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ARTICLES

**Of Zombie Permits and Greenwash Renewal
Strategies: Ten Years of New York's
So-Called "Environmental Benefit
Permitting Strategy"**

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I. INTRODUCTION

The 1972 federal Clean Water Act ("CWA" or "the Act") provides that water pollution permits issued under the Act "are for fixed terms not exceeding five years."¹ By the early 1980s more than 6,000 undead State Pollutant Discharge Elimination System (SPDES) permits in New York State roamed the State well beyond their statutory expiration date because the State Department of Environmental Conservation (DEC) had not processed permit renewal applications.² The holders of these zombie permits,³ with DEC's blessing, claimed an indefinite right to continue operating

1. Clean Water Act, 33 U.S.C. § 1342(b)(1)(B) (2000) (applicable to EPA administered permits under Clean Water Act, 33 U.S.C. § 1342(a)(3)).

2. N.Y. STATE COMPTROLLER REP., DEP'T OF ENVTL. CONSERV. CLEAN WATER PERMIT PROCESS, 2001-S-18 at 5-6 (2003), *available at* <http://www.osc.state.ny.us/audits/allaudits/093003/093003-h/01s18.pdf> (last visited Sept. 30, 2004).

3. Zombie is "a. A supernatural power or spell that according to voodoo belief can enter into and reanimate a corpse. b. A corpse revived in this way." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 2074 (4th ed. 2000).

under the State Administrative Procedure Act section 401.⁴ Nationally, the Environmental Protection Agency (EPA) has determined that, as of 2001, 27% of CWA permitted facilities nationwide were operating under expired, “administratively continued” permits.⁵

In 1994, with facilitative legislation adopted by the State Legislature, DEC adopted a so-called “Environmental Benefit Permit Strategy” (EBPS) in order to reduce this backlog of expired permits without applying the administrative resources necessary to engage in full public review of expiring permits.⁶ The “benefit” of this strategy appears to be to the administrative agency, not to the environment. “Greenwash” is a term used to describe the application of an environmentally friendly sounding name to an environmentally unfriendly practice.⁷ This article questions the conformance of New York’s strategy to avoid public substantive review of these zombie permits with the requirements of the CWA.

The federal CWA implements a comprehensive scheme of regulating point source discharges of pollutants into the nation’s waters.⁸ The Act accomplishes this regulation by requiring a permit for each and every point source discharge, with effluent limits based on the more stringent of technology-based standards and standards necessary to protect water quality and existing water uses.⁹ Public participation in the permitting process is a cornerstone of the Act’s strategy.¹⁰ Another key element of the Act’s scheme is periodic review of both permits and the underlying water quality and technology standards.¹¹ The period of review under the Act for permits is five years, and for standards three years.¹²

4. N.Y. A.P.A. LAW § 401 (2003).

5. EPA, FACT SHEET - NPDES PERMIT BACKLOG REDUCTION, *available at* <http://www.epa.gov/npdes/pubs/factsht.pdf> (last visited Feb. 6, 2004) [hereinafter FACT SHEET].

6. N.Y. DEP’T OF ENVTL. CONSERV., TECHNICAL AND OPERATIONAL GUIDANCE SERIES 1.2.2 at Cover Memorandum (June 5, 2003), *available at* <http://www.dec.state.ny.us/website/dow/togs/togs122.pdf> [hereinafter TOGS].

7. Greenwash is “[d]isinformation disseminated by an organisation so as to present an environmentally responsible public image. Derivatives greenwashing (n). Origin from green on the pattern of whitewash.” CONCISE OXFORD ENGLISH DICTIONARY 624 (10th ed. 2002).

8. 33 U.S.C. §§ 1251-1387 (2000).

9. *Id.* § 1342.

10. *See id.* § 1311.

11. *Id.* §§ 1342(b)(1)(B), 1313(c).

12. *Id.*

The CWA permitting program is, for the most part, administered by the states under EPA approved delegated permitting programs.¹³ State agency resources have not generally matched the demands of the CWA's five year review, reconsideration, and reissuance provisions for these delegated federal permits.¹⁴ New York State's response to the increasing backlog of unprocessed CWA permit renewals was the adoption of a so-called "Environmental Benefit Permitting Strategy," legislatively authorized and administratively implemented in 1994.¹⁵ Under the "EBPS," the vast majority of New York State CWA permits receive no substantive review upon expiration, but rather are "administratively renewed" without modification.¹⁶ The DEC then prioritizes these unreviewed permits for "full technical review" based on a matrix of factors. Technical review of these "administratively renewed" permits is conducted not according to the five year cycle contemplated by CWA, but rather on an indefinite cycle based on DEC's rankings and agency resources.¹⁷

The biggest casualty of this substituted review cycle is public participation. Rather than providing an opportunity for full public review, comment, and hearing at each permit renewal, the automatic "administrative renewal" purports to limit the right to public hearings on permit renewals and defer the issues raised in public comments to the "full technical review" to be held at some indefinite time in the future.¹⁸ The "full technical review," once conducted, is not subject to the full public notice and hearing procedures contemplated for a new permit; indeed, no public notice seems to be contemplated unless DEC staff determines to modify the permit based on its "technical review," and even then, notice and comment is sought only on DEC's proposed permit modifications without an opportunity for public proposals for modification.¹⁹

This article analyzes the CWA's provisions ensuring public participation in the permitting process and the history of EPA regulations implementing the public participation requirements. The article then examines the EBPS authorizing legislation, DEC's Technical Guidance concerning its implementation of the EBPS,

13. *Id.* § 1342(b).

14. FACT SHEET, *supra* note 5, at 1.

15. TOGS, *supra* note 6.

16. *See id.*

17. *See id.*

18. *See id.*

19. *See id.*

and some instances of DEC's actual practice implementing the EBPS, and compares these procedures with the public participation requirements contemplated by both the CWA and New York State's own clean water implementing legislation, Environmental Conservation Law Article 17. The article concludes that the procedures adopted by the DEC are inconsistent with both the CWA's public participation requirements, as well as with the Environmental Conservation Law's own requirements for reissuance of federally delegated Clean Water Act permits. The article then makes recommendations to improve the EBPS in order more fully to comply with CWA public participation requirements.

II. FEDERAL CWA PROVISIONS FOR FIVE YEAR REVIEW OF STANDARDS, REISSUANCE OF PERMITS, AND PUBLIC PARTICIPATION

The Federal Water Pollution Control Act Amendments of 1972, commonly known as the "Clean Water Act," ushered in a fundamental change in our nation's approach to protecting its waters from human pollution. Based on the premise that "[n]o one has the right to pollute,"²⁰ the CWA declared "the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985."²¹ In order to achieve this goal, the Act implemented a "National Pollutant Discharge Elimination System" (NPDES) permitting scheme.²² Consistent with the declaration that no person has any inherent right to pollute, section 301 of the Act declares a prohibition against any discharge of any pollutant into waters of the United States except in compliance with a NPDES permit.²³

In stark contrast to the previous incarnation of the Water Pollution Control Act, regulation of pollutant discharges under the CWA no longer depended on an assessment of the aquatic impacts of the discharge. Instead, the Environmental Protection Agency is charged with developing uniform technology-based effluent standards for each category of pollutant discharge.²⁴ Individual NPDES permits must contain effluent limitations based on these

20. S. REP. NO. 92-414, at 43 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3709, and in LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 (1973).

21. 33 U.S.C. § 1251(a)(1) (2000).

22. *See id.* § 1342.

23. *Id.* § 1311(a).

24. *Id.* §§ 1311(b)(2)(A), 1314(b), 1316. EPA effluent guidelines for various industrial categories are set out at 40 C.F.R. pts. 401-471.

uniform technology-based standards, or more stringent individual standards as necessary to achieve water quality standards in the receiving water bodies.²⁵

Congress envisioned that progress in pollution control technology would permit the nation to move toward the goal of eliminating the discharge of pollutants altogether.²⁶ For this reason, Congress wrote into the CWA a process of reconsidering and revising technology and water-quality based standards, as well as revisiting the permits that implement these standards.²⁷ Congress also envisaged active public participation in this iterative permitting process as a means of ensuring full implementation of its goals.²⁸

A. The CWA's Timetable for Review and Update of Permitting Standards and Permits

As noted, the CWA provides for effluent limitations based both on uniform national technology-based standards and local water quality based standards as needed.²⁹ The CWA contemplates that both categories of effluent limitations would be periodically reviewed and updated. Section 301(d) specifically directs that, "[a]ny effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedures established under such paragraph."³⁰ The Committee report on the 1972 legislation explains this requirement as follows:

The Committee has established a procedure to continue the program beyond 1981. Under this provision, the procedures and requirements of Phase II would be repeated every five years for those sources of pollution which could not have to achieve the no-discharge requirement in Phase I (if required to meet water quality standards) or Phase II, or in an earlier five-year phase.³¹

CWA section 304(b), which directs EPA to develop and publish national guidelines for technology-based effluent standards also di-

25. 33 U.S.C. §§ 1311(b)(2), 1312.

26. *See id.* § 1251(a).

27. 33 U.S.C. §§ 1311(d), 1313(c), 1342(b)(1)(B).

28. *See id.* § 1342(b)(3).

29. *Id.* §§ 1311, 1312.

30. *Id.* § 1311(d).

31. S. REP. NO. 92-414, *supra* note 20, at 46 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3712.

rects EPA to "at least annually thereafter, revise, if appropriate, such regulations."³² Similarly, CWA section 303 requires that each state "from time to time (but at least once each three year period . . .) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards."³³ The section 303(d) direction to states to develop a list of impaired water bodies and total maximum pollutant loadings allowable for such water bodies likewise directs states to re-submit this list "from time to time."³⁴

A five-year review and renewal cycle is also specifically written into the provisions governing delegated state NPDES permitting programs.³⁵ Section 402 of the Act governs permits for pollutant discharges, and provides for delegation of the NPDES permitting program to states upon compliance with minimum standards and specific approval of the delegation by EPA.³⁶ Among the minimum standards for a delegated NPDES program is a requirement that the State have authority "[t]o issue permits which . . . are for fixed terms not exceeding five years."³⁷ Delegated state permit programs must thus provide for the same five-year reconsideration cycle for effluent limitations that is written into section 301(d) of the Act.³⁸ The same five-year life of permit requirement is incorporated into the requirements for EPA-issued permits as well.³⁹

The structure of the Act makes clear that Congress expected water pollution control technology to improve, and these improvements would be written into permits as they expired, moving the nation towards the expressed goal of eliminating all discharges of pollutants. Section 301 of the Act spells out this expectation of technological progress and increasingly stringent standards: for nonconventional pollutants, effluent standards "shall require application of the best available technology economically achievable for such category or class, which shall result in reasonable further progress toward the national goal of eliminating the discharge of

32. 33 U.S.C. § 1314(b).

33. *Id.* § 1313(c)(1).

34. *Id.* § 1313(d)(2).

35. *Id.* § 1342(b)(1)(B).

36. *Id.* § 1342.

37. 33 U.S.C. § 1342(b)(1)(B).

38. *Id.* § 1311(d).

39. *Id.* § 1342(a)(3).

all pollutants”⁴⁰ As noted, the legislative history of the five-year review requirement built into section 301(d) explicitly ties that provision into making progress towards the “no-discharge” goal of the Act.⁴¹

EPA has also explained the rationale for having fixed-term permits, in a related context, as follows:

EPA agrees with those commentators who believe that permit expiration and reissuance is an important mechanism for providing regular scrutiny of permit compliance and updating of permit conditions. When permits must be reissued periodically, there is greater assurance that the existing conditions of the permit will be scrutinized to determine whether any of them must be modified or updated. In addition, a limited-term permit provides protection against human error by the permit writer⁴²

Thus, the point of having fixed permit terms and periodic review of permitting standards is to allow for continual improvement in pollution control standards, to implement new requirements based on the exigencies of protecting water quality standards, and, finally, to prevent “human error” by a permit writer from being written in stone into a permit with no expiration date.

B. The CWA’s Public Participation Requirement

The framers of the CWA relied on an engaged and involved public to help ensure full implementation of its sweeping goals. This predilection to public involvement is reflected not only in the citizen suit provision of the CWA,⁴³ but also in the minimum re-

40. *Id.* § 1311(b)(2)(A)(i). The 1972 Clean Water Act would have applied this standard of increasingly stringent technology-based effluent limits to conventional pollutants as well as non-conventional pollutants, but in 1977, Congress amended the Act to restrict the application of the “Best Available Technology Economically Achievable” standard to so-called “non-conventional” pollutants (i.e., those pollutants other than suspended solids, biological oxygen demand, fecal coliforms, and pH.) *See id.* § 1314(a)(2); Clean Water Act Amendments of 1977, Pub. L. No. 95-217 (codified as amended at 33 U.S.C. § 301(b)(2)(c) (1977)).

41. Congress implicitly reaffirmed the importance of five-year review of CWA permits when it rejected a proposal to extend the life of certain CWA permits to ten years. *See* H.R. CONF. REP. NO. 99-1004, at 182-183 (1986).

42. Consolidated Permit Procedures, 45 Fed. Reg. 33,280, 33,308 (May 19, 1980). Although the EPA was here referring to the question whether permits for Resource Conservation and Recovery Act (RCRA) permits under 42 U.S.C. § 3005 should be given fixed terms, the rationale applies equally to Clean Water Act permits (for which fixed terms are mandated by the statute).

43. 33 U.S.C. § 1365 (2000).

quirements established for permitting procedures in section 402 of the Act.⁴⁴ As noted by the Senate Committee Report on the 1972 Act, full implementation of the Act would depend “upon the pressures and persistence which an interested public can exert upon the governmental process.”⁴⁵ Thus, state permit programs and EPA issued permits alike must “insure that the public . . . receive[s] notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application.”⁴⁶

The CWA’s encouragement of public participation is written right into the Congressional Declaration of Goals and Policy in section 101 of the Act, which provides, “[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States.”⁴⁷ As one commentator has put it, “[t]hus, the CWA represents a pact with the public. The NPDES permit is the final product of a long public process, and if the permit is to be changed, the change must be done publicly, following the same process.”⁴⁸ Professor Hodas explains the vital role that citizen participation plays in the remedial scheme of the 1972 CWA amendments – specifically, the citizens’ role in back-stopping the regulatory efforts of the state and federal governments, which both are compromised by lack of resources and political and economic concerns that militate against strict application of the Act.⁴⁹

C. History of EPA Regulations Governing Permit Renewals and Public Participation

CWA section 304(i) directed EPA to promulgate guidelines establishing minimum standards for permitting procedures in a state-delegated permitting program under CWA section 402.⁵⁰ In establishing these regulations, EPA recognized the critical role

44. *Id.* § 1342.

45. S. REP. NO. 92-414, *supra* note 20, at 12 reprinted in 1972 U.S.C.C.A.N. 3668, 3679.

46. 33 U.S.C. § 1342(b)(3).

47. *Id.* § 1251(e).

48. David R. Hodas, *Environmental Federalism: Enforcement of Environmental Law in a Triangular Federal System: Can Three not be a Crowd When Enforcement Authority is Shared*, 54 MD. L. REV. 1552, 1577 (1995).

49. *Id.*, *passim*.

50. 33 U.S.C. § 1314(i).

public participation must play in both initial permit applications and renewals. At the outset, EPA adopted a specific regulation requiring that CWA permit renewals undergo all of the public notice, review, and hearing requirements that would apply to an initial permit application.⁵¹ This fundamental assumption that permit renewals will be treated as new permit applications underlies the governing regulations to this day, although it is less explicit than it was in the original regulations.⁵²

EPA promulgated its initial standards for an approvable delegated State CWA section 402 permitting program in December, 1972.⁵³ These initial rules recognized the importance of public participation in both initial permitting and renewal, and recited the Congressional declaration of purpose to foster public involvement.⁵⁴ Thus, these regulations contained an entire subpart D, entitled "Notice and Public Participation." Section 124.32 of these original regulations required specific forms of public notice of permit applications,⁵⁵ and section 124.36 made specific provision for public hearings to be held at the request of an interested member of the public:

The Director shall provide an opportunity for the applicant, any affected State, any affected interstate agency, any affected country, the Regional Administrator, or any interested agency, person, or group of persons to request or petition for a public hearing with respect to NPDES applications. Any such request or petition for public hearing shall be filed within the 30-day period prescribed in § 124.32(b) and shall indicate the interest of the party filing such request and the reasons why a hearing is warranted. The Director shall hold a hearing if there is a significant public interest (including the filing of requests or petitions for such hearings) in holding such a hearing. Instances of doubt should be resolved in favor of holding the hearing⁵⁶

Significantly, these initial regulations made clear that the public notice and participation requirements would apply with full force to permit renewals as well as initial applications.⁵⁷ Section

51. See 37 Fed. Reg. 28,398 (Dec. 22, 1972) (codified at 40 C.F.R. § 124.52(c) (1973)).

52. See 40 C.F.R. § 122.21(d) (2004).

53. 37 Fed. Reg. 28,390 (Dec. 22, 1972).

54. *Id.* at 28,393 (Dec. 22, 1972) (quoting 33 U.S.C. § 1251(e)).

55. *Id.* at 28,394 (Dec. 22, 1972) (codified at 40 C.F.R. § 124.32 (1973)).

56. *Id.* at 28,395 (Dec. 22, 1972) (codified at 40 C.F.R. § 124.36 (1973)).

57. *Id.* at 28,398 (Dec. 22, 1972) (codified at 40 C.F.R. § 124.52(c) (1973)).

124.52(c) of the 1972 regulations specifically provided that “[t]he State or interstate agency shall follow the notice and public participation procedures specified in Subpart D of this part in connection with each request for reissuance of an NPDES permit.”⁵⁸

EPA’s procedural requirements for state-administered NPDES permit programs have been recodified and modified several times since their enactment, and this precise language no longer appears in the current version of the regulations. Nevertheless, the requirement to treat permit renewals as if they were new permit applications appears to have been carried forward.⁵⁹ Current section 122.21(d), captioned “Duty to reapply,” and specifically made applicable to state-administered permit programs, provides that “[a]ll other permittees with currently effective permits shall submit a new application 180 days before the existing permit expires”⁶⁰ This requirement that existing permittees submit a “new application” appears to contemplate processing this new application as an application for a new permit.⁶¹ Indeed, the preamble to EPA’s 1980 consolidated regulations specifically rejected comments suggesting that a short form renewal application should suffice, instead requiring submission of a full permit application identical to the original application.⁶² Nothing in the preambles to the various amendments to the EPA permitting procedures suggested any intention to relax the previously explicit requirement that permit renewals be accorded the full procedural requirements, including public notice and comment, and public hearing, as required in the original application.⁶³

58. *Id.*

59. *See* 40 C.F.R. § 122.21(d) (2004).

60. *Id.*

61. A footnote to this provision in the Federal Register notice announcing the final rule cross references the term “new application” to the requirements applicable to new permit applications. 48 Fed. Reg. 14,146, 14,163 n1 (Apr. 1, 1983).

62. According to EPA:

One commenter suggested that a permittee should be able to refer to the application for its expired permit rather than submit a new one if none of the information has changed. EPA rejects this suggestion. It is essential to obtain an updated certification of the accuracy of the information before issuing a new permit.

45 Fed. Reg. 33,299 (May 9, 1980).

63. The major amendments to the EPA permitting procedures were adopted in 1979, when EPA sought to combine the regulations for permitting for Resource Conservation and Recovery Act, 42 U.S.C. § 6925 and the Underground Injection Control (UIC) program with those for Clean Water Act permits, *See* 44 Fed. Reg. 32,854 (June 7, 1979), and again in 1983, when EPA “deconsolidated” these regulations based on the confusion caused by the consolidated regulations. *See* 48 Fed. Reg. 14,146 (Apr. 1, 1983). The 1979 “consolidated” regulations included a section 122.7(b), providing “[i]f

EPA's regulations setting forth minimum standards for public participation in permitting decisions also recognize the importance of judicial review of state-agency permitting determinations.⁶⁴ Thus, according to the EPA regulations, "[a]ll States that administer or seek to administer a program under this part shall provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process."⁶⁵

III. ENVIRONMENTAL CONSERVATION LAW PROVISIONS AND DEC REGULATIONS GOVERNING STATE POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT REISSUANCE AND PUBLIC PARTICIPATION.

A. ECL Article 17 State Pollutant Discharge Elimination System Statute and Article 70 Permit Procedures

The CWA authorizes the EPA to delegate the NPDES permit program to state governments, enabling states to perform many of the permitting, administrative and enforcement aspects of the NPDES Program.⁶⁶ In states that have been authorized to implement CWA programs, EPA still retains oversight responsibilities.⁶⁷ Pursuant to CWA section 402(b), states may issue CWA permits within their borders under delegated authority from the EPA.⁶⁸ The state programs require approval of the EPA Administrator before becoming effective.⁶⁹ State permit programs must assure that they can meet certain requirements before being approved. These limitations specifically include requirements for state authority:

the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the permittee must apply for and obtain a new permit." 45 Fed. Reg. 33,425 (May 19, 1980). Like the 1972 regulation, this regulation provides that the holder of a permit that is about to expire must obtain a "new permit" subject to the new permit procedures. The 1983 "deconsolidation" modified this language slightly and adopted section 122.21(d) in essentially its current form. Neither of the preambles to these regulations suggested any intention to relax the procedural requirements for renewals of NPDES permits.

64. 40 C.F.R. § 123.30.

65. *Id.*

66. 33 U.S.C. § 1342(b) (2000).

67. *Id.*

68. *Id.*

69. *Id.* § 1342(a)(5).

- (1) To issue permits which [] . . .
- (B) are for fixed terms not exceeding five years;
- (3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application⁷⁰

These requirements apply to all states that have a delegated permit system, such as New York. Moreover, state-delegated NPDES programs “shall at all times be in accordance with this section”⁷¹ State permitting programs that fail to maintain compliance with the minimum standards established by CWA and EPA’s implementing regulations face withdrawal of the authority to administer a delegated permitting program.⁷²

New York State administers its State Pollutant Discharge Elimination System (SPDES) program as a delegated NPDES program. In order to take advantage of this federal delegation, New York State adopted its own SPDES permitting system, which is codified at Environmental Conservation Law (ECL) Article 17.⁷³ Under the ECL provisions, the DEC is charged with issuing and enforcing SPDES permits within New York State.⁷⁴

EPA approved New York State’s delegated NPDES program in 1977. In order to gain this approval, also in 1977, the legislature adopted the Uniform Procedures Act, which set out the procedures under which all DEC permits, including SPDES permits, would be issued and renewed.⁷⁵ These procedures, as initially adopted, tracked the EPA requirements for public notice, hearing, participation, and renewal.⁷⁶ ECL Articles 17 and 70, as well as DEC’s implementing regulations, contain parallel provisions for public notice, comment, and hearing on SPDES permit applications.⁷⁷ These requirements generally track the CWA requirements.

Under the Uniform Procedures Act, once an application for a permit is determined or deemed to be complete, DEC must publish notice of complete application in the next Environmental Notice

70. *Id.* § 1342(b)(1)(B), (b)(3).

71. *Id.* § 1342(c)(2).

72. *See* 33 U.S.C. § 1342(c)(3).

73. *See* N.Y. ENVTL. CONSERV. LAW § 17-0801 (2003).

74. *Id.*

75. *Id.* § 70-0101.

76. *Id.* § 70-0107.

77. *See id.* §§ 17-0703(2), 70-0107(1).

Bulletin, as well as in a newspaper having general circulation in the applicant's area at least once in the next fifteen calendar days.⁷⁸ Additionally, DEC must designate and publish a thirty-day public comment period on the application.⁷⁹ ECL Article 17 similarly provides that "[p]ublic notice of a complete application for a SPDES permit . . . shall be circulated in a manner designed to inform interested and potentially interested persons . . . of such an application,"⁸⁰ and provides for a thirty-day period for comments on the application.⁸¹

Article 70 specifically requires DEC to review public comments filed with respect to a SPDES permit application in order to determine whether a public hearing should be required and whether the proposed permit should be modified or denied.⁸² Under this provision, a public hearing is required if comments raise "substantive and significant issues," such that there is a reasonable likelihood that the permit would be denied or substantially modified to meet statutory or regulatory permitting criteria.⁸³ According to ECL § 70-0119(1),

[a]fter evaluating an application for a permit and any comments of department staff, other state agencies or units of government or members of the public, the department shall . . . determine whether or not to conduct a public hearing on the application and mail written notice to the applicant of a determination to conduct a public hearing. Such determination shall be based on whether the evaluation or comments raise substantive and significant issues relating to any findings or determinations the department is required to make pursuant to this chapter, including the reasonable likelihood that a permit applied for will be denied or can be granted only with major modifications to the project because the project as proposed may not meet statutory or regulatory criteria or standards; provided, however, where any comments received from members of the public or otherwise raise substantive and significant issues relating to the application and resolution of any such issue may result in denial of the permit or the imposition of significant conditions

78. See *id.* § 70-0109(2); N.Y. COMP. CODES R. & REGS. tit. 6, § 621.6(a) (2004).

79. See N.Y. ENVTL. CONSERV. LAW § 70-0109(2)(b); N.Y. COMP. CODES R. & REGS. tit. 6 § 621.5(c)(6)(i).

80. N.Y. ENVTL. CONSERV. LAW § 17-0805(1)(a).

81. *Id.* § 17-0805(1)(b).

82. *Id.* § 70-0119(1).

83. *Id.*

thereon, the department shall hold a public hearing on the application.⁸⁴

As required by the applicable EPA regulations, New York State's original Uniform Procedures Act required renewals of NPDES permits to be subject to the full scope of these permitting procedures for new applications.⁸⁵ Accordingly, Environmental Conservation Law § 70-0115(2)(c) provided, "[i]n the case of a request for the renewal, reissuance, recertification or modification of an existing state pollutant discharge elimination system permit the request shall be treated as an application for a new permit."⁸⁶

Thus, under both the EPA regulations governing state-delegated NPDES permitting programs and under the procedures adopted by New York State at the time it received delegation of its own NPDES permitting program, permit renewal applications had to be subject to the same public notice, comment and hearing requirements as new applications.⁸⁷ These requirements specifically included a mandatory public hearing wherever public comments raised "substantive and significant" issues concerning compliance with the proposed permit renewal with statutory and regulatory standards.⁸⁸

IV. NEW YORK'S "ENVIRONMENTAL BENEFIT PERMITTING STRATEGY" AND ITS COMPROMISE OF PUBLIC PARTICIPATION

The CWA contemplated an aggressive program of continually improving permitting standards, coupled with fixed permit terms that allowed permits to be upgraded to keep pace with the improving standards. Unfortunately, the commitment of administrative resources at both the federal and state level has never been commensurate with the ambitious goals of the CWA. At the state level, where the vast majority of CWA permit administration takes place, this shortfall in administrative resources leads to long

84. *Id.*

85. *Id.* § 70-0115(2)(c).

86. 1977 N.Y. LAWS, 723, (codified as amended at N.Y. ENVTL. CONSERV. LAW § 70-0115(2)(c) (1994)). As discussed below, this provision has since been amended, but still requires that an application for reissuance or renewal of a SPDES permit "issued in lieu of a national pollutant discharge elimination system permit" shall be treated as an application for a new permit.

87. N.Y. ENVTL. CONSERV. LAW § 70-0115.

88. *Id.* § 70-0119.

backlogs in processing permit renewals.⁸⁹ While the Environmental Benefit Permitting Strategy is one response to this backlog, DEC as well as other State environmental agencies, also undertook other responses that compromised the CWA's fixed permit term and new permit application requirements. While the Environmental Benefit Permitting Strategy was an attempt to regularize and legalize these other measures, the program still falls far short of the public participation and permit renewal requirements of the CWA.

A. State Agency Responses to Backlogged Permit Renewals

New York State DEC is responsible for administering a total of approximately 8,400 SPDES permits in New York State.⁹⁰ According to a 2001 report by the New York State Comptroller's office, by the early 1980s there was a backlog of more than 6,000 unprocessed permit applications.⁹¹ Based on the operation of State Administrative Procedure Act § 401, holders of expiring permits who had submitted a "timely and sufficient" permit renewal application were permitted to continue operating under the terms of the expired permit.⁹² Assuming that this so-called "administrative extension" of expiring permits could last indefinitely, during the 1980s and 1990s, DEC informed 6,000 holders of SPDES permits deemed to be of "low risk" to the environment that their permit renewals would never be processed but that they could continue to operate under their expired permits indefinitely.⁹³

89. See N.Y. STATE COMPTROLLER REP., *supra* note 2, at 6.

90. See TOGS, *supra* note 6, at Cover Memorandum. The SPDES program includes permits for discharges to groundwater, which are not part of the delegated federal permitting system under the Clean Water Act.

91. N.Y. STATE COMPTROLLER REP., *supra* note 2, at 6.

92. N.Y. A.P.A. LAW § 401(2) states, in pertinent part, "When a licensee has made timely and sufficient application for the renewal of a license . . . the existing license does not expire until the application has been finally determined by the agency"

93. N.Y. STATE COMPTROLLER REP., *supra* note 2, at 5. At least three judicial authorities have questioned the legality of such indefinite administrative extensions of expired permits in light of Clean Water Act section 402's five year permit term requirement. See *ONRC Action v. Columbia Plywood, Inc.*, 286 F.3d 1137, 1146 (9th Cir. 2002) (dissenting opinion of Judge Reinhard would hold that such administrative extensions should be limited to one five year term; majority affirmed on other grounds and did not reach this issue); *Riverkeeper v. Crotty*, Index No. 7540-02, slip. op. (N.Y. Sup. Ct., Albany Co., Aug. 31, 2004) (holding indefinite administrative extension to be arbitrary and capricious, and to violate the Clean Water Act); *Brodsky v. New York State Dep't of Env'tl. Conserv.*, Index No. 7136-02, slip op. at 4 (N.Y. Sup. Ct., Albany

New York was not the only state that fell behind in processing NPDES permit renewals and resorted to so-called “administrative extension” of the expired permits without any public notice, comment, hearing, or review.⁹⁴ The EPA has determined that, as of December 31, 2001, 27% of NPDES facilities nationally were operating under expired, “administratively continued” permits.⁹⁵ This includes the permits for 1,385 “major” permittees, or 22% of the total of “major” permits.⁹⁶ The reasons given by EPA for this backlog include the following factors:

- The universe of facilities requiring NPDES permit coverage is expanding at the same time that previously issued permits are expiring.
- State and Regional resources dedicated to permit issuance have been static or declining in concomitance with the expanding universe of facilities.
- State environmental agencies are challenged by implementing other competing regulations.
- Focus on new program initiatives has resulted in less oversight of the base NPDES Program.
- NPDES permits have become increasingly complex due to State adoption of numeric water quality standards, TMDL requirements, and more comprehensive effluent guidelines.
- Due to decreasing permit resources and movement of staff to other program areas, it has been difficult for States and Regions to maintain technical experts on their permits staff.
- States have begun shifting to a watershed approach for permit issuance, which may increase backlogs to allow alignment of five-year permit cycles within watershed boundaries.⁹⁷

While EPA seems willing to accept the denial of public notice and comment on permit renewals inherent in these “administratively continued” permits, EPA found the routine, indefinite extension of CWA permits to be unacceptable in at least one respect: these indefinite extensions of permits deprived the EPA Regional Administrator’s of their authority under CWA section 402 to review (and potentially object to) all NPDES permit renewals.⁹⁸ EPA was spe-

Co., Jan. 27, 2003) (denying motion to dismiss challenge to continued operation of power plant in reliance ten years after expiration of permit).

94. See FACT SHEET, *supra* note 5.

95. *Id.*

96. *Id.*

97. *Id.*

98. Clean Water Act section 1342(d)(2) provides:

cifically concerned that when states established Total Maximum Daily Loads (TMDLs) pursuant to Clean Water Act section 303 for pollutants discharged into impaired water bodies, failure to implement revised TMDLs in these “administratively continued” permits would defeat the water quality improvements the TMDL program was meant to accomplish.⁹⁹

Accordingly, in 2000, EPA announced an amendment to its regulations governing review of state-issued permits specifically to provide for EPA Regional Administrator review of “administratively continued” permits and for EPA reissuance of these permits under certain circumstances.¹⁰⁰ The revised section 123.44(k)(1) provided:

Where a State fails to submit a new draft or proposed permit to EPA within 90 days after the expiration of the existing permit, EPA may review the administratively-continued permit, using the procedure described in paragraphs (a)(1) through (h)(3) of this section, if:

- (i) The administratively-continued permit allows the discharge of pollutant(s) into a waterbody for which EPA has established or approved a TMDL and the permit is not consistent with an applicable wasteload allocation; or
- (ii) The administratively-continued permit allows the discharge of a pollutant(s) of concern into a waterbody that does not attain and maintain water quality standards and for which EPA has not established or approved a TMDL.¹⁰¹

EPA explained the need for this review authority in light of the growing state practice of allowing expired, but “administratively continued,” NPDES permits to last indefinitely.¹⁰² The preamble to the proposed rule explained:

No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter.

33 U.S.C. § 1342(d)(2) (2000). 40 C.F.R. § 123.44 delegates this authority to review and object to State issued NPDES permits to the EPA Regional Administrators and establishes procedures for this review process.

99. 65 Fed. Reg. 43,586 (July 13, 2000).

100. 40 C.F.R. § 123.44(k)(1) (2004); 65 Fed. Reg. 43,586, 43,661 (July 13, 2000). The amended regulations were subsequently withdrawn by the Bush administration before their effective date. See 68 Fed. Reg. 13,608 (Mar. 19, 2003).

101. *Id.*

102. 64 Fed. Reg. 46,058, 46,079 (Aug. 23, 1999).

Administrative continuance may provide States the necessary flexibility without significant adverse impacts on the NPDES permitting scheme. However, it may also lead to inappropriate delays in reissuing permits that need revision in order to remain in compliance with applicable requirements. State administrative-continuance laws typically allow an expired permit to remain administratively-continued indefinitely. Therefore, a lengthy administrative continuance of a permit for a discharge into an impaired water can greatly delay the implementation of needed water quality-based effluent limitations, including effluent limitations implementing wasteload allocations established in a TMDL for an impaired waterbody. Under EPA's existing regulations, no mechanism currently exists by which to invoke the Agency's permit veto authority to address this situation. Today's proposal would provide that needed procedural mechanism.¹⁰³

The new regulation thus allowed EPA Regional Administrators to treat the so-called "administrative continuances" as what they really are, a *de facto* permit renewal without modification. According to EPA, "the Regional Administrator would be able to treat the expired and administratively-continued permit as equivalent to the State's submission of a draft or proposed permit for EPA review"¹⁰⁴

B. DEC Institution of the "Environmental Benefit Permitting Strategy"

Faced with a mounting backlog of unprocessed permit renewals, in 1994 DEC sought to implement the program dubbed the Environmental Benefit Permitting Strategy.¹⁰⁵ As explained by DEC Guidance Document on the EBPS:

To effectively deal with the large volume of permits managed by the Division of Water, the Environmental Benefit Permit Strategy (EBPS) was developed by the Department and promulgated into law under Chapter 701 of the Laws of 1994. It became effective on August 2, 1994. The EBPS is designed to achieve two crucial objectives: 1) establish a system that provides for timely renewal of SPDES permits and avoids a backlog of pending permit renewal applications; and 2) identify and prioritize permits which have the greatest potential for causing significant envi-

103. *Id.*

104. *Id.*

105. TOGS, *supra* note 6, at Cover Memorandum.

ronmental harm. Thus, the EBPS system is a program designed for maximizing the efficiency of developing and managing permits in accordance with the Department's SPDES program, while attaining the highest levels of environmental protection.¹⁰⁶

The EBPS sought to accomplish this streamlining of the permit renewal process by implementing an "administrative renewal" process under which expiring permits would be renewed automatically, without any substantive review.¹⁰⁷ At the same time, all SPDES permits would be given a "priority ranking" for their turn for "full technical review" which would be conducted not when the permit expired, but when the permit moved up the waiting list based on its priority ranking score.¹⁰⁸ The ranking factors are supposed to reflect the "environmental benefit" to be gained by conducting a full permit review, the source of the moniker "Environmental Benefit Permitting Strategy."¹⁰⁹ The priority ranking factors include such considerations as whether permit modification would reduce a water quality violation, the length of time since the last "full technical review" of the permit, and public interest in the permit.¹¹⁰

1. 1994 EBPS Authorizing Legislation: What it Changed and What it Left in Place

Apparently because the proposed "Environmental Benefit Permit Strategy" was inconsistent with the existing provisions of the Environmental Conservation Law, DEC sought and obtained amendments to the ECL to accommodate the EBPS program.¹¹¹ Although the stated purpose of these amendments was specifically to accommodate the proposed EBPS program, the 1994 EBPS amendments to the Environmental Conservation law are both internally inconsistent and inconsistent with the scope of the EBPS program apparently contemplated by DEC.

The Legislature adopted DEC's rationale for adoption of the "Environmental Benefit Permit Strategy" in adopting the 1994

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 6-7, Tables 1 & 2.

111. 1994 N.Y. Laws 701, § 1.

amendments to the Environmental Conservation law.¹¹² According to the statement of legislative intent,

To simplify the permitting process for the regulated community, it is the intent of the legislature that the department of environmental conservation eliminate unnecessary administrative complexities which, though currently required in law, cause the regulated community and New York's economy to incur unnecessary costs. Prioritizing the review of permits independently of their renewal periods will reduce the department of environmental conservation's and the regulated community's workload. It will also allow the regulators to focus on significant source discharges, on discharges for which standards have changed, on modifications requested by the permittee, and on new permit applications. This change in the SPDES permitting process will deemphasize arbitrary calendar deadlines and replace them with important water quality and water body improvement initiatives. This new flexibility will enhance the ability of the department of environmental conservation to use the state's resources to protect the environment while allowing the regulated community and New York's economy to prosper from the reduced weight of regulatory burdens.¹¹³

The EBPS legislation substantially modified Environmental Conservation Law § 17-0817 in its effort to facilitate the Environmental Benefit Permit Strategy. First, the amendments drew a distinction between those SPDES permits "issued in lieu of National Pollutant Discharge Elimination System permits," and those not issued in lieu of the federal program, and extended the nominal life of those non-delegated permits to ten years.¹¹⁴ Second, section 0817(2) was added to provide that "[all] SPDES permits may be administratively renewed in accordance with article seventy of this chapter."¹¹⁵ However, neither article 17 nor article 70 anywhere defined the term "administrative renewal."

112. *Id.*

113. *Id.*

114. *Id.* § 5; N.Y. ENVTL. CONSERV. LAW § 17-0817(1). As discussed earlier, SPDES permits are required for discharges to groundwater even though they are not part of the federal NPDES permitting program. It would appear that these groundwater discharge permits are the ones that benefit from the extension of the permit term to ten years. Extension of the permit term for delegated NPDES permits would violate the CWA § 402(b)(1)(B) requirement that NPDES permits be issued for "fixed terms not to exceed five years." 33 U.S.C. § 1342(b)(1)(B) (2000).

115. 1994 N.Y. Laws 701, § 5; N.Y. ENVTL. CONSERV. LAW § 17-0817(2).

Consistent with the stated intention to divorce permit renewal from substantive permit review, the 1994 amendments included provisions for permit review apart from renewal, and for the EBPS priority ranking system for permit review.¹¹⁶ The amendments added a section 0817(3) to require that DEC review all existing SPDES permits “at least once every five years . . . for conformance with new federal treatment technology, new state water quality classifications and water quality standards.”¹¹⁷ Subdivision 4 of the amended section 0817 directed DEC to develop “a priority ranking system of SPDES permits” in order to prioritize these permits for “full technical review.”¹¹⁸ Full technical review is defined as:

The complete evaluation of all elements of the permit associated with the ranking system’s priority ranking factors, together with substantive issues identified in comments submitted during the public comment period, and the verification of the accuracy and appropriateness of all other information contained in the permit. Any permits reviewed pursuant to this subdivision shall require compliance with current effluent standards and limitations and water quality standards.¹¹⁹

Section 0817(4) does not indicate whether this “full technical review” is the same process as the five year review required under section 0817(3). Nor does either section provide for public notice of permit review activities under these sections.¹²⁰

In partial mitigation of this lack of specific public notice and comment at the “permit review” stage, the 1994 amendments established a procedure by which interested members of the public could seek permit modification at any point in the life of the permit.¹²¹ The new subdivision 5 of section 0817 provides that any interested party may file a written request with the Department at any time for modification, suspension, or revocation of a SPDES permit “on the grounds that newly discovered, material information has been discovered; that a material change in environmental conditions has occurred, [or] that relevant technology or applicable law or regulations have changed since the issuance of the ex-

116. 1994 N.Y. Laws 701, § 5; N.Y. ENVTL. CONSERV. LAW § 17-0817(2).

117. 1994 N.Y. Laws 701, § 5; N.Y. ENVTL. CONSERV. LAW § 17-0817(3).

118. 1994 N.Y. Laws 701, § 5; N.Y. ENVTL. CONSERV. LAW § 17-0817(4).

119. 1994 N.Y. Laws 701, § 5; N.Y. ENVTL. CONSERV. LAW § 17-0817(4).

120. 1994 N.Y. Laws 701, § 5; N.Y. ENVTL. CONSERV. LAW § 17-0817(4).

121. 1994 N.Y. Laws 701, § 5; N.Y. ENVTL. CONSERV. LAW § 17-0817(5).

isting permit.”¹²² The Department must respond in writing if it finds that the request for permit modification is “not justified,” or must “take action pursuant to article 70” if it finds that the request for modification is “justified.”¹²³ The amendments further provided that DEC must give the same public notice when it determines to modify a permit as it does for an initial or renewal permit application.¹²⁴ Presumably, this public notice requirement applies when DEC has determined to modify a permit after either the five year permit review or “full technical review” contemplated by section 0817.

Based solely on the sweeping statement of legislative intent to divorce the timing of substantive permit review from the calendar expiration date of SPDES permits, together with the structural changes to section 0817 allowing an un-defined “administrative renewal” of “all SPDES permits” and establishing separate substantive review procedures, one might conclude that SPDES permits, including those issued in lieu of the federal CWA permits, would no longer be subject to the full public notice, technical review, and hearing requirements that apply to newly issued SPDES permits. However, Article 70 provisions left undisturbed (or only partially disturbed), cast serious doubt on the actual sweep of the 1994 amendments. Indeed, the 1994 Amendments appear not to apply to federally delegated CWA permits at all.

Prior to the 1994 ECL amendments, section 70-0115(2)(c) provided that “[i]n the case of a request for the renewal, reissuance, recertification or modification of an existing state pollutant discharge elimination system permit the request shall be treated as an application for a new permit.”¹²⁵ The 1994 amendments changed this section to read “in the case of a request for the renewal, reissuance, recertification or modification of an existing state pollutant discharge elimination system permit *issued in lieu of a national pollutant discharge elimination system permit* the request shall be treated as an application for a new permit.”¹²⁶ Article 70 thus still requires that all delegated permits be subject to the complete review procedures applicable to a new permit application. Under this provision, the divorce of permit expiration from

122. 1994 N.Y. Laws 701, § 5; N.Y. ENVTL. CONSERV. LAW § 17-0817(5).

123. 1994 N.Y. Laws 701, § 5; N.Y. ENVTL. CONSERV. LAW § 17-0817(5).

124. 1994 N.Y. Laws 701, § 4; N.Y. ENVTL. CONSERV. LAW § 17-0805(1)(a)(iii).

125. 1977 N.Y. Laws 723, § 70-0115.

126. 1994 N.Y. Laws 701 § 7; N.Y. ENVTL. CONSERV. LAW § 70-0115(2)(c) (italics supplied to indicate amended language).

permit review would appear to be limited to the NPDES permits' first cousins: only those SPDES permits issued for discharges to groundwater (and hence not issued in lieu of a federal permit).

This reservation of full permit review in Article 70 seems facially inconsistent with the provision of section 0817 stating that "all SPDES permits" – presumably including those issued in lieu of NPDES permits – "may be administratively renewed in accordance article 70 of this chapter."¹²⁷ Yet the term "administratively renewed" is left undefined in both articles, and article 70 of the ECL, to which section 0817(2) explicitly refers, itself provides that SPDES permit issued in lieu of NPDES permits are *not* subject to expedited renewal procedures.¹²⁸ The only way to read these sections together is to exclude all SPDES permits issued in lieu of NPDES permits out of the Environmental Benefit Permit Program and its streamlined permit renewals. This interpretation would also accord with section 402 of the CWA and its requirement of fixed five-year permit terms, as well as with the EPA regulations (and regulatory history) requiring the same procedures and opportunities for public participation in NPDES permit renewals as provided for initial permit applications. The EBPS would apply only to SPDES permits for groundwater discharges. This interpretation is not the one that DEC would implement, however.

2. DEC's "Environmental Benefit Permitting Strategy" Regulations and Guidance

The EBPS authorizing legislation thus suffers from internal contradictions and a basic tension with the CWA requirement for five-year permit terms and renewal proceedings that provide the full measure of public review and procedures as applied to initial permits. The stated legislative purpose to divorce substantive permit review from permit expiration timetables directly contradicts the CWA scheme mandating permit review based on the five year life of permit. While the terms of the EBPS amendments (as opposed to its statement of purpose) seem to exclude delegated federal permits from the scope of the EBPS program by continuing to provide that renewals of such permits shall continue to be treated as an application for a new permit, another part of the

127. N.Y. ENVTL. CONSERV. LAW § 70-0817(2).

128. *Id.*

amendments states that all SPDES permits are subject to “administrative renewal.”¹²⁹

In light of these tensions and contradictions in the legislation, the legitimacy of the EBPS under the CWA depends on how it is implemented. Unfortunately, DEC’s implementing regulations interpret the EBPS to include federally delegated permits (in contravention of ECL 70-0817), and the DEC Technical Guidance document for its permit administrators abrogates even those elements of public participation in the renewal process that the regulations claim to preserve.¹³⁰

a. DEC EBPS Regulations

DEC did not promulgate regulations implementing the EBPS until 2003, when it adopted part 750 of title 6 of the New York Code, Rules and Regulations.¹³¹ Until that time, DEC implemented the EBPS solely through administrative guidance documents. While these regulations have filled some gaps in the statutory definitions, they incorporate the Environmental Conservation Law’s central ambiguity concerning the level of administrative process given to renewals of existing federally delegated permits.

Like the amended Environmental Conservation Law article 17, the DEC regulations state that “SPDES permits may be administratively renewed.”¹³² The 2003 DEC regulations at least provide a definition of “Administrative Renewal.” According to the DEC, “Administrative Renewal” is “renewal of a SPDES permit in accordance with Part 621 of this Title, based on an abbreviated review of changes at the permitted facility.”¹³³ Like the statute, the regulatory cross-reference to the general permitting procedures part of the DEC regulations introduces an ambiguity, as Part 621 of Title 6 (just like its statutory counterpart in Environmental Conservation Law section 70-0115(2)(c)) provides that “[f]or delegated permits, an application for permit renewal or modification will be treated as a new application under this Part.”¹³⁴

129. TOGS, *supra* note 6.

130. *Id.*

131. N.Y. COMP. CODES R. & REGS. tit. 6 § 750; TOGS, *supra* note 6.

132. N.Y. COMP. CODES R. & REGS. tit. 6 § 750-1.16(b).

133. *Id.* 6 § 750-1.2(a)(3).

134. *Id.* 6 § 621.13(f). This section excepts from the “new application” requirement those SPDES permit amendments that would be considered minor modifications under EPA’s rules, 40 C.F.R. § 122.63 (2004).

Thus the regulations suffer from the same ambiguity as the statute; SPDES permits (without limitation) may be “administratively renewed” *in accordance with* the general permit renewal procedures, but the general permit renewal procedures state that *delegated* SPDES permit renewals are to be treated as a new application.¹³⁵ The DEC regulations also make clear that “administrative renewal” is by no stretch of the imagination equivalent to a “new application.”¹³⁶ Significantly, the regulations provide that, even in the case of administrative renewal, the public should be afforded “an opportunity to submit written comments or request a public hearing on the permit application or the permit’s priority ranking score.”¹³⁷ Unlike Environmental Conservation Law section 70-0119, which requires DEC to conduct a public hearing wherever “substantive and significant” comments submitted by the public might result in permit denial or modification, the DEC regulations provide no guidance on whether, if ever, such a request for a public hearing should be granted.¹³⁸

DEC’s administrative guidance memorandum concerning the EBPS answers this question, but in a way inconsistent with both the CWA and the Environmental Conservation Law.

b. DEC EBPS Technical Guidance Document

Both the Environmental Conservation Law and DEC’s implementing regulations thus provide that an application for renewal of an existing SPDES permit issued in lieu of a federal permit shall be treated as a new permit application.¹³⁹ These provisions comport with the CWA requirement that such permits be for “fixed terms not exceeding five years”¹⁴⁰ and the consistent EPA regulatory requirement that renewals of NPDES permits be subject to the full public review procedures applicable to new permits.¹⁴¹ DEC’s implementing administrative guidance, however, qualifies these provisions.¹⁴² As it turns out in official administrative prac-

135. N.Y. ENVTL. CONSERV. LAW § 70-0115(2); N.Y. COMP. CODES R. & REGS. tit. 6, §§ 750-1.16(b), 621.13(f).

136. N.Y. COMP. CODES R. & REGS. tit. 6, §§ 750-1.16(b), 621.13(f).

137. N.Y. COMP. CODES R. & REGS. tit. 6, § 750-1.16(c)(8).

138. N.Y. ENVTL. CONSERV. LAW § 70-119; See N.Y. COMP. CODES R. & REGS. tit. 6, § 750-1.16(c).

139. See N.Y. ENVTL. CONSERV. LAW § 70-0115(2)(c); N.Y. COMP. CODES R. & REGS. tit. 6, § 621.13(f).

140. Clean Water Act, 33 U.S.C. § 1342(b)(1)(B) (2000).

141. 40 C.F.R. § 124.32 (2004).

142. See TOGS, *supra* note 6.

tice, renewals of delegated federal permits are not treated as new permit applications at all, and the statutory promise of a public hearing whenever public comments raise substantive and significant issues becomes a mere possibility of public hearing at the discretion of the regional water engineer.

Contrary to the statutory and regulatory requirement that an application for renewal of an existing SPDES permit issued in lieu of a federal permit be treated as an application for a new permit, DEC's Technical and Operational Guidance Series (TOGS) memorandum 1.2.2 draws a sharp distinction between new SPDES permit applications and renewals.¹⁴³ According to the TOGS, SPDES permit renewals are all processed on the basis of a "short form" renewal application, which provides far less information than that required for a new permit.¹⁴⁴ Indeed, the DEC permit renewal form consists solely of a one-page permit renewal section and a one-page questionnaire consisting mostly of check-off boxes.¹⁴⁵ This renewal form omits nearly all of the information required for a new application under either the DEC or EPA regulations.¹⁴⁶ Under the EBPS, a SPDES permit renewal simply is not treated "as an application for a new permit" as the statute requires.

Even more fundamentally, the EBPS guidance changes the role of public comment and removes the public comment trigger for public hearings on the permit renewal. The TOGS explains the changes in renewal procedures implemented by the EBPS as follows:

Prior to the implementation of the EBPS, SPDES permit renewal included administrative and technical review plus public notification and comment on a draft permit. Permit renewals under the EBPS involve an abbreviated application, administrative review of the existing permit, and public notice and comment for evaluation in determining a permit priority ranking. (Technical review for renewed permits is scheduled based upon the discharge priority ranking.)¹⁴⁷

143. *Id.*

144. *Id.* at 11-12.

145. *Id.* at 29, 34.

146. N.Y. COMP. CODES R. & REGS. tit. 6, § 750-1.7 (2004) sets forth the extensive information requirements for a new SPDES permit application. Recall that EPA specifically rejected the idea of allowing an abbreviated application for permit renewals when it adopted the regulations governing NPDES permitting procedures. *See, supra* text accompanying note 34.

147. TOGS, *supra* note 6 at 11.

Not only does the TOGS make clear that the EBPS no longer provides the same level of public review and process to permit renewals as are provided to new permit applications, the TOGS reflects a change in the assumption about the role of public comments in the permitting process. No longer are comments to be considered for whether they raise “substantive and significant” issues that require permit denial or modification; rather, comments are to be considered only in establishing the permit’s “priority ranking” that will determine when, if ever, a permit will undergo “full technical review.”¹⁴⁸ The TOGS makes this evisceration of the role of public comments clear in its step by step description of the EBPS permit renewal process:

5. If there are no substantive or significant comments, EP issues a Cover Sheet which renews the existing permit and is intended to be stapled to the top of the existing permit. A copy is sent to the BWP, the Regional Permit Administrator, and RWE.

If there are any substantive comments, they are factored into the priority scoring for the permit or, in limited circumstances where the comments justify immediate permit modification, the permit is referred to a permit writer for revision and notice of a Department-initiated modification.¹⁴⁹

Thus, even where the public raises comments that are “significant” (and under ECL § 70-0119 are subject to a mandatory hearing),¹⁵⁰ the EBPS guidance would simply factor these “substantive comments” into the permit’s “priority ranking” for eventual consideration if and when the permit comes up for “full technical review.”¹⁵¹ In the “limited circumstances” where the Regional Water Engineer determines that the comments raise sufficiently grave concerns to require immediate permit modification, the permit is referred to department staff for internal modification, not for a public hearing as contemplated by ECL § 70-0119.¹⁵²

Even when DEC undertakes the “full technical review” of a permit contemplated by the EBPS, there is no provision for public involvement. Neither the regulations nor the administrative guidance contemplate any public notice or comment on “full technical review” of a permit. The DEC will consider those public comments

148. *Id.*

149. *Id.* at 12.

150. N.Y. ENVTL. CONSERV. LAW § 70-0119.

151. *Id.*

152. *Id.*

filed at the time of the last “administrative renewal” of the permit,¹⁵³ but does not seek new public comment. The TOGS provides for public notice and comment during full technical review of a delegated permit only if and when the DEC determines to modify the permit to make it less stringent than the existing permit.¹⁵⁴ There is no public input into the question of whether the permit should be modified in the first place; public notice and comment occurs only after DEC has determined to modify the permit.¹⁵⁵ If the DEC determines not to modify the permit (or, presumably, to modify the permit to make it more stringent), there is no public notice whatsoever, and the public remains ignorant that the “full technical review” of the permit ever took place.¹⁵⁶

In short, the EBPS guidance makes clear that under this permitting approach, public comments on permit renewals will be considered only as a factor in establishing the permit’s priority ranking and will not generally be considered either to make a determination to modify or deny the permit, or even to hold a public hearing.¹⁵⁷ Although the regulations invite public comment seeking a public hearing, the guidance suggests that such a hearing will rarely, if ever, be afforded, even where the comments are “substantive.”¹⁵⁸ In fact, it appears that no such public hearing has ever been held in the ten years since the EBPS was adopted by the DEC.¹⁵⁹ This guidance falls far short of the CWA permitting scheme, as implemented by EPA, that contemplated fixed five-year permit lives and full public procedures upon renewal.

153. N.Y. COMP. CODES R. & REGS. tit. 6 § 750-1.2(37) provides that full technical review will include consideration of substantive comments received during the public comment period, but does not provide for any new notice or comment on the permit. Years may pass between the comment period and the commencement of “full technical review” for a given permit, yet no new public comment is solicited.

154. TOGS, *supra* note 6, at 14.

155. *Id.*

156. This author reviews the New York State Environmental Notice Bulletin weekly and has never seen any public notice of a DEC “Full Technical Review” or solicitation of comments on such review published.

157. *See* TOGS, *supra* note 6.

158. *Id.*

159. In this author’s weekly review of the New York State Environmental Notice Bulletin, the author has never come across a notice of a DEC hearing for the renewal of a SPDES permit applied for under the EBPS renewal program.

V. TEN YEARS AFTER: DIMINISHED OPPORTUNITIES FOR PUBLIC INVOLVEMENT IN NPDES PERMIT RENEWALS

This author's own experience confirms that DEC's implementation of the EBPS renewal program results in the denial of the public hearings even where public comments raise substantive and significant comments that should result in substantial permit modification. The New York State Comptroller's office has also issued a report that is critical of DEC's implementation of the EBPS.¹⁶⁰ Unfortunately, the statutory relief mechanisms built in to the EBPS authorizing legislation do not adequately address either the public participation issue raised in this article or the implementation shortcomings noted by the Comptroller's report.

A. DEC Practice: New York City Sewage Treatment Plant Permit Renewals

This author has represented Riverkeeper, Inc., New York/New Jersey Baykeeper, and Long Island Soundkeeper for ten years in connection with the water quality impacts of New York City's fourteen sewage treatment plants. These organizations have themselves been involved in various administrative proceedings and litigation for nearly twenty years seeking to ensure adequate protection for water quality in the discharges from these plants. One of the most contentious issues over this time period has been the dispute over appropriate measures to mitigate the impacts of New York City's hundreds of Combined Sewer Overflow (CSO) discharges.¹⁶¹

New York City's SPDES permits for its sewage treatment plants were reissued in 1993 after a lengthy series of administrative hearings.¹⁶² Subsequent to their reissuance, the EPA issued guidance for "nine minimum controls" to be implemented in all

160. N.Y. STATE COMPTROLLER REP., *supra* note 2, at 8.

161. A Combined Sewer Overflow, or CSO, is an overflow discharge from a combined stormwater and sanitary wastewater collection system. During rain events, such systems lack the capacity to transport and treat the combined sewage flow and the additional stormwater flow, and must have overflow points that discharge the untreated combination of rainwater and sewage directly into water bodies such as the Hudson River and New York Harbor. These discharge untreated fecal matter from domestic sewage as well as "floatables" consisting largely of trash and debris washed from the streets into stormwater catch basins.

162. N.Y. Dep't of Env'tl. Conserv., Environmental Notice Bulletin, at 6 (May 12, 1993).

sewage treatment plant permits that had CSO discharges.¹⁶³ In 2000, Congress amended the Clean Water Act to require that all sewage treatment plant permits incorporate these “nine minimum controls” upon renewal.¹⁶⁴

New York State DEC issued a notice of its intention to issue an administrative renewal, without modification, under the EBPS of the fourteen New York City Sewage Treatment Plant permits in the May 3, 2000 issue of the New York State Environmental Notice Bulletin.¹⁶⁵ As these permits did not incorporate the “nine minimum CSO controls” required by the EPA guidance and the CWA amendment, Riverkeeper, Baykeeper, and Soundkeeper collectively submitted comments pointing out this deficiency in the renewal permits and demanding an immediate public hearing and permit modification prior to permit renewal.¹⁶⁶

Instead of deferring permit renewal until these permit defects were resolved, DEC responded in a letter stating that the permits were already in the process of undergoing “technical review” under the EBPS, and that permit modification would be deferred pending completion of that review.¹⁶⁷ Significantly, no notice of this “technical review” had been published in the Environmental Notice Bulletin, no public comment had been sought, and not even longstanding stakeholders such as the Riverkeeper, Soundkeeper, and Baykeeper had been solicited for comment, invited to participate, or even notified that “technical review” of these permits was in progress.

The DEC proceeded to reissue the existing permits in 2001 without modification despite the presence of comments pointing out an undeniable legal defect in the permits.¹⁶⁸ When DEC completed its “technical review” of the permits in 2002, it published a notice of its intention to modify the permits, and solicited public comment “on these projects.”¹⁶⁹ Presumably, had DEC deter-

163. EPA, COMBINED SEWER OVERFLOW (CSO) CONTROL POLICY (1994) 6, 15, *available at* <http://www.epa.gov/cgi-bin/claritgwimage.clt> (last updated Oct. 14, 2003).

164. Clean Water Act, Pub. L. 106-554, § 112 (Amended 2000).

165. N.Y. Dep’t of Env’tl. Conserv., Environmental Notice Bulletin (May 3, 2000).

166. Letter from Pace Environmental Litigation Clinic, to Deborah Knight (June 6, 2000) (on file with author).

167. Letter from William R. Adriance, Chief Permit Administrator, Department of Environmental Conservation, to Albert Strazza, Pace Environmental Litigation Clinic (July 13, 2000) (on file with author).

168. As these comments raised an issue that demanded a substantial permit modification, they met the “substantive and significant” standard for a mandatory public hearing under N.Y. ENVTL. CONSERV. LAW § 70-0119.

169. *Id.*

mined not to modify the permits, there would have been no public notice or comment. The public hearings on the permit modifications did not commence until September 2003, two years after renewal, without modification, of the non-compliant SPDES permits.¹⁷⁰

This experience illustrates the point that under the EBPS, DEC will renew a non-compliant permit without modification or public hearing, despite receiving public comments pointing out the defect in the permit. It also illustrates DEC's failure, under the EBPS to solicit public comments – even from organizations known to be interested in the permit – during “full technical review” of a SPDES permit.

B. New York State Comptroller's Report Critical of EBPS Implementation

In 2003, the New York State Comptroller released an audit it performed of DEC's SPDES permit renewal performance during the first six months of 2002.¹⁷¹ The audit report is highly critical of DEC's implementation of the Environmental Benefit Permitting Strategy.¹⁷² The audit concludes that (1) “neither low-risk permits nor high-risk permits are adequately monitored by DEC”; (2) “many low risk permits go more than five years without any review”; (3) “many high-risk permits do not receive the annual review intended by DEC”; and (4) “in the absence of DEC reviews, some permits may not receive needed adjustments, and as a result, may no longer provide the level of protection intended by DEC.”¹⁷³

The audit report specifically criticizes the Environmental Benefit Permitting Strategy.¹⁷⁴ The report notes the requirement in ECL § 17-0817(3) that all SPDES permits be reviewed at least once every five years for conformance with changes in water quality standards and technology based permitting requirements.¹⁷⁵ The audit concludes that:

Despite this requirement and despite the need for lower-risk permits to receive some monitoring from DEC, under the Environmental Benefit Permit Strategy, lower risk permits may re-

170. N.Y. Dep't of Env'tl. Conserv., Environmental Notice Bulletin (Aug. 13, 2003).

171. N.Y. STATE COMPTROLLER REP., *supra* note 2.

172. *Id.* at Executive Summary.

173. *Id.*

174. *Id.* at 7-9.

175. *Id.* at 7 (quoting N.Y. ENVTL. CONSERV. LAW § 17-0817(3)).

ceive no substantive review. Rather, they may receive only a cursory review every five or ten years when they are administratively renewed.¹⁷⁶

The audit notes that, DEC Staff claimed that all permits received the five year review required by the Environmental Conservation Law, but were unable to provide any documentation establishing that such review took place for any of the permits examined.¹⁷⁷

The Comptroller's office documented that DEC's actual performance of "full technical review" falls well short of DEC's stated goal of conducting such review of the top ten percent of permits (based on their priority rankings) each year.¹⁷⁸ This conclusion indicates that even the most highly ranked (and thus the most environmentally "significant") permits will receive "full technical review" less than once per decade – falling far short of the five year review cycle contemplated by CWA.

Finally, the Comptroller notes that, even after nearly a decade since its adoption, DEC has not gained EPA approval for its implementation of the Environmental Benefit Permitting Strategy.¹⁷⁹ Such approval is required by the Delegation Memorandum by which EPA originally approved the delegation of the CWA permitting function to DEC.¹⁸⁰ Ominously, the Comptroller's Report noted that "to avoid possible litigation or a loss of Federal funding, we recommend that DEC be more active in seeking the EPA's formal approval for the Environmental Benefit Permit Strategy."¹⁸¹

C. Inadequacy of Statutory EBPS Provisions to Substitute for Public Involvement in Permit Renewal

The Environmental Benefit Permitting Strategy, as implemented by DEC, thus both fails to meet its own stated objective of assuring timely and thorough review of the most environmentally critical permits and fails to ensure the public notice, comment, public hearing, and right to judicial review contemplated by CWA for periodic reissuance of NPDES permits.¹⁸² Two provisions of

176. *Id.*

177. N.Y. STATE COMPTROLLER REP., *supra* note 2, at 8.

178. *Id.* at 9.

179. *Id.* at 7.

180. Memorandum of Agreement between EPA Region 2 and N.Y. Dep't of Envtl. Conserv. (Aug. 26, 1975) (on file with author).

181. N.Y. STATE COMPTROLLER REP., *supra* note 2, at 8.

182. 33 U.S.C. § 1342(b)(3) (2000); TOGS, *supra* note 6.

the 1994 EBPS legislation appear to be designed to ameliorate some of the impacts of divorcing permit review from periodic permit renewal.¹⁸³ These are ECL section 17-0817(5), which provides for a request by interested persons to the DEC to modify, suspend, or revoke a permit, and the section 17-0817(3)] requirement that DEC review all SPDES permits at least once every five years for conformance with new treatment technologies, water quality standards, and water quality classifications.¹⁸⁴ These provisions are an incomplete substitute, however, for the full public notice, comment, hearing, and judicial review procedures contemplated for permit renewals under CWA section 402.¹⁸⁵

1. Request for Permit Modification

As noted, ECL section 17-0817(5) provides that

Any interested party may request at any time that a permit be modified, suspended or revoked on the grounds that newly discovered material information has been discovered; that a material change in environmental conditions has occurred; that relevant technology or applicable law or regulations have changed since the issuance of the existing permit; or on other grounds established by the department by regulation. All such requests shall be in writing and contain facts or reasons supporting the request. If the department determined that the request is not justified, it shall send the party a brief written response giving the reasons for the decision. A copy of such request and the department's response shall be sent to the permittee. If the department determines that the request is justified, it shall take action pursuant to article 70 of this chapter.¹⁸⁶

This section appears to provide an alternate means for interested members of the public to raise the sort of permitting issues that might otherwise be raised during a plenary permit renewal proceeding. A close examination of this petition proceeding reveals that it does not provide an adequate substitute for the public notice and comment procedures contemplated by the CWA and its implementing regulations.

183. N.Y. STATE COMPTROLLER REP., *supra* note 2, at 7.

184. N.Y. ENVTL. CONSERV. LAW § 17-0817(3), (5).

185. 33 U.S.C. § 1342(b)(3).

186. N.Y. ENVTL. CONSERV. LAW § 17-0817(5). The reference to article 70 of the Environmental Conservation Law is apparently a reference to the Department initiated permit modification procedures set forth in ENVTL. CONSERV. LAW § 70-0115(1).

First and foremost, this petition procedure alters the fundamental chemistry of the notice and comment process. Rather than publicly noticing an intention to review and renew a permit and soliciting comment on that proposed action, as contemplated by CWA public review procedures, ECL section 17-0817(5) shifts the burden of initiating regulatory action to concerned members of the public.¹⁸⁷ Obviously, the existence of an obscure provision of the Environmental Conservation Law that requires members of the public to learn of its existence and take initiative is much less likely to draw pertinent information from the public than a notice seeking comment published in the Environmental Notice Bulletin (and in local newspapers of general circulation, as required by ECL section 70-0109(2)).¹⁸⁸

Second, the petition process not only shifts the burden of initiating the public review process, but also fundamentally changes the ground rules for what sort of issues will provoke Departmental action. Unlike initial permit review, for which the Department must hold an adjudicatory hearing for any issue raised in public comments that might reasonably lead to permit denial or modification, the ECL 17-0817 petition process is limited to permit modifications based on a demonstrated change in environmental conditions or technology requirements.¹⁸⁹ The EPA, in its preamble to the combined regulations governing EPA permitting procedures, has pointed out that one important role of fixed permit life is to ensure that an error in the issuance of the original permit is not graven in stone and forever immune from correction.¹⁹⁰ The EBPS procedures adopted by the Legislature and DEC provide no such safety valve for the public to remedy the erroneous initial issuance of a non-compliant permit. Section 17-0817 only provides for Department action where the petitioner can demonstrate a change in circumstances, and provides no remedy at all to correct an erroneous permit.¹⁹¹ Indeed, if an erroneous permit is issued for a facility that scores low on the EBPS ranking system, there may never be any opportunity to correct the permit writer's error, as many permits will never qualify for full technical review under the EBPS program.

187. See N.Y. ENVTL. CONSERV. LAW § 17-0817(5).

188. See *id.* § 70-0109(2).

189. See *id.* § 17-0817(5).

190. Consolidated Permit Procedures, 45 Fed. Reg. 33,280, 33,308 (May 19, 1980), discussed *supra* text accompanying note 22.

191. N.Y. ENVTL. CONSERV. LAW § 17-0817(5).

Finally, and perhaps most importantly, a petition under section 17-0817 does not provide the same opportunity for judicial review as the public notice and comment procedures provided for in new permit applications.¹⁹² Under the EPA regulations, an opportunity for judicial review of permitting decisions is an essential element of a lawful delegated state permitting program.¹⁹³ By allowing DEC discretion to grant (or deny) the requested permit modifications as DEC deems “appropriate,” without defining the term “appropriate,” section 17-0817 of the ECL invites an extremely deferential standard of review of a Department determination to reject permit modifications requested by a member of the public.¹⁹⁴ A member of the public who points out legal defects in the effluent limitations incorporated into a permit during initial issuance can have her claims reviewed under the “affected by error of law” standard of Article 78 of the Civil Practice Law and Rules.¹⁹⁵ The section 17-0817 petition process thus does not appear to provide the same level of judicial review afforded to new permit applications, contrary to the EPA regulations.

The section 17-0817(5) permit modification process is thus no substitute for the opportunity for public comment, permit reconsideration, and judicial review contemplated by CWA.

2. Section 17-0817(3) Five Year Permit Review

Environmental Conservation Law section 17-0817(3) provides that “[t]he department shall review at least once every five years all existing permits for conformance with new federal treatment technology, new state water quality classifications and water quality standards.”¹⁹⁶ This provision, incorporated as part of the 1994 EBPS amendments, seems designed on its face to mirror the five year permit review and re-issuance cycle contemplated by the federal CWA.¹⁹⁷ There are several reasons, however, why this review falls far short of the public five year permit review contemplated by the CWA.

192. *Id.* §§ 17-0805, 17-0817.

193. 40 C.F.R. § 123.30 (2004).

194. *See, e.g., Toth v. Nassau County Police Dep’t*, 302 A.D.2d 600, 755 N.Y.S.2d 639 (2d Dep’t 2003) (holding that great deference is due to agency determination of “appropriate” discipline); *Casey v. New York City Transit Authority*, 175 A.D.2d 128; 571 N.Y.S.2d 822 (2d Dep’t 1991) (deference to determination of “appropriate” punishment).

195. N.Y. C.P.L.R. 7803(3) (2003).

196. N.Y. ENVTL. CONSERV. LAW § 17-0817(3).

197. 33 U.S.C. § 1311(m)(3) (2000).

First, this five-year review requirement makes no provision whatsoever for public notice and comment at the time of permit review.¹⁹⁸ As such, this five year review is not a substitute for the public permit renewal procedures contemplated by the CWA and its implementing regulations.

Second, the Comptroller's report makes clear that in practice this five year review has been an illusory concept.¹⁹⁹ The Comptroller's report noted that even after eight years of experience with the Environmental Benefit Permit Strategy DEC could not produce any documentation that a single five-year permit review had occurred.²⁰⁰ Obviously, a "review" of a permit for compliance with current standards that generates no paper trail at all falls far short of the permit review and reissuance procedures contemplated by the CWA and EPA regulations.

Finally, ECL section 17-0817(3) is silent with respect to implementation of permit modifications deemed necessary based upon this five year review.²⁰¹ There is no provision for automatic immediate "full technical review" based on this five year review; or even for immediate permit modification without "full technical review."

VI. RESTORING GENUINE PUBLIC PARTICIPATION TO THE NEW YORK SPDES PERMIT RENEWAL PROCESS

The CWA set ambitious goals for its comprehensive scheme of pollutant discharge permitting and control. It declares a national goal "that the discharge of pollutants into navigable waters be eliminated by 1985."²⁰² It establishes an equally ambitious "zero discharge" standard for unpermitted discharges.²⁰³ As this article has detailed, the Act established a comprehensive and resource intensive scheme of technology and water quality based standards with periodic review, implemented through a comprehensive permitting scheme with its own periodic review and public participation requirements.²⁰⁴

198. N.Y. ENVTL. CONSERV. LAW § 17-0817(3).

199. N.Y. STATE COMPTROLLER REP., *supra* note 2, at 7.

200. *Id.*

201. N.Y. ENVTL. CONSERV. LAW § 17-0817(3).

202. 33 U.S.C. § 1251(1).

203. *E.g.*, Driscoll v. Adams, 181 F.3d 1285, 1288 (11th Cir. 1999); *see* 33 U.S.C. § 1311(a).

204. *See generally* 33 U.S.C. §§ 1251-1387.

The fact is that the administrative resources dedicated to carrying out this scheme at both the federal and state levels have fallen far short of those necessary to achieve the Act's ambitious goals. New York's EBPS is an attempt to allocate insufficient agency resources to those permitting issues ranked most important by DEC. As implemented by DEC, however, the EBPS illegally shortchanges the public's right to participate in timely periodic permit review, and, most importantly, to raise substantive challenges to existing permit provisions that have become obsolete or were initially issued in error.

The criticisms of the EBPS outlined in this article do not require wholesale abandonment of the EBPS system. The vast majority of SPDES permits remain non-controversial and would be unlikely to provoke substantive comments upon renewal. However, the CWA and the provisions of the Environmental Conservation Law, do require public notice and comment at the time of permit renewal, as well as a provision for pre-reissuance hearings where those comments raise substantive and significant issues.²⁰⁵ The CWA also contemplates that periodic technical review of permits will occur on the same schedule as permit renewal, and will include an opportunity for timely public comment at the time of technical review.²⁰⁶

The EBPS could be administered in such a way as to comply with these CWA and ECL requirements. The following recommendations would ensure compliance with the essential CWA public participation requirements while not adding any administrative burden for the vast majority of SPDES permit renewals that are non-controversial. To comply with these public participation requirements, DEC should:

- Require notice of proposed SPDES permit renewals in local newspapers (as required by ECL section 70-0109(2)(a) for new permit applications and for renewals of federally delegated permits under ECL section 70-0115(c));
- Where permit renewal is sought based on the abbreviated "administrative renewal" form provided in the TOGs memo, the last full permit renewal application should be appended to the short-form renewal application, and should be made readily available to the public during the public comment period.

205. See generally 33 U.S.C. § 1342; N.Y. ENVTL. CONSERV. LAW §§ 70-0109, 70-0119.

206. 33 U.S.C. § 1342.

- Evaluate all public comments and requests for public hearings received during the comment period on SPDES permit renewals, and provide for a mandatory public hearing prior to permit renewal where those comments raise substantive and significant issues, as provided by ECL section 70-0119(1);
- Provide public notice and seek comment in the Environmental Notice Bulletin as well as a local newspaper of general circulation at the time the Department commences full technical review of a permit under the EBPS permit scheme; and
- Provide public notice and seek comment in the Environmental Notice Bulletin as well as a local newspaper of general circulation at the time DEC performs its five year review of a permit for changes in technology or water quality standards.

While these measures might somewhat increase the administrative resources necessary for routine permit renewals, the vast majority of permit renewals are not controversial and would be unlikely to attract public comment that would invoke any higher levels of DEC review than are currently afforded. Implementing these measures would help ensure the legality of New York's delegated NPDES permitting program, as well as restore the public participation element that is the essence of CWA permitting.

VII. CONCLUSION

DEC's implementation of an "Environmental Benefit Permitting Strategy" for NPDES permit renewals in New York State has conserved administrative resources, but at the unacceptable cost of eliminating the periodic public review and involvement that is essential to the CWA permitting scheme. Simple measures to ensure public information about permit renewals and to provide for public hearings, where public comments raise significant issues could be implemented to restore public involvement without undue administrative burden.