is necessary to briefly investigate the analytical framework established by section 706 of the Administrative Procedure Act (APA),\(^5\) which establishes the scope of judicial review of agency action. A reviewing court might analyze the validity of the regulation under either of two separate but related inquiries. First, there is section 706(2) (A) review, which holds unlawful agency actions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”\(^6\) Second, there is Chevron\(^6\) review, the judicially established inquiry that parses the requirements of section 706(2) (C), which holds unlawful agency action found to be “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”\(^7\) The now-famous two-step analysis was initially explained by Justice Stevens in Chevron:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.\(^8\)

The choice between the two inquiries implicates a debate about their respective roles that was particularly well illustrated by Judge Edwards and Judge Wald in Arent v. Shalala.\(^9\) Judge Edwards argued that “Chevron is principally concerned with whether an agency

6. Id. § 706(2) (A).
8. 5 U.S.C. § 706(2) (C).
10. 70 F.3d 610 (D.C. Cir. 1995).
has authority to act under a statute. As was the case in *Arent* in the context of the Food and Drug Administration’s promulgation of voluntary labeling guidelines, there is no serious doubt that Congress intended EPA to create rules governing permit modification. Thus, perhaps the only question left to be decided is whether EPA’s exercise of its authority was arbitrary, capricious, or manifestly contrary to statute—review under section 706(2)(A). Under Judge Edwards’ conception of robust section 706(2)(A) review, *Chevron* analysis does relatively little work in comparison.

Judge Wald had a different take: “*Chevron* requires a reviewing court to ask a somewhat different question: whether an agency’s specific course of action is permitted by statute. It is possible that a statute might grant an agency authority to act in some fashion, but not in the particular manner it has chosen.” Utilizing Judge Wald’s reasoning, 40 C.F.R. § 124.55(b) could be dealt with equally well through *Chevron* review. While EPA may generally create rules on permit modification, the specific limitation imposed in 40 C.F.R. § 124.55(b) is arguably not permitted by several sections of the CWA—the result of an impermissible statutory construction under *Chevron* step two. Under Judge Wald’s conception of robust *Chevron* step two review, step two carries much of the workload that would otherwise be handled by review under section 706(2)(A).

A third option is to include the whole inquiry within *Chevron* step one. Congress, through silence or ambiguity, may have delegated to EPA the authority to promulgate rules governing permit modification, but 40 C.F.R. § 124.55(b) may nevertheless conflict with several provisions of the CWA. The agency’s interpretation would still violate the clear intent of Congress in this circumstance, and could be said to fail initially at *Chevron* step one. Under this conception of robust *Chevron* step one review, step one becomes more doctrinally significant.

No matter what framework a court prefers to apply, 40 C.F.R. § 124.55(b) cannot withstand judicial scrutiny. As detailed below, 40 C.F.R. § 124.55(b) is either: (1) an exercise of legitimate authority that is manifestly contrary to several provisions of the

65. Id. at 615 (citing *Chevron*, 467 U.S. at 842-45).
66. Id. at 616.
67. Id. at 616 (citing *Chevron*, 467 U.S. at 843-44).
68. Id. at 619 n.1 (Wald, J., concurring) (second emphasis added).
69. See id.
70. See also Whitman v. Am. Trucking Ass’ns, 531 U.S. 457 (2001) (employing this kind of analysis).
CWA, as prohibited by section 706(2)(A); (2) an impermissible exercise of authority under *Chevron* step two because of statutory conflicts; or (3) contrary to the clear intent of Congress under *Chevron* step one because of those same conflicts. Under any of these conceptions of section 706 review, if a conflict between the regulation and the statute is established, the regulation is unlawful and must be set aside. Part II.B.2 undertakes to establish such a conflict.

2. Detailing the Statutory Conflict

As discussed in Part II.A, section 402(b)(1)(C) of the CWA does seemingly confer (or is at least sufficiently ambiguous about conferring) on EPA the authority to elaborate on what constitutes "cause" for permit modification. But, importantly, this implied delegation did not give EPA a license to define "cause" in any way that it desires. However defined, EPA could not restrict the "for cause" requirement so severely that it conflicts with other provisions of the CWA, or else the regulation would fail under *Chevron* step one, *Chevron* step two, or section 706(2)(A) review. Sections 101(b), 401(a)(1), and 401(d) present such a conflict. They indicate that when a state court decides that a certification is insufficient to protect state WQS, EPA must respect the State's ultimate decision and modify the permit accordingly. The perceived advantages of enacting the regulation are insufficient to cure these statutory conflicts.

a. 40 C.F.R. § 124.55(b) Conflicts with Sections 101(b), 401(a)(1), and 401(d) of the Clean Water Act

Section 401(d) of the CWA requires that "[a]ny certification ... shall set forth any ... limitations ... necessary to assure that any applicant ... will comply with [sections 301, 302, 306, and 307 of the CWA] and with any other appropriate requirement of State law [including state WQS] set forth in such certification, and shall become a condition on any Federal license or permit."72 Two separate ideas are expressed in this language. First, States are obligated to issue sufficiently protective certifications, as indicated by the words "shall set forth."73 This is the idea explored above in Part I.D. As noted in that discussion, section 401(d) contemplates state judicial

73. See id.
review of certification decisions, so that the States' obligations are meaningful. Second, that these limitations "shall become a condition" on a permit demonstrates that EPA must incorporate all conditions that a State deems necessary to protect its own waters.\footnote{See id.} There is no ambiguity in deciphering the intent of Congress in drafting section 401(d)—certifications must protect state water quality, and EPA must defer to States on this matter.

This reading of section 401(d) is in line with Congress's express policy in section 101(b) "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution."\footnote{See id. § 1251(b).}

Section 401(a)(1) is likewise explicit in putting states in control of the certification process. It establishes that the State has the authority to certify, the State has the authority to deny certification, and the federal permit depends upon the State's grant of a certification that meets the requirements of section 401.\footnote{Id. § 1341(a)(1) ("Any applicant for a federal license or permit ... shall provide the licensing or permitting agency a certification from the State ... Such State ... shall establish procedures for public notice in the case of all applications for certifications by it ... and for public hearings in connection with specific applications. ... No license or permit shall be granted if certification has been denied by the State." (emphasis added)).}

The CWA, however, says nothing at all about the authority of state agencies. Nor could it, because the federal government may not directly regulate a state's administrative procedures, as defined by state legislatures.\footnote{See Printz v. United States, 521 U.S. 898, 912 (1997) ("[S]tate legislatures are not subject to federal direction.".).} State administrative bodies have only the authority that they are granted by their state legislatures. It is up to the States to decide how to certify NPDES permits, and including judicial review of agency certification decisions is an eminently reasonable way for States to fulfill their obligations under section 401. Most states do provide for such review, some through procedures specifically tailored to the state certification process,\footnote{See, e.g., MICH. Const. art. VI, § 28, MICH. COMP. LAWS § 600.631 (2010) (providing for judicial review of agency action not otherwise provided for).} others through the normal procedures by which state agency actions are challengeable.\footnote{See, e.g., MINN. STAT. § 115.05 (2009) (providing for judicial review of Minnesota Pollution Control Agency final decisions pertaining to certifications).} Therefore, any decision by an authorized state court must be respected as part of the authoritative determination of the State.

EPA might point to alternative language in section 401(a)(1) as an independent basis of authority for the promulgation of 40
C.F.R. § 124.55(b), or at least to rebut the claim that this section conflicts with its interpretation of section 402(b)(1)(C). Section 401(a)(1) states: "If the State . . . fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application." This language signals congressional intent that state certification be undertaken quickly and efficiently, that a State can lose its certification rights if it unreasonably delays in issuing a certification, and that there are limits to a State's power under section 401.

This sentence should not be construed, however, to preclude judicial review of a timely certification decision. In rejecting a permittee's argument that a certification was not final because of a state agency's subsequent attempt to reconsider the certification, the U.S. Court of Appeals for the First Circuit stated, "where . . . the agency itself . . . has spoken and has explicitly labeled its action 'final,' we think that is enough [to consider the action final], even though the agency may choose to reconsider or may be reversed on judicial review." In light of the language of sections 401(d) and 101(b), section 401(a)(1) is best read as requiring EPA to treat state agency certification decisions as final but reviewable. Under this interpretation, EPA may issue permits in reliance upon state agency certifications, but may not treat post-issuance alterations stemming from judicial review as implied waivers by unreasonable delay.

Because 40 C.F.R. § 124.55(b) denies the effect of a state court's remand and subsequent certification by a state agency, it conflicts with the language of section 401(d), in that permit terms settled on by a State would not become part of a final permit. It conflicts with section 401(a)(1), because it takes from States a portion of their authority to grant or deny certification. And it conflicts with section 101(b) in that it wrests from States their long-established responsibility and right to protect their own waters. These conflicts with the CWA render the regulation unlawful.

81. P.R. Sun Oil Co. v. EPA, 8 F.3d 73, 80–81 (1st Cir. 1993) (emphasis added) (remanding an NPDES permit to EPA on alternative grounds).
b. The Interest in Certainty and Finality

EPA may argue that sections 402(b)(1)(B)\textsuperscript{82} and 402(k)\textsuperscript{83} of the CWA indicate an emphasis on regularity in permit issuance and finality in permit terms justified the promulgation of 40 C.F.R. § 124.55(b).\textsuperscript{84} EPA seemed to have these interests in mind when it declared the promulgation of 40 C.F.R. § 124.55(b) "necessary to avoid a 'moving target' of State law during the permit's life."\textsuperscript{85} While EPA's concern with certainty and finality in permitting is indeed justified, any interpretation of the two above-mentioned provisions that would grant EPA the ability to deny the effectiveness of state judicial review does not withstand careful scrutiny.

Section 402(k) states, in relevant part, that "[c]ompliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections [309 and 505 of the CWA], with sections 1311, 1312, 1316, 1317, and 1343 of this title."\textsuperscript{86} This section is intended to exculpate permittees who are in compliance with the terms of their permits from enforcement actions under sections 309 and 505, even if the permit is not sufficiently protective of water quality. EPA, however, has already acknowledged that any protection section 402(k) may provide to permittees who are complying with the terms of their permits is expressly limited by section 402(b)(1)(C), which provides an avenue for permit modification "for cause."\textsuperscript{87} Thus, section 402(k) provides EPA with no guidance on how to define the "for cause" requirement for permit modification. The U.S. Court of Appeals for the Seventh Circuit has confirmed EPA's initial reading of 402(k), holding that "[section] 402(k) does not purport to address the question of permit modification. Its concern is what constitutes compliance with the Act for the purpose of an enforcement proceeding brought under [section] 309 or [section] 505."\textsuperscript{88}

Similarly, the text of section 402(b)(1)(B) does not provide EPA with the authority to promulgate section 124.55(b). Section

\begin{itemize}
\item \textsuperscript{82} 33 U.S.C. § 1342(b)(1)(B).
\item \textsuperscript{83} Id. § 1342(k).
\item \textsuperscript{84} See National Pollutant Discharge Elimination System, supra note 37, at 32,867 (discussing the concept of finality as expressed in section 402(k)); id. at 32,879 (emphasizing that departures from the five-year cycle of permit issuance and reexamination laid down by section 402(b)(1)(B) should not be encouraged).
\item \textsuperscript{85} Id. at 32,880.
\item \textsuperscript{86} 33 U.S.C. § 1342(k).
\item \textsuperscript{87} See National Pollutant Discharge Elimination System, supra note 37, at 32,867.
\item \textsuperscript{88} Inland Steel Co. v. EPA, 574 F.2d 367, 370 (7th Cir. 1978) ("There is nothing in the legislative history to indicate that § 402(k) was intended to prohibit modification of a permit to bring it into conformity with a different or more stringent standard.").
\end{itemize}
402(b)(1)(B) emphasizes that NPDES permits must be "for fixed terms not exceeding five years." This section merely speaks to the fixed duration of NPDES permits—the length of time that a legally sufficient permit is in effect cannot be unexpectedly shortened to the detriment of a permittee. Section 124.55(b), however, does nothing to protect a permit's fixed term; any permit modification that 40 C.F.R. § 124.55(b) prevents would merely alter a permit's content, not its duration. Instead, 40 C.F.R. § 124.55(b) helps ensure that legally defective permits remain defective for their duration. Furthermore, Congress explicitly provided for permit termination or revocation when circumstances warrant such action.89

Taken together, sections 402(b)(1)(B) and (k) merely help to define a permit's parameters, and a permittee's rights flowing from compliance with a permit, while the permit's terms remain in effect. Neither provides EPA with any assistance in defining the circumstances that justify modifying or terminating those terms, let alone the specific advice to prohibit permit modification based on state-court induced changes to certifications.

In sum, the underlying interest in certainty and finality implicit in sections 402(b)(1)(B) and (k) falls short of providing EPA with a statutory directive that creates conflict with the language of sections 101(b), 401(a)(1), and 401(d), so as to justify the promulgation of 40 C.F.R. § 124.55(b). EPA might have alternative rationales for the promulgation of the regulation, but none are readily apparent from the record available.90 So while EPA may for policy reasons prefer that certifications be insulated from judicial review, it has no statutory basis for imposing such a regime on the states.

90. See, e.g., id. § 1341(a)(5) (stating that any state-certified federal permit may be revoked by the issuing federal agency upon entering of a judgment that the activity has been operated in violation of §§ 1311, 1312, 1313, 1316, or 1317); id. § 1342(b)(1)(C) (allowing a permit to be terminated for cause).
91. When initially promulgating the regulation, EPA seemed to suggest there might be some due process concerns with applying permit conditions that were not in effect at the time of permit issuance. See National Pollutant Discharge Elimination System, supra note 37, at 32,880 (referencing a due process discussion at 32,886–87). This suggestion misses the mark for two reasons. First, EPA's subsequent discussion of due process regards the application of generally applicable regulations promulgated after permit issuance, not conditions specific to a permit that are added because of statutory insufficiency. Id. at 32,886–87. Second, EPA rejects this due process argument in that very discussion for the same reason it should be rejected here—the permittee has an opportunity to argue the sufficiency of the certification in court. Id.
III: GETTING RID OF 40 C.F.R. § 124.55(b)

If the goal is to ensure that NPDES permits reflect certification decisions that comport with the CWA, then establishing the invalidity of 40 C.F.R. § 124.55(b), in the abstract, is but one step toward ultimate success. The remainder of this Note will attempt to identify a path for aggrieved environmental organizations to successfully challenge 40 C.F.R. § 124.55(b), and in turn, the legality of certifications. This task requires an investigation into the availability of judicial review of administrative action and the division of labor between state and federal courts.

This Part concludes that there are two possible avenues for environmental groups to attack 40 C.F.R. § 124.55(b). The first, and most straightforward, requires a petition to EPA to repeal the rule. There is a possibility (however remote) that EPA would simply agree. If EPA rejects the petition, this refusal to repeal could potentially serve as the basis for a challenge to the regulation’s substantive validity in federal court. However, standing would remain a significant hurdle to obtaining relief.

The second avenue stems from an initial state-court challenge to a defective certification. If a state court decides to invalidate 40 C.F.R. § 124.55(b) within its jurisdiction, a subsequent legal battle may ensue with EPA over the legal effect of the state-court decision. If this is the case, then EPA’s application of 40 C.F.R. § 124.55(b) could serve as the basis for an as-applied challenge to the regulation in federal court. If the state court decides that the regulation moots the appeal, then this state court’s application of 40 C.F.R. § 124.55(b) to the plaintiffs might serve a similar function.

A. Petition EPA to Repeal 40 C.F.R. § 124.55(b)

The first and most obvious way to advocate for the repeal of an administrative rule is to petition the promulgating agency. The APA explicitly provides this avenue of relief to any “interested person,” which includes organizations representing the concerns of their members.92

There is at least a possibility that EPA would find that the petition has merit, deciding that its prior rulemaking did indeed conflict with the CWA, and that the conflict was merely not appreciated when it promulgated 40 C.F.R. § 124.55(b). If this were the

case the repeal of the rule would still need to comply with the required APA process for notice and comment rulemaking. The repeal would be open to judicial challenges from industry groups that currently enjoy the unilateral benefits that the rule provides.

If EPA denies the petition, the exercise would still be a valuable one for the petitioners. The denial might help to supply the petitioners access to the federal courts. Ordinarily, challenges to the validity of the regulation would be time-barred by the generally applicable six-year statute of limitations on civil actions against the United States. EPA's rejection of the petition, however, would renew the ripeness of the petitioners' claim that the rule is substantively defective, because EPA's rejection of the petition would constitute reviewable "agency action" under the APA. By relying on, and implicitly reaffirming the lawfulness of, the rule in question, EPA would expose itself to legal challenges alleging that the rule conflicts with the CWA and is therefore invalid.

This denial would be reviewed under the standard laid out in the APA at 5 U.S.C. § 706(2)(A), whereby agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" is set aside. If the reviewing court agrees that the regulation conflicts with the CWA, EPA's decision to not repeal could be struck down under any one of these criteria, "for agencies have an everpresent duty to insure that their actions are lawful." The "otherwise not in accordance with law" prong, though, would capture the essence of EPA's potential wrongdoing particularly well because the decision to keep 40 C.F.R. § 124.55(b)

93. 5 U.S.C. § 551(5) (defining "rule making" as an "agency process of formulating, amending, or repealing a rule" (emphasis added)); Columbia Falls Aluminum Co. v. EPA, 139 F.3d 914, 919 (D.C. Cir. 1998) ("Once a rule is final, an agency can amend it only through a new rulemaking.").

94. See 28 U.S.C. § 2401(a) (2006) ("Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."); see, e.g., Elk Grove v. Evans, 997 F.2d 328, 331 (7th Cir. 1993) ("[A] number of cases hold that 28 U.S.C. § 2401(a) . . . applies to suits under the Administrative Procedure Act.").

95. See 5 U.S.C. § 704 (stating that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review"); id. § 551 (defining agency action as including "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act").

96. See Pub. Citizen v. Nuclear Regulatory Comm'n, 901 F.2d 147, 152 (D.C. Cir. 1990) ("[A] claim that [an] agency action was violative of statute may be raised outside a statutory limitations period, by filing a petition for amendment or rescission of the agency's regulations, and challenging the denial of that petition."); Legal Envtl. Assistance Found., Inc. v. EPA, 118 F.3d 1467, 1472–73 (11th Cir. 1997).

97. 5 U.S.C. § 706(2)(A); see, e.g., Gen. Motors Corp. v. EPA, 738 F.2d 97, 99–100 (3d. Cir. 1984) (reviewing the EPA administrator's denial of a petition for rulemaking under the standard of § 706(2)(A)).

98. Pub. Citizen, 901 F.2d at 152.
Investigating 40 C.F.R. § 124.55(b) in place would not be in accordance with the sections of the CWA that the rule violates.

Overcoming the statute of limitations is an important step towards invalidating 40 C.F.R. § 124.55(b), but by no means the only one. In order to challenge the validity of the regulation, the petitioners would still need to establish standing. Standing doctrine requires that the regulation cause the petitioners some particularized injury that can be effectively redressed by the judicial relief sought. In order to find potential plaintiffs who have suffered such an injury, one must look to the state courts.

B. State Court Challenge to a Certification

It is well established that state courts are the appropriate forums for challenges to state certifications under section 401 of the CWA, despite the fact that review of certification decisions might involve federal questions. Generally speaking, this helps to protect the states' role as the primary guardian of their own water quality, and prevents federal courts and agencies from second-guessing the wisdom of state certification decisions. In this respect, it is a tradition that is not in the best interest of environmental organizations to challenge.

It does, however pose a unique problem to these organizations when they would like to challenge the sufficiency of certifications of NPDES permits. If EPA has issued a permit after a state agency's initial certification, any subsequent action by a state agency in response to a state-court decision would ultimately be rejected by EPA as an improper ground for permit modification; this renders the challenge to the certification moot. Therefore, 40 C.F.R. § 124.55(b) must be invalidated in the course of the state-court proceeding for a certification challenge to have any success.


100. Id.

1. State Court Jurisdiction to Invalidate 40 C.F.R. § 124.55(b)

While state courts may not be the most natural setting for a challenge to a federal rule, existing precedent, explored in this Part, indicates that it is within the jurisdiction of state courts to invalidate 40 C.F.R. § 124.55(b) within their territories.

The starting point of the jurisdictional analysis begins with the presumption that state courts have inherent authority to adjudicate claims arising under federal law. This presumption of concurrent jurisdiction can be rebutted only by (1) "an explicit statutory directive," (2) "by unmistakable implication from legislative history," or (3) "by a clear incompatibility between state-court jurisdiction and federal interests." Part III.B.1.a reveals that state courts have not been broadly divested of their jurisdiction to pass on the validity of federal regulations. Part III.B.1.b establishes that section 509 of the CWA has not stripped state courts of their authority to invalidate 40 C.F.R. § 124.55(b).

   a. State Courts Retain Their Authority to Invalidate Federal Regulations

There has been no broad divestment—either statutorily through the APA or by clear incompatibility with federal interests—of state-court authority to determine whether federal regulations conflict with federal statutes. In The Michigan Department of Environmental Quality, in National Wildlife Federation v. Chester, suggested that the APA requires judicial review of an EPA regulation in federal court. A textual analysis of the APA suggests otherwise.

Section 702 declares that persons suffering legal wrong because of agency action are entitled to judicial review, and that certain actions in federal court shall not be dismissed on the ground that they are against the United States, or that the United States is an indispensable party. While this provision does establish the general reviewability of agency action in federal courts, it does not speak to the state courts' jurisdiction to review federal agency action. Likewise, section 703 establishes that when no special statutory-review

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102. Tafflin v. Levitt, 493 U.S. 455, 458 (1990) (holding that "state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States").
proceedings are created by statute, judicial review may be had in any court of competent jurisdiction. 106 But this provision says nothing about which courts have such jurisdiction. In short, the APA does not speak to the question of whether state courts have jurisdiction to invalidate federal regulations.

Similarly, there is no clear incompatibility between state-court jurisdiction and federal interests when determining a federal regulation’s validity. While there is a federal interest in uniform interpretation of federal law, this interest has no particular importance here. In a close parallel, the federal courts of appeal routinely disagree on matters of statutory interpretation, requiring federal agencies to adjust their implementation of regulatory regimes in different geographic regions in appropriate circumstances; 107 an identical system would work equally well if state courts disagreed. If the U.S. Supreme Court decides that the implicated CWA provisions are particularly in need of uniform interpretation, it can supply it, because even state courts must accept the construction that the Supreme Court gives to federal statutes. 108 Additionally, there is a counterbalancing federal interest that is implicated here—state-court jurisdiction to rule on the validity of federal regulations will sometimes allow for the vindication of federal rights violated by state or local officials acting under color of state law. 109 This is precisely the scenario that invalidation of 40 C.F.R. § 124.55(b) presents because the regulation would otherwise prevent aggrieved citizens from bringing suit against state environmental agencies that have violated the certification requirements of section 401 of the CWA.

Upon reflection, it should be no surprise that state courts are generally competent to invalidate federal regulations operating within their territories. Phrased differently, a state court would merely be enforcing the superior authority—the federal Clean Water Act—rather than an inconsistent regulation, a result

106. Id. § 703 (2006).

107. See Hyatt v. Heckler, 807 F.2d 376, 379 (4th Cir. 1986) (“The separation of powers doctrine requires administrative agencies to follow the law of the circuit whose courts have jurisdiction over the cause of action. In the absence of a controlling decision by the Supreme Court, the respective courts of appeals express the law of the circuit.”); Thomas v. N.C. Dept’ of Human Res., 478 S.E.2d 816, 824 (N.C. Ct. App. 1996), aff’d 485 S.E.2d 295 (N.C. 1997); Samuel Estreicher & Richard L. Revesz, Nonacquiescence by Federal Administrative Agencies, 98 YALE L.J. 679, 753–65 (1989) (discussing the circumstances under which it is appropriate for federal agencies to disregard the precedents of the federal courts of appeals).


demanded by the Supremacy Clause of the U.S. Constitution. Confirming this interpretation, at least one state court has invalidated a federal regulation that conflicted with a federal statute. Other state courts have suggested that they would do the same if presented with a clear conflict. No precedent can be found that suggests otherwise.

The legal community has paid surprisingly little attention to the question of whether a state court can invalidate a federal regulation. At first glance, this issue seems both important and basic—the type of legal question destined to be answered in casebooks on the federal courts or administrative law. It has, however, seemingly slipped through the cracks until this point, going almost entirely untested in courts and law review articles. This is probably because, in most imaginable situations, there is little in the way of a discernible advantage to challenging a federal regulation in state court, given the geographically limited scope of the judgment that such a court is able to render. This calculus is altered here, however, because a state court is the only forum where a challenge to 40 C.F.R. § 124.55(b) can be initiated. Such a situation arises here only be-

110. See U.S. Const. art. VI, cl. 2 ("[T]he laws of the United States ... shall be the supreme law of the land; and the judges in every state shall be bound thereby.")

111. See Anderson v. N.C. Dep't of Human Res., 428 S.E.2d 267, 269–70 (N.C. Ct. App. 1993); Thomas, 478 S.E.2d at 823–24. In Anderson, the North Carolina Court of Appeals invalidated a U.S. Department of Agriculture (USDA) regulation that conflicted with the federal Food Stamp Act. 428 S.E.2d at 269–70. In Thomas, the same court reaffirmed its decision in Anderson and was subsequently affirmed by the state Supreme Court, holding that it had "acted within its authority in interpreting the Food Stamp Act and consequently invalidating the USDA's conflicting regulation." 478 S.E.2d at 824. In support of this holding, the court noted the discussion of concurrent jurisdiction in Tafflin and the lack of any evidence that Congress had divested state courts of jurisdiction. Id. (discussing Tafflin v. Levitt, 493 U.S. 455, 458 (1990)).

112. See State Treasurer v. Abbott, 660 N.W.2d 714, 718 (Mich. 2003) (holding that "[w]here a federal statute clearly addresses the issue at hand, we apply the statute as written," and not a federal agency's inconsistent interpretation of the statute) (applying Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)). In Abbott, the court applied federal Treasury regulations containing reasonable definitions of terms that the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1056(d)(1) (2000), did not define. 660 N.W.2d at 718. But the decision signals that the court would have applied the statute, and not the regulation, had ERISA been clear or the Treasury's interpretation unreasonable. See id. at 717–18, 722–23.

Additionally, a recent Michigan circuit court decision directly addressed this issue, albeit in dicta, in a case involving a challenge to a certification and 40 C.F.R. § 124.55(b). See Nat'l Wildlife Fed'n v. Chester, No. 08-1652-AA, slip op. at 8–9 (Mich. 30th Cir. Ct. Dec. 17, 2010). The court stated that it did "not agree ... that [section 124.55(b)] or some other federal rule may not be challenged here ..." Id. However, this language was not controlling; there was no need to reach the issue after the court found the certification at issue legally sufficient. Id. at 9. And as previously noted, application for leave to appeal has been filed in this case, and the decision's precedential value is in question. See supra text accompanying note 44.
cause of the uniqueness of the federal-state relationship created by the CWA scheme under sections 401 and 402 and their implementing regulations. To successfully challenge a section 401 certification in state court, 40 C.F.R. § 124.55(b) must be invalidated. But to invalidate 40 C.F.R. § 124.55(b), the challengers need standing, and standing cannot be achieved until the regulation threatens to disrupt the proceedings or decision of a state court.

b. Section 509 of the CWA Has Not Divested State Courts of Their Jurisdiction to Invalidate 40 C.F.R. § 124.55(b)

An analysis of section 509 of the CWA suggests that Congress did not specifically strip state courts of their authority to invalidate a more narrow category of regulations similar to 40 C.F.R. § 124.55(b). Section 509 establishes special procedures for review of specific actions taken by the EPA administrator pursuant to the CWA. Specifically, section 509(b)(1) states that review of the Administrator's action in discharging various responsibilities may be had in the pertinent federal circuit court of appeals, provided that such appeal be taken within 120 days of the Administrator's action, or after that date only if the appeal is based solely on grounds that arose after the 120th day.

Even if the Administrator's promulgation of 40 C.F.R. § 124.55(b) falls within one of the categories of activities listed in section 509(b)(1) (a point taken up in the next paragraph), Congress's choice of the word "may" indicates that state courts have not been divested of their concurrent jurisdiction. "This grant of federal jurisdiction is plainly permissive, not mandatory . . . . Indeed, 'it is black letter law . . . that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action.'" Hence, section 509 merely addresses the division of labor amongst the federal courts. When an interested party would like to challenge an action included within the language of section 509(b)(1)(A)-(G), recourse must be had to the special procedures described, but only if the challenge is being made in federal court.

115. See id.
116. Id. (emphasis added).
117. See id.
Assuming *arguendo* that section 509 does divest state courts of jurisdiction over the disputes governed by that section, the promulgation of 40 C.F.R. § 124.55(b) most likely does not fall into any of the categories listed in section 509(b)(1)(A)–(G). These categories include:

Review of the Administrator’s action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314(1) of this title . . . .

There is some precedent expressing the notion that subsection (F), which governs review of the issuance or denial of any permit under section 402, also encompasses review of the rules governing the issuance of permits and regulating the underlying permitting procedures. Taking this proposition as established, it is far from clear that 40 C.F.R. § 124.55(b) qualifies as such a regulation. Taking a cue from its title, 40 C.F.R. § 124.55(b) governs the “Effect of State certification” on modification of already issued permits. Additionally, the “perverse situation” to which the Supreme Court referred to in *E.L. du Pont de Nemours & Co. v. Train,* where a federal court of appeals would be forced to review the grants or denials of specific permits without being able to scrutinize the reg-

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120. See Natural Res. Def. Council, Inc. v. EPA, 966 F.2d 1292, 1296–97 (9th Cir. 1992) (holding that EPA storm water discharge regulations which exempted some activities from immediate NPDES permitting requirements were within the purview of section 509(b)(1)(F)); Nat'l Cotton Council of Am. v. EPA, 553 F.3d 927, 933 (6th Cir. 2009) (citing Am. Mining Cong. v. EPA, 965 F.2d 759, 763 (9th Cir. 1992)) (holding that rules exempting pesticides from NPDES permitting requirements were within purview of section 509(b)(1)(F)). But see League of Wilderness Defenders v. Forsgren, 309 F.3d 1181, 1190 n.8 (9th Cir. 2002) (counseling against the expansive application of section 509(b)); Envtl. Protection Info. Ctr. v. Pac. Lumber Co., 266 F. Supp. 2d 1101, 1113 (N.D. Cal. 2003) (holding that an EPA rule was "properly characterized as a regulation identifying a class of silvicultural sources that do not require NPDES permits," and was thus not within the purview of section 509(b)(1)(F)).
121. 40 C.F.R. § 124.55(b) (2009).
ulations governing those actions, is not implicated with respect to § 124.55(b); the circuit courts are not the appropriate forums for disputes over state certifications, nor for permit modifications, the actions in which the validity of 40 C.F.R. § 124.55(b) is likely to arise.123

2. State Courts Can Invalidate 40 C.F.R. § 124.55(b)

A challenge to the validity of 40 C.F.R. § 124.55(b) satisfies all of the requisite threshold inquiries that might otherwise prevent a court from reviewing an administrative decision on the merits. After refuting the possible bases for statutory divestment, it is safe to conclude that state courts retain their concurrent jurisdiction to invalidate the regulation within their respective territories.124 The presumption that agency action is reviewable in the absence of clear and convincing evidence to the contrary, established in Abbott Laboratories from the language of sections 702 and 704 of the APA, indicates that EPA's promulgation 40 C.F.R. § 124.55(b) is reviewable.125 Lastly, any potentially applicable statutes of limitations should not bar state judicial review of the regulation in the course of a challenge to a state certification. Because section 509's requirements do not apply to our challenge, there is no need to worry about its requirement that a challenge to a regulation occur within 120 days of issuance. Neither does the six-year limitation of 28 U.S.C. § 2401 (a) apply, because the action would not be brought against the federal government, but rather against the state agency that issued the certification.126

Thus, the state courts should be free to examine 40 C.F.R. § 124.55(b)'s consistency with the CWA. An interesting question is whether the state courts should review the federal regulation pursuant to the federal APA or to their own versions of the APA, which carry their own unique interpretive glosses. While a federal agency

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123. Section 509(b)(1)(F) could be read expansively to encompass actions related to permit modifications, in addition to issuances and denials. If that is the case, then permit modification disputes should be handled by the federal courts of appeals, and there would be a stronger case to be made that a challenge to 40 C.F.R. § 124.55(b) should likewise fall within the terms of section 509(b)(1)(F).
126. Additionally, an attempt by a state agency to introduce 40 C.F.R. § 124.55(b) into the litigation probably amounts to an application of the regulation to the plaintiffs. This application, by itself, should allow plaintiffs to work around any potentially applicable statute of limitations. An analogous point is taken up in greater detail infra Part III.B.2.b, in reference to a state court's potential application.
promulgated the regulation pursuant to federal APA standards, a state court conducting the review might be inclined to review the agency action pursuant to its state's own APA-like judicial-review provisions. While the state court inquiries into the legality of federal agency action are similar in nature to the inquiry employed by the federal courts pursuant to the federal APA (which, as explained supra Part II.B, has itself been subject to different applications by the federal courts), they differ in the details. Notably, a number of state courts employ a version of the *Chevron* test that gives less deference to agency interpretation, making it more likely that a 40 C.F.R. § 124.55(b) would be adjudged to be inconsistent with the CWA.\textsuperscript{127}

Thus, there is at least a possibility that challenges to certification decisions can be successful in state court. A state court could reasonably find in favor of the plaintiffs on both the threshold issues and the substantive validity of 40 C.F.R. § 124.55(b). At that point, the state court could investigate the procedural and substantive adequacy of the certification. But as detailed in the following section, there are more legal obstacles to overcome following a state-court judgment.

3. Possible Paths for Litigation After State Court Ruling

How a state court rules on the validity of 40 C.F.R. § 124.55(b) is a crossroads that will decide the direction in which litigation proceeds. This section attempts to envision a few of the key issues and

\textsuperscript{127} See Michael Pappas, *No Two Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the *Chevron* Doctrine*, 39 *McGeorge L. Rev.* 977, 985–86 (2008). Pappas groups the states into four broad categories that roughly approximate their announced standards of review. Id. States in at least two of those groupings apply standards of review that are in theory less deferential than *Chevron*. States in the least deferential category, "de novo with deference discouraged," include Delaware, Nebraska, New York, Oklahoma, and Virginia. Id. at 986 n.32. The second less deferential category, "de novo with the possibility of deference to agency expertise or experience," includes Alaska, California, Iowa, Maryland, Minnesota, New Hampshire, New Mexico, Utah, and Washington. Id. at 1010–23. A third category of states applies "intermediate deference" often explicitly asserting the authority to review matters of law de novo while choosing instead to apply deference, which Pappas interprets to be most consistent with the current federal application of *Chevron*. Id. at 985. States in this category include Arizona, Arkansas, Colorado, Idaho, Illinois, Kansas, Kentucky, Massachusetts, Missouri, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, Texas, and Wisconsin. Id. at 985 n.29. Pappas characterizes the final category, "strong deference," as composed of states that mandatorily defer to agency interpretations that are not contrary to statute, which Pappas claims is most consistent with the announced *Chevron* two-step. Id. at 985. These states are Alabama, Connecticut, Florida, Georgia, Hawaii, Indiana, Maine, Michigan, Mississippi, Montana, Pennsylvania, South Carolina, Tennessee, Vermont, West Virginia, and Wyoming. Id. at 985 n.28.
disputes that might arise in such litigation, in order to gauge the ability of environmental groups to avoid the effect of the regulation.

a. State Court Invalidates 40 C.F.R. § 124.55(b)

If a state court agrees on both its jurisdiction to invalidate 40 C.F.R. § 124.55(b) and this regulation's substantive invalidity, the court might set aside 40 C.F.R. § 124.55(b), reach the merits of the challenge to the certification, and remand the certification back to the state certifying agency with an order to modify in accordance with the requirements of the CWA. What happens after this depends on the actions of the parties involved.

As a preliminary matter, the state agency would have to comply with the state court's decision to correct the certification. If it refused to comply, the agency could be held in contempt.

When the state agency forwards the modified certification to EPA, EPA might relent and simply choose to modify the permit to incorporate the new conditions. This decision could then be challenged by the permittee, but if the challenge fails, the permit would be modified in accordance with 40 C.F.R. § 124.5(c)(1), and 40 C.F.R. § 124.55(b) would remain invalidated in one state out of fifty.

Alternatively, EPA might refuse to modify the permit, in an attempt to rely on 40 C.F.R. § 124.55(b), which, never having been repealed by EPA or adjudged invalid by a federal court, would remain on the books throughout most of the nation. If EPA refuses to modify the permit, the denial must first be informally appealed to the Environmental Appeals Board; this step constitutes an administrative remedy that must be exhausted before access to the courts may be had. Nothing in the language of the regulation establishing the informal appeal process seems to require that the appeal come from the same entity that requested the modification—in this case, the State. If the informal appeal is

128. See United States v. United Mine Workers of Am., 330 U.S. 258, 293–94 (1947); 17 C.J.S. Contempt § 23 (2011). Of course, the state agency could attempt to appeal the state court decision within the state judicial system.

129. If the permit at issue is a general permit, and if no individual applications have yet been processed, there would be no permittee to challenge the agency action. If an individual permit is at issue, or if permittees have already been authorized to discharge under a general permit, the permittees should have standing to challenge the EPA action.

130. See 40 C.F.R. § 124.5(b) (2009).

131. See id. (stating that "[d]enials by the Regional Administrator may be informally appealed to the Environmental Appeals Board by a letter briefly setting forth the relevant
unsuccessful, the environmental organization that brings the informal appeal could bring an action against EPA seeking injunctive relief. Because the action is being brought against EPA, and involves federal, not state, questions, the suit would likely end up in federal court.\footnote{EPA's action in refusing to modify the permit likely falls outside the categories of actions listed in section 509(b)(1)(A)--(G). Thus, the suit would be brought in federal district court.} The outcome of the action might turn on whether the state court's interpretation of the CWA binds EPA with regard to the certification at issue. In answering this question it is important to pin down exactly what the state court has held. In invalidating 40 C.F.R. § 124.55(b), not only does the state court remove the absolute bar to permit modification that the regulation imposes on EPA, it does so because EPA shall include the State's final determinations as part of the permit, pursuant to section 401(d) of the CWA.\footnote{Thus, if the state court decision binds EPA, EPA must incorporate the new conditions and modify the permit.} Thus, if state court decision binds EPA, EPA must incorporate the new conditions and modify the permit.

A federal agency must comply with a decision rendered by a court of competent jurisdiction, when that agency was a party to the suit in which the decision was rendered.\footnote{A federal agency must comply with a decision rendered by a court of competent jurisdiction, when that agency was a party to the suit in which the decision was rendered.} The situation is more complicated here, where EPA was not a party to the state-court action that invalidated its regulation.

\footnote{The environmental organization may believe there is an advantage to bringing the challenge in the state court that rendered the initially favorable decision. However, such an organization would have a countervailing interest in having a federal court rule on the issue of the validity of 40 C.F.R. § 124.55(b); a federal court's invalidation could potentially have broader geographic applicability than that of a state court. See Estreicher & Revesz, supra note 107, at 717 (noting EPA's general policy of eschewing relitigation of an issue that has been decided against it in any circuit). The exact balance of these interests turns on the specifics of the case. In addition, EPA could successfully remove the action to federal court, if so desired. See 28 U.S.C. § 1442(a) (2006) ("A civil action ... commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending: (1) The United States or any agency thereof . . . .") The remainder of this discussion assumes a party removed the action to federal court.}
Investigating 40 C.F.R. § 124.55(b)

To determine if EPA is bound, it is helpful to determine whether the federal court is bound by the state court decision in this scenario. If the federal court is bound, then it must force EPA to modify the permit by granting injunctive relief. In most circumstances, federal courts are not bound by state-court interpretations of federal law in their districts.136 But in the action envisioned, the federal court would not merely be interpreting the CWA in some unrelated case. The court would be dealing with the same core set of facts that was already authoritatively handled by the state court. This raises the possibility of issue preclusion and collateral estoppel. "It is . . . settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered."137 This is the result commanded by 28 U.S.C. § 1738, which states in relevant part that "judicial proceedings [of any state court] shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State."138

But there is a significant exception to the doctrine of collateral estoppel: "the Court has repeatedly recognized . . . that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case."139 A due process concern is at the heart of this exception.140 While EPA, a governmental entity, may not be entitled to the same measure of due process that a legal person would be entitled to under the Fifth Amendment,141 a court might still find that this exception to collateral estoppel applies, meaning that the federal court is not bound to enforce the state-court decision.

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136. See Grantham v. Avondale Indus., 964 F.2d 471, 473 (5th Cir. 1992) ("It is beyond cavil that we are not bound by a state court's interpretation of federal law regardless of whether our jurisdiction is based on diversity of citizenship or a federal question." (internal citation omitted)).
140. See Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 329 (1971) ("Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.").
141. See Mathews v. Eldridge, 424 U.S. 319, 322 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." (emphasis added)).
While this conclusion does not necessarily mean that EPA is not bound, it does narrow in on the difficulty with making that claim. Arguably, EPA deserves a chance to defend its regulation before it is prevented from applying it.

On the other hand, the opinion in Thomas, discussed supra note 111, put special emphasis on the meaning and ramifications of judicial invalidation of a rule:

An order of this Court determining that a regulation impermissibly conflicts with the enabling statute has the effect of invalidating or voiding the regulation, and no action whatsoever by the administrative agency can breathe life into the invalidated regulation absent reversal or modification of this Court's order by a higher court or absent legislative action sufficiently altering the enabling act.\(^\text{142}\)

This language leaves no room for a distinction between invalidated regulations that the administrative agency previously had an opportunity to defend in court and those that it did not. In Thomas, the U.S. Department of Agriculture (USDA) was similarly situated to EPA in our hypothetical; neither were joined to the initial litigation that invalidated their regulations.\(^\text{143}\) But perhaps a narrower distinction can be drawn distinguishing Thomas from our fact pattern. In Thomas, it was the state agency, the North Carolina Department of Human Resources, that continued to apply the invalidated regulation.\(^\text{144}\) The USDA never actually attempted such an application, and only joined the suit as an intervenor.\(^\text{145}\) The court's attention was thus directed primarily toward the state agency that already had a fair opportunity to defend its position.

If the federal court decides that EPA should have a chance to defend its regulation, despite the prior state-court ruling, the environmental organization would have to work around the six-year statute of limitations in 28 U.S.C. § 2401(a). Substantive challenges to regulations, alleging lack of authority or inconsistency with statute, may be brought within six years of the agency's application of


143. See Thomas, 478 S.E.2d at 817-18.

144. Id.

145. Id.
that decision to a specific challenger.\textsuperscript{146} EPA’s denial of a request for modification would amount to an application of 40 C.F.R. § 124.55(b), but it is unclear to whom the regulation applies in this circumstance. The state agency initially forwards the revised certification to EPA, which is important because a crucial part of the argument that 40 C.F.R. § 124.55(b) is invalid relies on the State’s authority to protect its water quality. This suggests that EPA has applied the regulation against the State, which is probably uninterested in challenging EPA’s decisions not to modify; after all, the state agency initially issued the lenient certification. However, the environmental organization informally appealed EPA’s decision not to modify, held the state agency to its obligations in state court, and its members feel the effects of diminished water quality. This is strong evidence that the regulation was applied to the environmental organization, which is significantly more interested in the outcome of the dispute than the public at large.\textsuperscript{147}

To conclude, if EPA refuses to modify a permit after a state court invalidates 40 C.F.R. § 124.55(b), it is less than certain that a federal court would force EPA to do so. Most importantly, the federal court might insist upon conducting an independent evaluation of the regulation’s validity. There is a good chance that EPA’s refusal to modify could serve as the basis for an as-applied challenge to the regulation in federal court.

\textit{b. State Court Applies 40 C.F.R. § 124.55(b)}

If the state court rules that 40 C.F.R. § 124.55(b) is valid, after determining that it has jurisdiction to decide that question, the state court, in effect, would have applied 40 C.F.R. § 124.55(b) to the plaintiffs. Here, it is clear that the regulation has been applied to the environmental organization, but a new ambiguity surfaces. Typically, the as-applied challenge allowance is discussed in terms of the \textit{agency’s} application of the regulation, not a \textit{court’s} application.\textsuperscript{148} Our fact pattern is a unique scenario in which a court might moot an appeal in anticipation of an agency’s application. By

\textsuperscript{146} Wind River Min. Corp. v. United States, 946 F.2d 710, 716 (9th Cir. 1991); see also Dunn-McCampbell Royalty Interest, Inc. v. Nat’l Park Serv., 112 F.3d 1283 (5th Cir. 1997).

\textsuperscript{147} Cf. Wind River, 946 F.2d at 715 (supporting its decision to allow a substantive challenge to agency action outside the usual six year limitation period by noting that these challenges, "by their nature, will often require a more 'interested' person than generally will be found in the public at large"). This suggests that a particularized interest is at least correlated with the ability to pursue an as-applied challenge to a regulation. See infra Part III.B.3.b for a related exposition on this topic.

\textsuperscript{148} See, e.g., Wind River, 946 F.2d at 716.
mooting the appeal, the state court has spared EPA from applying the regulation and has applied the regulation on EPA's behalf.

A federal court would have good reason to extend the as-applied challenge doctrine to our fact pattern. The reason courts allow challenges to the substantive validity of regulations within six years of their application to plaintiffs is that the grounds for such challenges are typically not apparent before their application. This is precisely the reason that 40 C.F.R. § 124.55(b) was not initially challenged; it was the proverbial needle in the haystack of an NPDES program regulatory overhaul. A formalistic requirement that the promulgating agency must have performed the application itself would undermine the purpose of the rule. Such a requirement would leave the environmental organization with the burden of having the regulation applied to it but without the ability to question its validity, through no fault of its own. Thus, the application of the regulation by the court should suffice to overcome the statute of limitations for a challenge to the regulation in federal court.

There are undoubtedly many more uncovered issues that would arise in the course of litigation following a challenge to a certification of an NPDES permit in state court. This discussion has captured a handful of the most important. The road to invalidating 40 C.F.R. § 124.55(b) may be arduous and fraught with legal obstacles, but the road exists nonetheless. With determined advocates and skillful attorneys at the wheel, there is light at the end of the tunnel.

**Conclusion**

Once EPA issues an NPDES permit, the regulation creates a one-way avenue for permit modification based on challenges to state certifications—only to delete permit conditions, only at the request of a permittee. It boldly bars modifications that would protect the environment, while providing an open door for modifications that do the opposite, under exactly equivalent circumstances. While EPA must take into account the interests of law-abiding permittees in its regulatory programs, 40 C.F.R. § 124.55(b) unlawfully sacrifices environmental protection in the name of administrative

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149. See id. at 715 (contrasting substantive challenges to regulations with procedural and policy based challenges by noting that the grounds for the latter categories of challenges "will usually be apparent to any interested citizen within a six-year period following promulgation of the decision").

150. See supra note 48 and accompanying text.
efficiency. It is a regulation that must be repealed or invalidated if our nation is to achieve the level of water quality for which the Clean Water Act explicitly strives.