Casting Pearls Before Swine: How the Buffalo River Incarnates the Gap in Wild and Scenic Legislation*

I. INTRODUCTION

The Buffalo River holds a unique place in the hearts of Arkansans—photogenically, geographically, environmentally, and politically. The Buffalo flows freely for approximately 140 miles and is one of the few truly undammed rivers left in the continental United States.[1] Thousands visit the river annually,[2] spending over $38 million in local communities and supporting over 500 local jobs.[3] As Rogers C.B. Morton, former Secretary of the Interior, once observed:

> The significance of the Buffalo River . . . . is due to a splendid combination of favorable qualities. Massive bluffs and deeply entrenched valleys give the Buffalo the most spectacular setting of any stream in the Ozark region, and enable it to be classed among the most outstanding scenic of the free-flowing streams in the Eastern United States. With little residential or commercial development on its banks, and with no municipal or industrial pollution, the Buffalo River is unspoiled.[4]

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1. *See* TOM KENNON, A CANOEING & KAYAKING GUIDE TO THE OZARKS 50 (3d ed. 2004); *America's First National River*, U.S. NAT'L PARK SERVICE, http://www.nps.gov/buff/index.htm (last visited Feb. 4, 2015).

2. *See* KENNON, *supra* note 1, at 50.

3. Press Release, U.S. Nat'l Park Serv., Buffalo National River Tourism Creates $38,000,000 in Local Economic Benefit (Feb. 26, 2013), *available at* http://www.nps.gov/buff/parknews/buffalo-national-river-tourism.htm.

4. S. REP. NO. 92-130, at 3 (1971), *reprinted in* 1972 U.S.C.C.A.N. 1969, 1971.

Congress recognized the importance of the Buffalo by declaring it the country's first National River in 1972.[5] This declaration preserved a free-flowing stream with "unique scenic and scientific features . . . for the benefit and enjoyment of present and future generations."[6] In 1992, Congress gave the Buffalo "wild and scenic" status under the Wild and Scenic Rivers Act (WSRA)[7] in order to protect the river's "outstandingly remarkable . . . values,"[8] free-flowing condition, and water quality.[9]

To limit federal intrusion on local property rights, Congress allowed development below or above the Buffalo National River Park's boundaries, including private use on any upper tributary that "will not invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present."[10] In August 2012, the Arkansas Department of Environmental Quality (ADEQ) issued a Concentrated Animal Feeding Operations (CAFO) permit to C & H Hog Farms for operations adjacent to Big Creek, an upper tributary of the Buffalo River.[11] C & H Hog Farms estimated that it would produce more than 2 million gallons of manure, wastewater, and litter each year, collected in open-air storage ponds on site and spread onto approximately 630 acres of land adjacent to Big Creek—roughly six miles upstream of the tributary's confluence with the Buffalo River.[12]

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5. *See* Pub. L. No. 92-237, § 1, 86 Stat. 44, 44 (1972).

6. *Id.*

7. *See* Wild and Scenic Rivers Act, Pub. L. No. 90-542, 82 Stat. 906 (1968).

8. *See* 16 U.S.C. § 1271 (2012) ("Congressional declaration of policy").

9. *See* Arkansas Wild and Scenic Rivers Act of 1992, Pub. L. No. 102-275, 106 Stat. 123 (1992).

10. 16 U.S.C. § 460m-11 (2012).

11. ARK. DEP'T. ENVTL. QUALITY, C & H HOG FARMS CAFO GENERAL PERMIT ARG590001 (2012), *available at* http://www.adeq.state.ar.us/ftproot/Pub/WebDatabases/PermitsOnline/NPDES/Permits/ARG590001.pdf.

12. NPDES NOTICE OF INTENT (NOI): CONCENTRATED ANIMAL FEEDING OPERATIONS (CAFO) ARG 590000, at 1 (2015) [hereinafter NOTICE OF INTENT], *available at* http://www2.adeq.state.ar.us/ftproot/Pub/WebDatabases/PermitsOnline/NPDES/PermitInformation/arg590001_noi_20140218.pdf; *see also* Press Release, Nat'l Parks Conservation Ass'n, Groups Go to Court to Protect Buffalo National River from Factory Hog Farm Waste (Aug. 6, 2013), *available at* http://www.npca.org/news/media-center/press-releases/2013/groups-go-to-court-to-protect.html (noting the proximity of Big Creek to the Buffalo National River).

Statewide, Arkansans immediately questioned the wisdom and legality of the swine farm's operation on Big Creek.[13] Citizens were particularly concerned about the potential for effluent production and scrutinized the decision to award a CAFO permit to an operation situated on an important Buffalo tributary in an area characterized by karst geology with underground drainage networks.[14] Opponents heavily criticized ADEQ's minimal notification requirements, as the CAFO was not required to notify neighboring landowners or the National Park Service of its intent to house such a large concentration of swine.[15]

In response to the criticism, the Arkansas General Assembly immediately revised ADEQ notification requirements for CAFOs and streamlined the process for review of ADEQ decisions.[16] Governor Mike Beebe sought funds from the legislature to cover the costs of water quality monitoring around the swine farm, and a subcommittee allocated $340,000 to the University of Arkansas's Division of Agriculture to study the environmental effects.[17] Currently, the Arkansas Commission on Wildlife and Ecology faces strong pressure to limit ADEQ's ability to issue additional large CAFO permits within the Buffalo watershed.[18]

In August 2013, the National Parks Conservation Association, the Buffalo River Watershed Alliance, the Ozark Society, and the Arkansas Canoe Club filed suit in federal court

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13. *See* John Eligon, *2,500 Pigs Join Debate Over Farms Vs. Scenery*, N.Y. TIMES, Dec. 28, 2013, at A10.

14. Letter from Hank Bates, Partner, Carney, Bates & Pulliam, to Teresa Marks, Dir., Ark. Dep't of Envtl. Quality, Permit Data System Database (June 3, 2013), *available at* http://www.adeq.state.ar.us/ftproot/Pub/WebDatabases/PermitsOnline/NPDES/PermitInformation/ARG590001_H%20Bates%20Follow%20Up%20Public%20Comment_20130603.pdf. Mr. Bates wrote this letter on behalf of four organizations—the Ozark Society, the Buffalo River Watershed Alliance, the National Parks Conservation Association, and the Arkansas Canoe Club. *Id.* He also included information provided by Dr. John Van Brahana, a geology professor at the University of Arkansas. *Id.*

15. *See* David Ramsey, *Trouble Upstream: A Hog Farm Near the Buffalo Stirs Controversy*, ARK. TIMES, Aug. 15, 2013, at 14, 14-16.

16. *See* Act 1021, 2013 Ark. Acts 3760.

17. Sean Beherec, *UA Division to Study Effects of Hog Farm on Soil, Water*, ARK. DEMOCRAT-GAZETTE, Sept. 6, 2013, at 2B; Mike Masterson, Editorial, *Close, Don't Monitor*, ARK. DEMOCRAT-GAZETTE, Aug. 27, 2013, at 7B.

18. *See* Press Release, Ark. Dep't of Envtl. Quality, Notice of Proposed Third-Party Rulemaking, Public Hearing (May 1, 2014), *available at* http://buffaloriveralliance.org/Resources/Documents/Notice%20of%20Public%20Hearing-%20Reg%206%20Petition.pdf (noting third-party proposal to change applicable regulations).

against the United States Department of Agriculture Farm Service Agency and the United States Small Business Administration.[19] The complaint alleged that the agencies failed to adhere to the National Environmental Policy Act (NEPA)[20] before guaranteeing a loan request by C & H Hog Farms.[21] On December 2, 2014, United States District Judge D.P. Marshall ruled that the federal agencies had failed to comply with NEPA requirements and ordered an intra-agency NEPA review.[22] The defendants filed a notice of appeal in early 2015.[23]

While the future of this particular hog farm is uncertain, the controversy highlights a problem with the WSRA—a complete lack of congressional guidance on how to protect Wild and Scenic river segments from upstream effluent created by a private landowner's use of his land. This comment explores the issue of effluent created both within and outside of the Clean Water Act (CWA) system. Part II addresses the unique CAFO and CWA regulations at play. Part III unwraps the larger issue of the legislative gap in the WSRA. Part IV proposes reform at both the federal and state levels.

II. CAFOS, THE CLEAN WATER ACT, AND THE BUFFALO RIVER

A. Meat Production in America

CAFOs have become king in the meat industry, as producers consider them essential to satisfy high demand,[24] and CAFOs are responsible for raising "the vast majority of

19. *See* Complaint for Declaratory and Injunctive Relief at 1, Buffalo River Watershed Alliance v. U.S. Dep't of Agric., No. 15-1310 (8th Cir. filed Feb. 11, 2015).

20. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1969).

21. Complaint for Declaratory and Injunctive Relief at 2-3, *Buffalo River Watershed Alliance*, No. 15-1310 (8th Cir. filed Feb. 11, 2015).

22. Order at 4-7, *Buffalo River Watershed Alliance*, No. 15-1310 (8th Cir. filed Feb. 11, 2015), 2014 WL 6837005.

23. *See* Notice of Appeal to the United States Court of Appeals for the Eighth Circuit at 1, *Buffalo River Watershed Alliance*, No. 15-1310 (8th Cir. filed Feb. 11, 2015).

24. *See* Michelle B. Nowlin, *Sustainable Production of Swine: Putting Lipstick on a Pig?*, 37 VT. L. REV. 1079, 1082 (2013). Slaughterhouses in several states have refused to accept animals in lots of fewer than 1000—a move which some believe has bolstered the CAFO industry and effectively forced smaller farmers out of business. Wendee Nicole, *CAFOs and Environmental Justice: The Case of North Carolina*, 121 ENVTL. HEALTH PERSP. A182, A185 (2013).

America's . . . food animals slaughtered annually."[25] Production practices aim to facilitate maximum growth in the shortest amount of time, often in tight living quarters.[26] Research suggests that the potential for transfer of harmful pathogens is higher among CAFO-housed animals than among regular animal populations.[27]

Despite regulatory oversight of manure application rates and effluent limitations,[28] CAFOs are synonymous with water pollution.[29] The operations often encounter difficulties in completely disposing of animal waste, which presents sustainability problems for local ecosystems.[30] States with high concentrations of these operations experience an average of twenty to thirty serious water quality problems per year that are directly attributable to manure-management issues.[31] Surface waters surrounding CAFOs often contain ammonia, nitrates, excessive nutrient concentrations, hormones, and fecal bacteria—all of which can adversely impact the local aquatic environment.[32] CAFOs also pose a significant threat to groundwater, where contamination can be especially difficult to monitor.[33]

The most common method of manure disposal is field application, which can overwhelm and exhaust the absorptive capacity of soil.[34] CAFO waste commonly contains elevated levels of nitrogen, phosphorus, *E. coli*, growth hormones, antibiotics, animal blood, silage leachate from corn feed, and copper sulfate.[35] In some cases, as much as 80% of antibiotics administered to CAFO animals pass through unaltered and

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25. Nicole, *supra* note 24, at A185.

26. Nowlin, *supra* note 24, at 1084.

27. CARRIE HRIBAR, NAT'L ASS'N OF LOCAL BDS. OF HEALTH, UNDERSTANDING CONCENTRATED ANIMAL FEEDING OPERATIONS AND THEIR IMPACT ON COMMUNITIES 9 (2010), *available at* http://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf.

28. State environmental agencies approve nutrient-management plans and oversee compliance. Terence J. Centner, *Nutrient Pollution from Land Applications of Manure: Discerning a Remedy for Pollution*, 21 STAN. L. & POL'Y REV. 213, 222 (2010).

29. *See* Nowlin, *supra* note 24, at 1083-85.

30. HRIBAR, *supra* note 27, at 2-3.

31. *Id.* at 4.

32. *Id.* at 4-5.

33. *Id.* at 3.

34. *Id.* at 2-3.

35. HRIBAR, *supra* note 27, at 2.

subsequently collect in waste lagoons or are spread onto application fields.[36]

B. CAFO Discharge Under the Clean Water Act

CAFOs that discharge into "waters of the United States" are currently required to apply for National Pollutant Discharge Elimination System (NPDES) permits, which are subject to EPA oversight.[37] NPDES permits are issued for point-source wastewater flows into "waters of the United States"[38] and are intended to reduce, and eventually eliminate, pollution under the CWA through pollution management and limitations.[39] NPDES permits may be issued by the EPA directly or, more commonly, by approved state entities,[40] and the permits have varied in their efficacy and application in the past.[41] This variation might exist because there is a lag time in NPDES compliance—water quality standards, which control NPDES discharge limitations, are reviewed once every three years, while NPDES permits are

36. ROBBIN MARKS, NATURAL RES. DEF. COUNCIL & CLEAN WATER NETWORK, CESSPOOLS OF SHAME: HOW FACTORY FARM LAGOONS AND SPRAYFIELDS THREATEN ENVIRONMENTAL AND PUBLIC HEALTH 25 (2001), *available at* https://www.nrdc.org/water/pollution/cesspools/cesspools.pdf.

37. *See* Nat'l Pork Producers Council v. EPA, 635 F.3d 738, 751 (5th Cir. 2011); 40 C.F.R. § 122.23(a) (2013); 40 C.F.R. § 412.4 (2012).

38. 40 C.F.R. § 122.1(b)(1) (2013). A precise definition of "waters of the United States" has proven elusive for some time, but courts typically require navigability as a basic element. *See* Rapanos v. United States, 547 U.S. 715, 723-24, 739 (2006) (plurality opinion). Many upper-tributary reaches may not satisfy the navigability requirement for a skeptical court. *See* William W. Sapp et al., *The Float a Boat Test: How to Use It to Advantage in This Post*-Rapanos *World*, 38 ENVTL. L. REP. NEWS & ANALYSIS 10,439, 10,439-40 (2008) (discussing the difficulty of convincing a federal court to recognize a tributary that is navigable only by expert whitewater paddlers). Both the *Rapanos* plurality's "continuous-surface-connection" test and Justice Kennedy's "significant-nexus" test would clearly include tributaries as "waters of the United States," as would the EPA's current rule proposal to include all headwaters in the phrase's definition. *See Rapanos*, 547 U.S. at 739-42; *id*. at 767 (Kennedy, J., concurring in the judgment); Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188 (Apr. 21, 2014) (to be codified at 33 C.F.R. pt. 328 and in scattered parts of 40 C.F.R.).

39. *See* Terence J. Centner, *Courts and the EPA Interpret NPDES General Permit Requirements for CAFOs*, 38 ENVTL. L. 1215, 1216-17 (2008).

40. *See* 33 U.S.C. § 1342 (2012) (relevant statute).

41. *See generally* Hannah Connor, *Comprehensive Regulatory Review: Concentrated Animal Feeding Operations Under the Clean Water Act from 1972 to the Present*, 12 VT. J. ENVTL. L. 275 (2011) (discussing the history of the NPDES program and its relationship with the CAFO industry).

reviewed once every five years.[42] Despite this temporal disconnect, all NPDES discharge permits must comply with the CWA and local water quality standards.[43] The vast majority of states issue NPDES permits,[44] and while the EPA still oversees some permits directly, it largely functions in a hands-off, supervisory role in the modern NPDES system.[45]

In 2011, the Fifth Circuit Court of Appeals held that CAFOs anticipating stormwater discharges were under no duty to apply for NPDES permits until an actual discharge occurred.[46] CAFO CWA compliance has been the subject of much debate since the Fifth Circuit's ruling.[47] Indeed, some have questioned the wisdom of EPA oversight and states' use of general permits, arguing that many general permits violate the very purpose of the CWA.[48]

Not all developers who discharge pollutants during rainfall are required to obtain an NPDES permit, as permit writers have discretion not to require NPDES permits for certain stormwater discharges and some activities are exempt entirely.[49] Even

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42. Michael P. Healy, *Still Dirty After Twenty-Five Years: Water Quality Standard Enforcement and the Availability of Citizen Suits*, 24 ECOLOGY L.Q. 393, 427-28 (1997).

43. 33 U.S.C. § 1342(a) (2012); 40 C.F.R. § 122.23 (2013).

44. *See* Iowa League of Cities v. EPA, 711 F.3d 844, 855 (8th Cir. 2013).

45. *See* Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 650 (2007); Ford Motor Co. v. EPA, 567 F.2d 661, 669 (6th Cir. 1977); Chesapeake Bay Found. v. Va. State Water Control Bd., 453 F. Supp. 122, 126 (E.D. Va. 1978).

46. Nat'l Pork Producers Council v. EPA, 635 F.3d 738, 751 (5th Cir. 2011); *see also* Christopher R. Brown, *When the "Plain Text" Isn't so Plain: How* National Pork Producers Council *Restricts the Clean Water Act's Purpose and Impairs Its Enforcement Against Factory Farms*, 16 DRAKE J. AGRIC. L. 375, 376-77 (2011) (discussing the decision).

47. *See, e.g.*, Rachel Bleshman, Note, National Pork Producers Council v. U.S. EPA*: Striking Down Clean Water Act Rule for Factory Farms, the Fifth Circuit Strips the EPA of Effective Regulatory Power*, 25 TUL. ENVTL. L.J. 207, 215-19 (2011) (criticizing the decision).

48. *See* Jeffrey M. Gaba, *Generally Illegal: NPDES General Permits Under the Clean Water Act*, 31 HARV. ENVTL. L. REV. 409, 433 (2007).

49. *See* Envtl. Def. Ctr. v. EPA, 344 F.3d 832, 844 (9th Cir. 2003) ("It is more reasonable to interpret congressional silence about permits as an indication of EPA's flexibility not to use them than as an outright prohibition."); Conservation Law Found. v. Hannaford Bros., 327 F. Supp. 2d 325, 331 (D. Vt. 2004) ("In sum, § 402(p)(5)–(6) does not require EPA to regulate all stormwater discharges, nor does it require EPA to use NPDES permits to regulate those discharges EPA does designate for regulation."). While the EPA or a state agency *may* override an individual permit writer and require a permit where a discharger "contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States," neither are obligated to do so. *See* 40 C.F.R. § 122.26(9)(i)(D) (2013).

though the CWA requires permits for specific types of discharges, like those "associated with industrial activity,"[50] the EPA has found those requirements do not apply to stormwater effluent from certain types of industrial and agricultural uses.[51] The United States Supreme Court has ruled that a state affected by downstream pollution lacks the authority to block another state's issuance of an NPDES permit and cannot establish a separate permit program to regulate point sources located in another state.[52]

Perhaps to alleviate concerns over the issues that multiple permit writers may create, Congress allows private citizens to sue NPDES permit holders who allegedly violate water quality standards in their discharges.[53] This citizen-suit provision is particularly important considering the generally broad discretion of permit writers and the lack of permit oversight from the EPA for the thousands of permits within any given state.[54] Moreover, because either the EPA or state authorities may issue NPDES permits, there have been discrepancies with enforcement in the past.[55]

Some suggest that the CWA's intricate federalist cooperation has failed in its application,[56] and others recommend returning to common law nuisance or allowing legal action under another federal statute.[57] Through the various forms of the NPDES system, courts have struggled to determine whether specific instances of rainfall effluent from CAFOs

50. 33 U.S.C. § 1342(p)(2)(B) (2012).

51. *See, e.g.*, Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1332-33 (2013) (noting that the EPA determined the requirements do not apply to certain types of industrial logging effluent).

52. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 490-91 (1987).

53. 33 U.S.C. § 1365(a)(1) (2012); *see also* Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy, 305 F.3d 943, 949-50 (9th Cir. 2002) ("Under the CWA private citizens may sue any person alleged to be in violation of the conditions of an effluent standard or limitation under the Act . . . .").

54. *See* Arkansas v. Oklahoma, 503 U.S. 91, 105 (1992) (noting the "broad discretion" afforded to establish permit conditions); Gaba, *supra* note 48, at 433 (describing the shortcomings of broad general permits). *See generally* U.S. ENVTL. PROT. AGENCY, NPDES PERMIT WRITERS' MANUAL (2010), *available at* http://water.epa.gov/polwaste/npdes/basics/upload/pwm_2010.pdf (providing a comprehensive overview of the process).

55. *See* Save the Valley, Inc. v. EPA, 223 F. Supp. 2d 997, 1008-10 (S.D. Ind. 2002).

56. Healy, *supra* note 42, at 414-19.

57. Centner, *supra* note 28, at 218 (proffering the Comprehensive Environmental Response, Compensation, and Liability Act as one such federal statute).

constitute CWA violations or exemptions.[58] One federal district court recently found that a CAFO's excessive animal waste application, which subsequently leaked into groundwater, not only violated its permit conditions, but also constituted a violation of the Resource Conservation and Recovery Act (RCRA).[59] These decisions addressing CAFO NPDES discharges certainly indicate that the system operates dissimilarly in different jurisdictions.

C. Likelihood of Pollution

Arkansas first approved private CAFOs in November 2011,[60] and the C & H Hog Farms permit was the first private CAFO approved by ADEQ.[61] The farm's CAFO Notice of Intent explained that the facility would confine over 6000 pigs,[62] qualifying the farm as a "large" CAFO under EPA regulations.[63] Current ADEQ regulations only allow discharge of animal waste effluent during rare high rainfall events.[64]

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58. *Compare* Concerned Area Residents for the Env't v. Southview Farm, 34 F.3d 114, 120 (2d Cir. 1994) (finding a CAFO and manure application hoses constituted individual point sources), *with* Alt v. EPA, 979 F. Supp. 2d 701, 715 (N.D. W. Va. 2013) (finding CAFO manure effluent fell under the general exemption for agricultural stormwater discharge).

59. Cmty. Ass'n. for Restoration of the Env't, Inc. v. Cow Palace, LLC, No. 13-CV-3016-TOR, 2015 WL 199345, at *36 (E.D. Wash. Jan. 14, 2015) ("[T]here is no triable issue that when Defendants excessively over-apply manure to their agricultural fields—application that is untethered to the DNMP and made without regard to the fertilization needs of their crops—they are discarding the manure and thus transforming it to a solid waste under RCRA. Because the excess manure is not 'returned to the soil as fertilizers,' it is not exempt from RCRA's provisions." (quoting Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1045 (9th Cir. 2004))); *see also* Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (relevant legislation).

60. ARK. DEP'T ENVTL. QUALITY, FACT SHEET FOR 2ND DRAFT GENERAL PERMIT NO. AR6590000 CONCENTRATED ANIMAL FEEDING OPERATIONS (CAFO) IN THE STATE OF ARKANSAS 1 (n.d.), *available at* http://www2.adeq.state.ar.us/water/branch_permits/general_permits/pdfs/arg590000_fact_sheet.pdf.

61. *See id.*

62. NOTICE OF INTENT, *supra* note 12, at 1.

63. *See* 40 C.F.R. § 122.23(b)(4) (2013).

64. ARK. DEPT. ENVTL. QUALITY, AR6590000, at 5 (2011), *available at* http://www.adeq.state.ar.us/ftproot/Pub/WebDatabases/PermitsOnline/NPDES/Permits/ARG590000.pdf ("Whenever rainfall events cause an overflow of process wastewater from a facility designed, constructed, operated, and maintained to contain all process-generated wastewaters plus the runoff from a 25-year, 24-hour rainfall event at the location of the point source, any process wastewater pollutants in the overflow may be discharged into Waters of the State."). The "25-year, 24-hour" rainfall discharge requirement is standard among general NPDES permits, requiring that waste retention facilities be able to hold

CAFO farms in other states have introduced significant pollution into local ecosystems. In 1995, one CAFO infamously spilled 25 million gallons of concentrated animal feces and urine into local streams and the New River, a component of the Wild and Scenic system.[65] A CAFO farm in North Carolina is currently the target of hundreds of nuisance complaints,[66] and studies there "have conclusively shown that swine CAFOs are contaminating shallow groundwater."[67]

While testing has not yet definitively revealed animal waste effluent from C & H Hog Farms, it seems quite possible that untreated, concentrated swine excrement could travel down Big Creek to the Buffalo River at some point during annual high-water events. The Buffalo River and its tributaries are susceptible to flooding,[68] and ADEQ's leadership has admitted that effluent from C & H Hog Farms could reach the Buffalo.[69] One local hydrogeologist predicted a greater than 95% chance of degraded water quality and major environmental degradation from the CAFO.[70] Karst geology in the area also suggests a high possibility of swine effluent infiltrating the surrounding

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animal waste and process wastewater, in addition to excess rainfall, without overflowing during a twenty-five-year rainfall event. *See* Kristen E. Mollnow, Note, Concerned Area Residents for the Environment v. Southview Farm*: Just What Is a Concentrated Animal Feeding Operation Under the Clean Water Act?*, 60 ALB. L. REV. 239, 253-56 (1996) (discussing this requirement).

65. Michael A. Mallin, *Impacts of Industrial Animal Production on Rivers and Estuaries*, 88 AM. SCIENTIST, Jan.-Feb. 2000, at 26, 26.

66. Emery P. Dalesio, *EPA to Probe Whether DENR Failed Minorities Living Near Hog Farms*, NEWSOBSERVER.COM, http://www.newsobserver.com/news/local/article11312843.html (last updated Feb. 25, 2015, 5:59 PM).

67. Nowlin, *supra* note 24, at 1087.

68. *See* Scott F. Davis, *Buffalo River Flowed like Mississippi, High-Water Marks Make Impression on Scientists*, USGS NEWS (Dec. 1 2002), http://ar.water.usgs.gov/NEWS/DecNWA02-2.html (describing a historic 1982 flood where the "river rose about 47 feet in a few hours").

69. Eligon, *supra* note 13.

70. *Id.* Past studies from the University of Arkansas have expressed concern over the possibility of environmental pollution in the Buffalo River due to the river's geology, shallow aquifer, high-water events, and steep, sloping banks. *See* STEPHEN C. HURLEY, GEOHYDROLOGY OF THE BUFFALO RIVER BASIN AND RELATED LAND USE PROBLEMS 98 (1976) ("The natural features that are inherent to the Buffalo River basin make the ground and surface water particularly susceptible to environmental hazards."); *see also* TAYLOR W. DILLARD, THE GEOHYDROLOGY AND WATER QUALITY OF THE UPPER BUFFALO RIVER BASIN, NEWTON COUNTY, ARKANSAS 79 (1978) ("During periods of increased flow, the river becomes extremely susceptible to contamination from surface runoff.").

groundwater,[71] which significantly influences the Buffalo River's surface water due to hydrologic continuity.[72] The farm's location, characteristics, and its status as the guinea pig for private CAFOs in Arkansas certainly pose a conceivable threat to the Buffalo River.

III. SEEING THE FOREST FOR THE TREES: THE LEGISLATIVE GAP

Considering the WSRA's underlying polices, why has the Park Service, as the Wild and Scenic managing agency for the Buffalo River, not utilized the judicial system to prevent C & H Hog Farms from polluting Big Creek? Put simply, Congress did not give the Park Service express permission to do so under the WSRA, and the agency has been unwilling to stretch its powers by litigating as a party or by filing amicus briefs.

A. Understanding Wild and Scenic Rivers

Congress passed the WSRA in 1968,[73] and the Wild and Scenic river system now includes over 12,000 miles on hundreds of rivers across the country.[74] Arkansas currently has fifty Wild and Scenic river segments on eight major river basins, including two upper-Buffalo tributaries.[75] Rivers can be added to the system by congressional act or by state nomination and approval from the Secretary of the Interior.[76] Proposed rivers must be in free-flowing condition and possess some outstandingly

71. *See* DAVID M. MOTT & JESSICA LAURANS, NAT'L PARK SERV., WATER RESOURCES MANAGEMENT PLAN: BUFFALO NATIONAL RIVER, ARKANSAS 27 (2004), *available at* http://www.nature.nps.gov/water/planning/management_plans/buff_final_screen.pdf. ("The karst geology of the region makes waste lagoons undesirable because of leakage into the groundwater.").

72. *See* RANDALL J. CHARBENEAU, GROUNDWATER HYDRAULICS AND POLLUTANT TRANSPORT 12-14 (2000) (discussing the "Subsurface Hydrologic Cycle").

73. Congress passed the Act to protect and preserve the "scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values" of designated free-flowing rivers. Wild and Scenic Rivers Act, Pub. L. No. 90-542, § 1, 82 Stat. 906, 906 (1968).

74. *About the WSR Act*, NAT'L WILD & SCENIC RIVERS SYS., http://www.rivers.gov/wsr-act.php (last visited Feb. 26, 2015).

75. *Arkansas Segments*, NAT'L PARK SERVICE, http://nps.gov/ncrc/programs/rtca/nri/states/ar.html (last visited Feb. 26, 2015).

76. Peter M.K. Frost, *Protecting and Enhancing Wild and Scenic Rivers in the West*, 29 IDAHO L. REV. 313, 316-17 (1992); *see also* 16 U.S.C. § 1273(a) (2012) (relevant statutory provision).

remarkable value.[77] New river segments have been added to the system in piecemeal fashion, although Congress essentially doubled the number in the system in 2009.[78]

The WSRA establishes federal protection for land up to one-quarter of a mile from the ordinary high water mark of rivers in the system,[79] which may be acquired through a limited eminent domain power.[80] Rivers in the system are classified as "Wild," "Scenic," or "Recreational," depending on their characteristics.[81] Wild rivers "represent vestiges of primitive America"—they are generally only accessible by trail, are free of impoundments, and have natural watersheds and unpolluted waters.[82] Scenic rivers are relatively undisturbed, possessing largely "primitive" shorelines.[83] Recreational rivers may have significant development along the banks or may have experienced diversion in the past.[84] Rivers within the Wild and Scenic system are managed and maintained largely by the National Forest Service or the National Park Service, agencies under the Departments of Agriculture and Interior, respectively.[85] This shared responsibility parallels the joint tasks of the two Departments in identification and acquisition of new river segments.[86]

B. Conservationist Intent

In the WSRA, Congress clearly indicated that the immediate environment of certain rivers should be preserved and protected in free-flowing condition.[87] Courts have been

77. 16 U.S.C. § 1273(b) (2012).

78. Kate Phillips, *Huge Lands Bill to Become Law*, N.Y. TIMES (Mar. 25, 2009, 5:48 PM), http://thecaucus.blogs.nytimes.com/2009/03/25/huge-lands-bill-to-become-law/.

79. 16 U.S.C. § 1275(d) (2012).

80. *See* 16 U.S.C. § 1277 (2012).

81. 16 U.S.C. § 1273(b) (2012).

82. 16 U.S.C. § 1273(b)(1).

83. 16 U.S.C. § 1273(b)(2).

84. 16 U.S.C. § 1273(b)(3).

85. *See Wild and Scenic Rivers*, U.S. FOREST SERVICE, http://www.fs.fed.us/recreation/programs/cda/wild-scenic-rivers.shtml (last visited Feb. 26, 2015). The Bureau of Land Management and the Fish and Wildlife Service also manage some rivers within the system. *Id.*

86. *See* 16 U.S.C. § 1275 (2012).

87. *See* 16 U.S.C. § 1271 (2012) ("The Congress declares that the established national policy of dam and other construction at appropriate sections of the rivers of the United States needs to be complemented by a policy that would preserve other selected

quick to uphold this conservationist objective, although ironically most of the high-profile cases have been brought by conservation groups to enjoin a Wild and Scenic managing agency from allowing certain activities like road construction,[88] harvesting trees from controlled timber burns,[89] or inadequate management plans.[90]

The executive branch has strongly supported protecting rivers in the Wild and Scenic system. At the signing of the WSRA, President Johnson remarked:

> An unspoiled river is a very rare thing in this Nation today. Their flow and vitality have been harnessed by dams and too often they have been turned into open sewers by communities and by industries. It makes us all very fearful that all rivers will go this way unless somebody acts now to try to balance our river development.[91]

President Carter, a particularly vocal supporter of Wild and Scenic rivers, directed federal agencies to "tak[e] an aggressive role" in preserving designated river segments and to demonstrate "sound management for state, local, and private landowners."[92] President Obama called the 2009 expansion of the Wild and Scenic river system "among the most important in decades to protect, preserve, and pass down our nation's most treasured landscapes to future generations."[93]

C. Gap Problem

It was perhaps inevitable that such a strong federal conservationist directive would conflict with local development. Despite a clear national policy of protecting water quality and other environmental values, Congress did not address a critical

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rivers or sections thereof in their free-flowing condition to protect the water quality of such rivers and to fulfill other vital national conservation purposes.").

88. *See* Sierra Club v. Babbitt, 69 F. Supp. 2d 1202, 1207 (E.D. Cal. 1999).

89. *See* Wilderness Soc'y v. Tyrrel, 918 F.2d 813, 814 (9th Cir. 1990).

90. *See* Friends of Yosemite Valley v. Norton, 348 F.3d 789, 792 (9th Cir. 2003).

91. *President Lyndon B. Johnson*, *Remarks Upon Signing Four Bills Relating to Conservation and Outdoor Recreation*, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=29150#axzz2ig1XCPY9 (last visited Feb. 26, 2015).

92. *Nationwide Rivers Inventory*, NAT'L. PARK SERVICE, http://www.nps.gov/ncrc/programs/rtca/nri/hist.html#pdq (last visited Feb 26, 2015).

93. Press Release, White House, Remarks by the President at Signing of the Omnibus Public Lands Management Act of 2009 (Mar. 30, 2009), *available at* https://www.whitehouse.gov/the_press_office/Remarks-of-the-President-at-Signing-of-the-Omnibus-Public-Lands-Management-Act-of-2009-33009.

problem—how to protect portions of Wild and Scenic rivers from private landowner polluters outside direct federal control who fail to adequately prevent effluent caused by heavy rainfall or high-water events.[94] This effluent may result from farming, mining, construction, logging, or other land development.[95] The WSRA is mostly silent as to acceptable methods of protection under these circumstances, only vaguely stating that the managing agency "shall take such action respecting management policies, regulations, contracts, [and] plans . . . as may be necessary to protect such rivers in accordance with the purposes of" the WSRA.[96] Although one could reasonably construe such ambiguous language to include utilization of the judiciary, Wild and Scenic managing agencies are currently unwilling to stretch their vague statutory charge, as their directive includes no express right to bring or to intervene in a lawsuit as a party or amicus curiae.

Professor Brian Gray recognized this legislative gap concerning extrinsic development effluent over twenty-five years ago,[97] but the issue has largely since been ignored. Professor Joseph Sax, widely renowned for his writings on the public trust doctrine,[98] described national parks as "helpless giants" because of the Park Service's "profound concern about the constitutional power of the federal government to control private land uses near and within the parks."[99] In his work, Gray urged Congress: (1) to confer authority to the Park Service to regulate private activities that threaten the values of Wild and Scenic rivers; (2) to direct the Park Service to take necessary measures to defend the WSRA, "including the issuance of regulations, the commencement of litigation, and the assertion of

94. Professor Joseph Sax once noted that "[t]here has been very little regulation of private landowners within the [national] parks or on their peripheries." Joseph L. Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239, 241 (1976).

95. Brain E. Gray, *No Holier Temples: Protecting the National Parks Through Wild and Scenic Designation*, 58 U. COLO. L. REV. 551, 566-67 (1988).

96. 16 U.S.C. § 1283(a) (2012).

97. *See* Gray, *supra* note 95, at 566-68.

98. *See generally* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) (discussing the doctrine).

99. Sax, *supra* note 94, at 241. While Professor Sax addressed national parks and not Wild and Scenic rivers, the underlying conflict he highlighted between the conservation of national treasures and the threat of extraneous development persists.

the federal water right embodied in the Act"; and (3) to create an express private right of action for the Park Service against upstream, land-based pollution threats.[100]

Gray believed that using portions of the CWA as a model and creating a private right of action were the most appropriate routes toward fixing this issue.[101] Since Gray's article was published in 1988, the NPDES permitting system has drastically changed how it limits water pollution from point sources to regulate water quality.[102] Gray did not consider that pollutants from upstream landowners might actually comply with the CWA; rather, he assumed that upstream development effluent would occur outside of the NPDES permitting process, and he recommended designing the regulation of Wild and Scenic rivers on the NPDES model.[103] In Arkansas's current case, C & H Hog Farms possesses an NPDES permit, and therefore the farm is presumably complying with both EPA regulations and state permitting requirements.[104]

A simple declaration of congressional intent to protect specific stream portions might be acceptable in a world without gravity or watershed reaches, but the unique characteristics of tributary gradient and the inherent differences between running streams and stagnant lakes expose the true nature of the WSRA—legislation that offers an Achillean facade of protection while exposing the proverbial heel. It is both illogical and counterproductive to not provide managing agencies with the tools necessary to manage and conserve Wild and Scenic rivers, especially when the failure has been apparent for some time.

The Buffalo River example is not the first such instance of frustration, as Wild and Scenic managing agencies have been suppressed from taking action against upstream private landowner effluent in the past. In *Reynolds v. Rick's Mushroom*

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100. *See* Gray, *supra* note 95, at 582-96.

101. *Id.* at 592-95.

102. *See* Connor, *supra* note 41, at 293-303.

103. *See* Gray, *supra* note 95, at 592-93.

104. This may not be as clear of an assumption as the author would prefer. In August 2013, the EPA notified the State of Arkansas that it would no longer waive its right to review certain water discharge permits issued by ADEQ, removing the state agency's ability to issue water quality permits without obtaining EPA approval. *See* Max Brantley & David Ramsey, *EPA Revokes Waiver for Arkansas to Approve Water Permits*, ARK. BLOG (Aug. 30, 2013, 11:55 AM), http://www.arktimes.com/blogs/ArkansasBlog/. It appears the EPA acted in response to a newly enacted Arkansas statute concerning mineral discharge. *Id.*; *see also* Act 954, 2013 Ark. Acts 3510 (relevant legislation).

Service, Inc.,[105] private landowners initiated a citizen suit under the CWA to enjoin a corporation that processed harvested mushrooms and produced significant mushroom waste from allowing effluent above a Wild and Scenic river segment and the plaintiffs' private pond.[106] The corporation, operating without an NPDES permit, stored the waste in large piles that produced black runoff during rainfall and contained elevated levels of ammonia, nitrogen, and harmful bacteria.[107] The court noted that unless action was taken to limit the waste effluent, the plaintiffs' pond and the Wild and Scenic segment would suffer "irreparable harm."[108] Notably absent from the suit was the Wild and Scenic managing agency, either as a litigant or amicus curiae.[109]

The court ordered the corporation to apply for an NPDES permit but allowed it to remain in operation, concluding that enjoining the corporation from managing its operation was not in the public interest.[110] The court also ordered the parties to participate in mediation so the corporation could develop cost-effective operational controls and alleviate the plaintiffs' concerns.[111] The corporation ultimately agreed to settle the case for $950,000 and was required to construct a cover over the waste piles to eliminate some of the effluent—an effort that another court later noted eliminated some, but not all, of the problems.[112]

What should have started as a suit by a federal agency to guard a federally protected stream ended in a mediation session between private entities that never truly eliminated the problem. *Reynolds* struck a balance between the interests of the corporation and local landowners, but the Wild and Scenic managing agency was ultimately barred from representation, redress, or remedy.

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105. No. Civ.A. 01-3773, 2004 WL 620164 (E.D. Pa. Mar. 29, 2004).

106. *Id.* at *1-2.

107. *Id.* at *2-4.

108. *Id.* at *6.

109. *See id.* at *1 (listing the parties).

110. *Reynolds*, 2004 WL 620164, at *7.

111. *Id.* at *8.

112. *See* Rick's Mushroom Serv., Inc. v. United States, 521 F.3d 1338, 1341-42 (Fed. Cir. 2008).

D. Congressional Inaction

Congress has opted to continue protecting select tributaries on a case-by-case basis instead of directly confronting the development effluent issue in the years since Gray exposed the legislative gap.[113] The lack of congressional action to protect clear WSRA goals indicates that the WSRA legislative flaw is not an attractive issue for Congress to address at this time.

IV. PROBLEM SOLVING

There is no single, golden solution to the gap issue created by two conflicting federal acts; however, a variety of options may work to resolve the problem. This Part proposes several solutions at both the federal and state levels, none of which are mutually exclusive—an appropriate course of action considering the cooperative federalism at play in both the CWA and WSRA.

A. The Federal Route

1. An Improved Water Right for Wild and Scenic Rivers

The path of least resistance to protect the WSRA's legislative goal would be for Congress to continue extending Wild and Scenic protection to select tributaries or tributary systems. Similar WSRA legislation has met few congressional obstacles in the past, and new river segments have recently been identified for inclusion.[114] Moreover, recently proposed additions to the Wild and Scenic system have included tributary segments.[115]

In this vein, Congress's grant of Wild or Scenic status to individual tributaries could extend a main segment's protection upstream, thereby incorporating its tributary reaches. Such a use of eminent domain, however, would curtail private landowner rights in areas where citizens may still resent the federal government for using condemnation power to establish a river's

113. *See* 158 CONG. REC. E1113 (daily ed. June 21, 2012) (statement of Rep. Dicks); 155 CONG. REC. H9755 (daily ed. Sept. 22, 2009) (statement of Rep. Bordallo); 153 CONG. REC. H8950 (daily ed. July 30, 2007) (statement of Rep. Grijalva).

114. *See, e.g.*, 158 CONG. REC. E1113 (daily ed. June 21, 2012) (statement of Rep. Dicks) (describing legislation proposing the addition of nineteen rivers and their tributaries in the Congressman's home state of Washington).

115. *See id.*

Wild and Scenic status in the first place.[116] It would also effectively shut down C & H Hog Farms after the facility was completed and began to operate—something the court refused to do in *Reynolds* even though the operation had blatantly failed to apply for an NPDES permit or comply with federal regulations.[117] Ultimately, such a piecemeal approach ignores the WSRA gap and fails to address the underlying problem.

Congress could appropriately balance competing federal and local interests by giving the Wild and Scenic managing agencies the express power to bring or enter litigation to protect tributaries above Wild and Scenic river segments. At a minimum, this right of action should include a right to seek both temporary and permanent injunctive relief. Any right of action would only marginally extend the legal power already vested in Wild and Scenic managing agencies, as Congress expressly claimed some type of federal water right in the WSRA for maintenance of system rivers while at the same time deferring generally to state water law.[118] The WSRA explains, "[d]esignation of any stream or portion thereof as a national wild, scenic or recreational river area shall not be construed as a reservation of the waters of such streams for purposes other than those specified in this chapter,"[119] including water quality. Key to this federal water right reservation is that state water right claims to Wild and Scenic rivers remain unaffected "to the extent that such jurisdiction may be exercised without impairing the purposes of this chapter or its administration."[120] While the specific water protection powers delegated to Wild and Scenic managing agencies are unclear, Congress implied that some type

116. Wild and Scenic status requires protection up to one-quarter mile from the segment's high-water mark, which naturally results in a loss of river access for neighboring landowners. *See supra* notes 79-80 and accompanying text. Some landowners neighboring the Buffalo River still resent the federal government's use of its eminent domain power in the 1970s to originally establish the Buffalo National River Park. Telephone Interview with Judy Cook-Campbell, Resident, Mount Judea, Ark., (Mar. 6, 2014) ("A lot of people did not understand that either the Army Corp of Engineers was going to dam the river or the federal government was going to take it through eminent domain. Personally, my family did not live close enough to be affected one way or the other, but a lot of people still do not like the way the government used its eminent domain power way back then.").

117. *See* Reynolds v. Rick's Mushroom Serv., Inc., No. Civ.A. 01-3773, 2004 WL 620164, at *6-7 (E.D. Pa. Mar. 29, 2004).

118. *See* Gray, *supra* note 95, at 555-56.

119. 16 U.S.C. § 1284(c) (2012).

120. 16 U.S.C. § 1284(d).

of water right is necessary to effectuate the intent of the WSRA.[121] Currently, the federal water right can be used to protect parks from upstream water-resource projects, such as diversions or dams, as well as to prevent upstream uses of water that impair downstream water quality.[122]

Strong support exists for creating an express water right under the WSRA where a Wild and Scenic river is part of, or adjacent to, a national park or forest. The United States Supreme Court has long recognized an implied water reservation doctrine for federal lands, national parks, or "[w]here water is necessary to fulfill the very purposes for which a federal reservation was created . . . even in the face of Congress' express deference to state water law."[123] This implied water reservation allows a managing agency to bring suit under water rights created by congressional reservation, although it has most often been extended to the quantity, rather than quality, of water.[124]

Regardless of the fact that the implied water reservation is primarily quantity based, the same principles directly apply to water quality issues due to the intertwined and synergetic relationship between water quantity and quality. The Court has extended the implied water reservation doctrine to several types of federal lands, including two national wildlife refuges, a national recreation area, and a national forest.[125] One can think of few opportunities more appropriate for the application of an implied water reservation than the federally created, and federally managed, Wild and Scenic river system, especially considering that the federal government actually owns the land

121. 16 U.S.C. § 1284(c); *see also* Gray, *supra* note 95, at 574-75 ("Congress stated in the Act itself—although in a back-handed manner—that it was reserving the water of component rivers for the purposes specified in the statute.").

122. Gray, *supra* note 95, at 582. In his ruling on the Buffalo River lawsuit, United States District Judge D.P. Marshall carefully noted that water resource projects do not include land development that is not immediately adjacent to riparian river tracts. *See* Order at 5, Buffalo River Watershed Alliance v. U.S. Dep't of Agric., No. 15-1310 (8th Cir. filed Feb. 11, 2015), 2014 WL 6837005 ("The United States Department of Agriculture has interpreted ["water resource project"] to include construction projects in a river or along its banks, and projects that involve withdrawing something from, or discharging something into, the river. . . . C & H wasn't built in the Buffalo River or along its banks. The farm doesn't withdraw anything from the River or discharge anything into it. The farm is just too far from the Buffalo to qualify as a water resources project.").

123. United States v. New Mexico, 438 U.S. 696, 702 (1978).

124. *See* Arizona v. California, 373 U.S. 546, 600-01 (1963).

125. *Id.* at 601.

on both sides of protected river segments. Creation of a right of action for Wild and Scenic managing agencies would essentially codify the implied water reservation doctrine to supplement existing WSRA water rights where a Wild and Scenic river segment connects to a national park or forest.

The current protection power cannot be used directly against upstream uses of land outside of federal control that occur without an NPDES permit, which explains the managing agency's absence in *Reynolds*. Managing agencies also have not utilized their protection power against upstream users of land that actually possess an NPDES permit, as the permit itself presumably protects the downstream water quality under the CWA banner through effluent limitation standards.[126] This creates a problematic outcome by combining two legal presumptions: (1) that NPDES permit writers, who have substantial discretion within the permit writing process with little oversight for general permits,[127] always consider the best interests of downstream portions; and (2) that the EPA routinely approves of every state-issued NPDES permit. These dual presumptions leave Wild and Scenic managing agencies up a creek without a paddle, or, perhaps more pertinently, downriver without a protective right of action.

Even though Wild and Scenic managing agencies have not pursued judicial relief, Congress did create a private right of action in the CWA through the legislation's citizen-suit provision.[128] Current law is counterintuitive—a private citizen may sue for compliance violations of the CWA, but the managing agency of a Wild and Scenic river segment cannot act at all against NPDES permit holders or sue non-permit polluters. The Secretary of the Interior or the Director of the National Park Service could theoretically sue as a private citizen, but both are handcuffed from pursuing redress in their official roles. This

126. It is worth noting that the EPA operates under a clear conservationist directive, and the agency may revoke any state-issued NPDES permit at its discretion. *See* 40 C.F.R. § 124.5 (2013). One court came close to scrutinizing the assumption that an NPDES permit protects downstream water quality. *See* Oklahoma v. EPA, 908 F.2d 595, 602-04 (10th Cir. 1990), *rev'd*, Arkansas v. Oklahoma, 503 U.S. 91 (1992). Although proponents argued this issue before the Tenth Circuit Court of Appeals, the segment under scrutiny was merely a proposed inclusion into the Wild and Scenic system, and the issue was later dropped on appeal to the United States Supreme Court.

127. *See supra* note 49 and accompanying text.

128. *See* 33 U.S.C. § 1365 (2012).

paradox hardly seems to be the best solution—logically or financially.

2. The Agricultural Rainfall Discharge Exception

Agricultural stormwater effluent and return irrigation flows are expressly listed as major exemptions to the NPDES program, and the CWA defines these as "nonpoint sources."[129] Where agricultural developers on Wild and Scenic tributaries produce effluent during high-water events, the primary parties with standing to pursue a nuisance claim are private landowners (in riparian states), or appropriators (in prior appropriation states)—and even they could be limited in their recovery by right-to-farm statutes.[130] Citizen suits brought under the CWA would be frivolous, as federal regulations specifically list nonpoint agricultural stormwater discharge as an exception to the NPDES requirement.[131]

Before an individual has standing to sue, water from these tributaries must first travel through a Wild and Scenic segment, which bears the brunt of all possible effluent pollution, yet the managing agency cannot take action against agricultural polluters. While the agricultural stormwater discharge exception certainly merits considerable respect from a policy perspective, its existence further strengthens the necessity of a right of action to enjoin agricultural developers from discharging particularly threatening nonpoint effluent above a Wild and Scenic segment.

3. A Marriage of Agency Compliance: A Cooperative Federalist Conservation

Admittedly, if Congress were to create a Wild and Scenic water right of action, and the managing agency were to sue an NPDES permit holder, a federal court could be forced to weigh Wild and Scenic water rights against a state-issued permit. Such inter-agency conflict is not new, as many believe the broad and

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129. *See* 40 C.F.R. § 122.23(e) (2013); *see also* 33 U.S.C. § 1362(14) (2012) (exempting agricultural stormwater discharges and return flows from the definition of "point source").

130. *See generally* L. Paul Goeringer & H.L. Goodwin, *An Overview of Arkansas' Right-to-Farm Law*, 9 J. FOOD L. & POL'Y 1 (2013) (discussing the rationale and application of Arkansas's right-to-farm statute and similar laws across the country).

131. CAFOs are specifically denied this NPDES exemption. *See* 40 C.F.R. § 122.23(e) (2013); *see also* 33 U.S.C. § 1362(14) (2012) (defining "point source").

ever-changing goals of federal agencies inevitably lead to governmental conflicts.[132]

In this instance, it is clear that a Wild and Scenic water right claim should prevail. The WSRA is a federal statute with a clearly stated purpose, and legislators passed the law after careful debate. This contrasts with the process of issuing individual permits, which are typically awarded by an election-exempt state agency.[133] Further, most Wild and Scenic protections existed before the emergence of current NPDES regulations and permits, providing notice of a legally superior claim in prior appropriation jurisdictions.[134] While this notice would apply only to water quantity claims, a Wild and Scenic designation similarly provides notice of federal claims to water quality within the river segment, which should likewise trump attempts to impair water quality in pursuit of land development.[135]

This conflict can be remediated at the federal level if Congress directed state permitting agencies to cooperate with Wild and Scenic managing agencies when considering NPDES permits that propose to discharge into Wild and Scenic tributaries, creating a "cooperative federalist conservation." For NPDES permit applicants located near Wild and Scenic tributaries, the Wild and Scenic managing agency could prepare an environmental impact statement during the NPDES decision-making process that the state permitting agency would consider

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132. *See* Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 8-9 (2009).

133. This statement in no manner attempts to discredit the congressional debate that lead to the creation of the current CWA format or to ignore the fact that the WSRA management agencies also fall under the category of an election-exempt agency. Rather, it merely emphasizes that the individual Wild and Scenic river segments were considered so important that Congress chose to elevate them to a protected status prior to any individual state agency permit application or decision.

134. Although courts have yet to definitively rule on the issue, some have argued that the priority date for the federal water rights of Wild and Scenic rivers in prior appropriation states should be the date when Congress or the Secretary of the Interior included the river in the system. *See* Gray, *supra* note 95, at 577. This priority date both complements the preservationist intent of the WSRA and provides notice of a legally superior preexisting claim. *Id.*

135. *See* 16 U.S.C. § 1271 (2012) ("The Congress declares that the established national policy of dam and other construction at appropriate sections of the rivers of the United States needs to be complemented by a policy that would preserve other selected rivers or sections thereof in their free-flowing condition *to protect the water quality of such rivers and to fulfill other vital national conservation purposes*." (emphasis added)).

in its permit evaluations.[136] This model would place the burden of preparing the environmental impact statement wholly onto the Wild and Scenic managing agency. The typical notice and public comment requirements for federal environmental impact statements and state agency permitting would remain unchanged,[137] and an interested individual could comment both in the federal environmental impact statement and during the state agency permitting comment period. Such an interdependent relationship would harmonize the obligations of all parties and shift the financial burden of environmental impact consideration to the federal government because the federally managed Wild and Scenic river segment would be the primary beneficiary of having an environmental impact statement assessed by the state permitting agency. This relationship would most appropriately scrutinize proposed discharges above Wild and Scenic river segments and provide managing agencies with the ability to have their concerns heard in a formal state administrative procedure.

Under NEPA, Congress already directs all federal agencies to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment."[138] This cooperative conservation requires an environmental impact statement prepared by a federal agency where proposed "actions significantly affect[] the quality of the human environment."[139] Under the NEPA model, other federal agencies may comment during the environmental impact statement preparation and have their concerns heard.[140]

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136. *See* 40 C.F.R. § 1502.2 (2013). The environmental impact statement requirement imposes a duty to "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a) (2013). When preparing environmental impact statements, federal agencies must "[m]ake diligent efforts to involve the public . . . . [and] [p]rovide public notice of . . . hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected." 40 C.F.R. § 1506.6(a)–(b) (2013).

137. *See* 5 U.S.C. § 553 (2012) (outlining the notice and comment requirements for federal agency rulemaking).

138. 42 U.S.C. § 4332(A) (2012).

139. 42 U.S.C. § 4332(C).

140. 42 U.S.C. § 4332(C).

The proposed cooperative federalist conservation scheme would simply require the same underlying cooperation inherent in the NEPA model between state NPDES permit writers and Wild and Scenic managing agencies. State permit writers operate at EPA discretion, and the fact that a permit is issued by a state agency rather than the EPA should not sidestep the cooperative conservation mandated at the federal level. The proposal is also consistent with the National Environmental Policy, which directs the federal government to "cooperat[e] with State and local governments . . . to use all practicable means and measures, including financial and technical assistance . . . [to] fulfill the social, economic, and other requirements of present and future generations of Americans."[141] In fact, federal agencies are mandated to "make available advice and information useful in restoring, maintaining, and enhancing the quality of the environment" to all states and localities.[142]

B. The State Solution: Legislative Action

Unfortunately, it is unlikely that Congress will address the WSRA legislative gap anytime in the immediate future. The 113th Congress was one of the least productive in recent history.[143] The federal government shutdown in 2013 certainly did not aid congressional bipartisanship or productivity. Ultimately, Congress will have to fight two battles rather than one to fix the problems created by the water right and agency compliance issues under the WSRA. Reason and pragmatism lead to the conclusion that it is the states who must save Wild and Scenic rivers.

1. The Benefit of State Action

The WSRA operates as an unmistakable example of federalism in practice. It is clear that state authorities play a vital role by identifying river segments for inclusion into the

141. 42 U.S.C. § 4331(a) (2012).

142. 42 U.S.C. § 4332(G) (2012).

143. Drew DeSilver, *Current Congress Is Not the Least Productive in Recent History, but Close*, PEW RES. CENTER (Sept. 3, 2013), http://www.pewresearch.org/fact-tank/2013/09/03/current-congress-is-not-the-least-productive-in-recent-history-but-close/; David Welna, *Congress Is on Pace to Be the Least Productive Ever*, NAT'L PUB. RADIO (Dec. 24, 2013), http://www.npr.org/2013/12/24/256696665/congress-is-on-pace-to-be-the-least-productive-ever.

system and because federal law must comply with state conservation objectives or regulations over and above federal minimums.[144] Congress specifically directed managing agencies to cooperate with the EPA and state agencies to eliminate or diminish pollution in designated rivers, considering the states to be essential in achieving Wild and Scenic goals.[145] One of the two identification methods for possible Wild and Scenic river segments begins with state actors,[146] and Congress demonstrated its preference for local conservation efforts when it directed the Secretary of the Interior to "encourage and assist" states in establishing state or local Wild, Scenic, and Recreational river areas.[147]

The state political arena is perhaps the more appropriate and probable venue to protect tributaries of the Wild and Scenic system. Local citizens may feel state legislators better understand, and are more likely to consider, their concerns. Landowners have a greater opportunity to voice their input at state proceedings than traveling, at great cost, to appear before a federal body considering the same action. Most importantly, state legislators are more likely to feel a greater personal connection to the rivers in their state, and state-level elected officials likely know of a particular river's outstandingly remarkable values and culture.

State protection can be best achieved through a state equivalent to the WSRA. In fact, every state with a federally designated Wild and Scenic river inside its borders has enacted some type of state conservation equivalent to the WSRA.[148]

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144. *See* Black Dog Outfitters, Inc. v. Idaho Outfitters & Guides Licensing Bd., 790 F. Supp. 2d 1248, 1263 (D. Idaho 2011).

145. *See* 16 U.S.C. § 1283(a) (2012).

146. *See* 16 U.S.C. § 1273(a) (2012).

147. *See* 16 U.S.C. § 1282(a) (2012).

148. *See* ALA. CONST. art. XI, § 219.07 (West, Westlaw through Nov. 2014 amendments); ALASKA STAT. ANN. §§ 41.23.400–.510 (West 2014); ARIZ. REV. STAT. ANN. §§ 45-105 to -117 (2014); ARK. CODE ANN. §§ 15-23-301 to -315 (Repl. 2009); CAL. PUB. RES. CODE §§ 5093.50–.70 (West 2014); COLO. REV. STAT. ANN. § 37-60-122.3 (West 2014); CONN. GEN. STAT. ANN. § 25-102qq (West 2014); DEL. CODE ANN. tit. 7, §§ 7301–7312 (West 2015); FLA. STAT. ANN. § 258.501 (West 2014); GA. CODE. ANN. §§ 12-5-350 to -354 (West 2014); IDAHO CODE ANN. §§ 42-1730 to -1780 (West 2014); 20 ILL. COMP. STAT. ANN. §§ 855/0.01–855/2 (West 2014); KY. REV. STAT. ANN. §§ 146.200–.360 (West 2014); LA. REV. STAT. ANN. §§ 56:1840–56:1856 (2014); ME. REV. STAT. tit. 12, §§ 401–409 (2014); MASS. GEN. LAWS ANN. ch. 21A, § 11C (West 2014); MICH. COMP. LAWS ANN. §§ 324.30501–.30515 (West 2014); MINN. STAT. ANN. §§ 103F.301–.345 (West 2015); MISS. CODE ANN. §§ 51-4-1 to -23.10 (West 2014); MO.

Most have adopted a mirror act that is similar in title and substance to the WSRA,[149] and these state laws normally include some form of the public trust doctrine.[150] Other states have created conservation districts to further the proper management of state river systems.[151] The remaining states that have not

REV. STAT. §§ 257.020–.490 (West 2014); MONT. CODE ANN. §§ 85-9-101 to -104 (West 2014); NEB. REV. STAT. ANN. §§ 37-714 to -721 (West 2014); N.H. REV. STAT. ANN. §§ 483:1–483:15 (2014); N.J. STAT. ANN. §§ 13:8-45 to -63 (West 2015); N.M. STAT. ANN. §§ 16-4-1 to -6 (West 2014); N.Y. ENVTL. CONSERV. LAW §§ 15-2701 to -2723 (McKinney 2014); N.C. GEN. STAT. ANN. §§ 113A-30 to -44 (West 2014); OHIO REV. CODE ANN. §§ 1547.81–.91 (West 2014); OR. REV. STAT. ANN. §§ 390.805–.925 (West 2014); 32 PA. CONS. STAT. ANN. §§ 820.21–.29 (West 2014); S.C. CODE ANN. §§ 49-29-10 to -230 (West 2014); S.D. CODIFIED LAWS §§ 46A-15 to -16 (West 2014); TENN. CODE ANN. §§ 11-13-101 to -118 (West 2014); TEX. PARKS & WILD. CODE ANN. §§ 25.001–.006 (West 2013); UTAH CODE ANN. §§ 17B-2a-1001 to -1010 (West 2014); VT. STAT. ANN. tit. 10, §§ 1421–1428 (West 2014); WASH. REV. CODE ANN. §§ 79A.55.005–.900 (West 2014); W. VA. CODE ANN. §§ 22-13-1 to -15 (West 2014); WISC. STAT. ANN. § 30.26 (West 2014); WYO. STAT. ANN. §§ 11-16-101 to -135 (West 2014).

149. ALA. CONST. art. XI, § 219.07 (West, Westlaw through Dec. 2014 amendments); ALASKA STAT. ANN. §§ 41.23.400–.510 (West 2014); ARK. CODE ANN. §§ 15-23-301 to -315 (Repl. 2009); CAL. PUB. RES. CODE §§ 5093.50–.70 (West 2014); COLO. REV. STAT. ANN. § 37-60-122.3 (West 2014); CONN. GEN. STAT. ANN. § 25-102qq (West 2014); DEL. CODE ANN. tit. 7, §§ 7301–7312 (West 2015); FLA. STAT. ANN. § 258.501 (West 2014); GA. CODE ANN. §§ 12-5-350 to -354 (West 2014); 20 ILL. COMP. STAT. ANN. §§ 855/0.01–855/2 (West 2013); KY. REV. STAT. ANN. §§ 146.200–.360 (West 2014); LA. REV. STAT. ANN. §§ 56:1840–15:1856 (2014); ME. REV. STAT. tit. 12, §§ 401–409 (2014); MASS. GEN. LAWS ANN. ch. 21A, § 11C (West 2014); MICH. COMP. LAWS ANN. §§ 324.30501–.30515 (West 2014); MINN. STAT. ANN. §§ 103F.301–.345 (West 2015); MISS. CODE ANN. §§ 51-4-1 to -23.10 (West 2013); NEB. REV. STAT. ANN. §§ 37-714 to -721 (West 2014); N.H. REV. STAT. ANN. §§ 483:1–483:15 (2014); N.J. STAT. ANN. §§ 13:8-45 to -63 (West 2015); N.M. STAT. ANN. §§ 16-4-1 to -6 (West 2014); N.Y. ENVTL. CONSERV. LAW §§ 15-2701 to -2723 (McKinney 2014); N.C. GEN. STAT. ANN. §§ 113A-30 to -44 (West 2014); OHIO REV. CODE ANN. §§ 1547.81–.91 (West 2014); OR. REV. STAT. ANN. §§ 390.805–.925 (West 2014); 32 PA. CONS. STAT. ANN. §§ 820.21–.29 (West 2014); S.C. CODE ANN. §§ 49-29-10 to -230 (West 2014); S.D. CODIFIED LAWS §§ 46A-15 to -16 (West 2014); TENN. CODE ANN. §§ 11-13-101 to -118 (West 2014); VT. STAT. ANN. tit. 10, §§ 1421–1428 (West 2014); WASH. REV. CODE ANN. §§ 79A.55.005–.900 (West 2014); W. VA. CODE ANN. §§ 22-13-1 to -15 (West 2014); WISC. STAT. ANN. § 30.26 (West 2014).

150. *See, e.g.*, ARK. CODE ANN. § 15-23-302(a), (k) (Repl. 2009) ("It is declared that certain rivers in the State of Arkansas possess outstanding natural, scenic, educational, geological, recreational, historical, fish and wildlife, scientific, and cultural values of great present and future benefit to the people. . . . In all planning for the rivers' use and development, full consideration and evaluation shall be given to the rivers as a natural resource so that they shall be used and preserved for the welfare of all people."). *See generally* Sax, *supra* note 98 (discussing the public trust doctrine).

151. *See* MO. REV. STAT. §§ 257.020–.490 (West 2014); MONT. CODE ANN. §§ 85-9-101 to -104 (West 2014); TEX. PARKS & WILD. CODE ANN. §§ 25.001–.006 (West 2013); UTAH CODE ANN. §§ 17B-2a-1001 to -1010 (West 2014); WYO. STAT. ANN. §§ 11-16-101 to -135 (West 2014).

chosen to utilize a mirror act or conservation district have simply designated power over their rivers to a state authority, such as a water planning board, with an express conservation directive.[152]

2. Concrete State Solutions

States are left with three realistic options to protect Wild and Scenic tributaries from development runoff. First, states could extend Wild and Scenic status to individual tributaries by nominating them for inclusion into the federal Wild and Scenic system or a state equivalent. Second, states could propose Wild and Scenic status to all upper tributaries of Wild and Scenic rivers in their state. Third, states could most effectively solve the issue by both proclaiming a heightened "designated use" for upper tributaries to federal and state Wild and Scenic rivers and designating a watchdog entity with a right of action specifically tailored to fill the legislative gap.[153]

While extending state-based Wild and Scenic status on a case-by-case basis appears to be the congressional action of choice, this option should only be used as a last resort by state legislators. Protecting an individual tributary through the Wild and Scenic system does not address the underlying problem, forcing legislators to continually revisit the same action when different tributaries are threatened. Neighboring landowners will likely object to any condemnation of property adjacent to the stream. Addressing threatened tributaries one by one represents a Band-Aid approach—effective on an individual basis but not to treat the underlying problem.

Extending Wild and Scenic status to all upper tributaries of Wild and Scenic rivers would likely encounter such strong opposition from adjacent landowners that it appears unrealistic as a workable solution. The option would eliminate the legislative gap but would probably not be financially feasible. It would also invite reverse-condemnation litigation and essentially establish a new state park system above Wild and Scenic rivers.

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152. *See* ARIZ. REV. STAT. ANN. §§ 45-105 to -117 (2014); CONN. GEN. STAT. ANN. § 25-102qq (West 2014); IDAHO CODE ANN. §§ 42-1730 to -1780 (West 2014).

153. This list is certainly not exhaustive, and although other solutions exist, such as blanket bans of development in upper tributary reaches, they hardly seem plausible.

The legislative gap may be most prudently solved by creating a heightened designated use standard for Wild and Scenic tributaries and a right of action for the state equivalent of the Wild and Scenic managing agency. Heightened designated use standards are not drastic reform measures and could be easily implemented through applicable state rulemaking processes. The right of action may be broadly or narrowly tailored, but at a minimum it must include the right to seek both temporary and permanent injunctive relief for upper tributaries of river segments in the federal and state Wild and Scenic systems.[154]

a. Heightened Designated Uses

A heightened designated use for Wild and Scenic tributaries, which controls effluent limitations through water quality standards,[155] most appropriately protects Wild and Scenic river components from harmful effluent discharged by users with NPDES permits.[156] It is clear that states may impose more stringent environmental standards than the minimum EPA requirements,[157] and the United States Supreme Court has specifically recognized that states may impose stricter requirements on their own CWA point sources.[158] Arkansas, for example, already has a heightened designated use for "Natural and Scenic Waterways" in its "Outstanding Resource Waters" designated use.[159] Such a designation is appropriate "[w]here high quality waters constitute an outstanding state or natural resource."[160] This designated use currently applies only to protected river segments and not to their tributary reaches.[161]

Effluent limitation and categorization of river segments based on heightened standards are clearly expected under the

154. This standing to seek injunctive relief mirrors the provisions of the CWA's citizen-suit provision. *See* 33 U.S.C. § 1365 (2012).

155. 40 C.F.R. § 131.11(a)(1) (2014) ("States must adopt those water quality criteria that protect the designated use. Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use.").

156. See 33 U.S.C. § 1313(c)(2) (2012).

157. *See* 33 U.S.C. § 1370 (2012); Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041, 1056 (1st Cir. 1982).

158. *See* Int'l Paper Co. v. Ouellette, 479 U.S. 481, 497 (1987).

159. *See* 014-00-002 ARK. CODE R. § 2.302 (LexisNexis 2015).

160. 014-00-002 ARK. CODE R. § 2.302.

161. 014-00-002 ARK. CODE R. § 2.302.

CWA.[162] A heightened designated use for Wild and Scenic tributaries would reduce the effluent discharge acceptable on these special waterways in order to accommodate new water quality standards.[163] For land applicators, states can reduce effluent discharges by lowering the amount of nutrient application allowed per acre under the nutrient-management plan. This reduction will lower the concentration of pollutants entering Wild and Scenic tributaries by reducing the overall amount applied within the watershed, which allows developers to continue discharging during rainfall but in far less concentrated amounts.[164] If land applicators such as CAFOs oversupply manure to their application fields in excess of their permit allocation, any resulting discharge is a CWA violation[165]—and in some jurisdictions, an RCRA violation as well.[166]

When determining a heighted designated use standard, state authorities should consider: "(1) the geographic scope of water; (2) the scope of impaired water quality standards; (3) the scope of pollutants and other harms; and (4) the scope of sources of harms."[167] Under heightened designated uses, which will trigger a state adopting heightened water quality standards for a specific waterway,[168] developers may continue to operate at full capacity, albeit with the additional cost of temporarily storing or removing excess waste from Wild and Scenic watersheds, or they may choose to operate at a reduced capacity to ensure compliance. This approach spreads land application problems across a greater area and outside of Wild and Scenic watersheds.

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162. *See* 33 U.S.C. § 1313(d) (2012); *see also* 33 U.S.C. § 1316(a)(1) (2012) (defining "standard of performance").

163. *See* 33 U.S.C. § 1313(d)(4)(A) (2012).

164. This solution fits well within the overall NPDES scheme, as Congress has defined effluent limitations as "restriction[s] established by a State or the [EPA] on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, . . . including schedules of compliance." 33 U.S.C. § 1362(11) (2012).

165. Centner, *supra* note 28, at 222.

166. *See* Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC, No. 13-CV-3016-TOR, 2015 WL 199345, at *36 (E.D. Wash. Jan. 14, 2015).

167. *See* Michael M. Wenig, *How "Total" Are "Total Maximum Daily Loads"?—Legal Issues Regarding the Scope of Watershed-Based Pollution Control Under the Clean Water Act*, 12 TUL. ENVTL. L.J. 87, 162 (1998).

168. 40 C.F.R. § 131.11(a)(1) (2014).

A heightened designated use standard closely aligns with the EPA's recommended "watershed approach" to pollution regulations.[169] Although developers would likely protest the introduction of heightened standards on such special tributaries, the benefits clearly outweigh the costs; development may continue with the guarantee of maintained or improved water quality, thereby furthering the public interest. Heightened designated uses would function as a general deterrent, offering notice to major developers to consider locating future operations away from the upper tributaries of Wild and Scenic rivers. Placing this additional cost on developers that operate on Wild and Scenic tributaries is proper considering that the NPDES permit system "serves to transform generally applicable effluent limitations . . . into the obligations . . . of the individual discharger."[170] It is the developers who have chosen to operate on upper tributaries of Wild and Scenic rivers, and, accordingly, the additional costs of doing business on such important watersheds should reside with the decision maker.

States should consider issuing individual NPDES permits, as opposed to general permits, for developers on Wild and Scenic tributaries because individual permits can be specifically tailored to heightened effluent and water quality standards.[171] Failure to adhere to a heightened effluent discharge standard should result in a revocation of all on-site NPDES or other operating permits.[172] This will allow for better oversight of discharges and ensure compliance on Wild and Scenic tributary reaches.

In states where legislative or quasi-legislative bodies, and not NPDES permit writers, draft water quality standards, a proper separation of powers ensures a competent reform of

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169. *See generally* Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188 (Apr. 21, 2014) (to be codified at 33 C.F.R. pt. 328 and in scattered parts of 40 C.F.R.) (describing this approach at length).

170. EPA v. Cal. *ex rel.* State Water Res. Control Bd., 426 U.S. 200, 205 (1976).

171. The EPA recommends that state authorities require individual permits for CAFOs where a CAFO: (1) "[i]s exceptionally large"; (2) "[h]as historical compliance problems"; (3) "[h]as significant site-specific environmental concerns (e.g., proximity to a water of the U.S., discharges of stormwater from outside the production area, or other discharges that are not specifically addressed by the general permit)"; or (4) "[i]s in an area of significant environmental concern." *See* ENVTL. PROT. AGENCY, NPDES PERMIT WRITERS' MANUAL FOR CONCENTRATED ANIMAL FEEDING OPERATIONS 3-4 (2012), *available at* http://www.epa.gov/npdes/pubs/cafo_ permitmanual_entire.pdf.

172. *See* 33 U.S.C. § 1313(c)(3) (2012).

water quality and effluent limitations.[173] This allows for legislative oversight of state NPDES permit writers because permit issuers are forced to comply with a stricter designated use under the heightened water quality standards. Heightened standards would bind even the few NPDES permits still issued by the EPA itself.[174]

Heightened water quality standards would embody the federalist power duality envisioned in both the WSRA and the CWA. Both pieces of legislation give state authorities considerable discretion over state resources through river segment identification and conservation attempts in the WSRA,[175] and permit writing, approval power, and regulation in the CWA.[176] Water quality standards are generally promulgated by the states,[177] and because "[t]he Clean Water Act anticipates a partnership between the States and the Federal Government," the EPA gives states "substantial guidance in the drafting of water quality standards."[178] Additionally, guaranteeing water quality on tributaries of Wild and Scenic rivers furthers two major goals of the CWA: (1) eliminating the discharge of pollutants into navigable waters, and (2) achieving water quality standards "for the protection and propagation" of wildlife and recreation.[179]

b. A State-Based Wild and Scenic Right of Action

It is clear that Wild and Scenic managing agencies will not sue to protect components of the system. The complete lack of an official avenue for private action further compounds this

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173. *Compare* 014-04-002 ARK. CODE R. § 101 (LexisNexis 2012) (designating water quality standard determinations and permit writing decisions to different state bodies), *with* ALA. CODE § 22-22A-8 (2015) (designating water quality regulation power to the same state authority that issues NPDES permits).

174. *See* 33 U.S.C. § 1313 (2012); *see also State Program Status*, ENVTL. PROTECTION AGENCY, http://water.epa.gov/polwaste/npdes/basics/NPDES-state-program-status.cfm (last visited Feb. 26, 2015) (listing states that do not issue NPDES permits).

175. *See* 16 U.S.C. §§ 1273(a), 1281–1283 (2012).

176. *See* 33 U.S.C. § 1313 (2012).

177. 33 U.S.C. § 1251(b) (2012).

178. Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992).

179. 33 U.S.C. § 1251(a)(1)–(2) (2012); *see also* 40 C.F.R. § 131.10(b) (2014) ("In designating uses of a water body and the appropriate criteria for those uses, the State shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters.").

problem; unlike the CWA's citizen-suit provision and most of the other major environmental statutes enacted during the 1970s, the WSRA does not provide any means for private litigants to pursue relief.[180] The recent Buffalo River litigation illustrates this problem, as conservation groups initiated suit.

While heightened designated use standards would mandate Wild and Scenic protection for NPDES permit holders under the CWA, states should also take action against those who discharge, or propose to discharge, threatening nonpoint source development effluent into tributaries of Wild and Scenic rivers *outside* of the NPDES permit system. Heightened water quality standards would give state authorities specific directives as to where this power should be exercised.[181] Any right of action must, at a minimum, include the power to obtain injunctive relief and would parallel the proposed federal right of action at the state level.

This proposed right of action is supported at the federal level. In 1987, the United States Supreme Court recognized that "[a]lthough Congress intended to dominate the field of pollution regulation, the saving clause negates the inference that Congress 'left no room' for state causes of action."[182] Further, the CWA directs "[f]ederal agencies [to] co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources."[183]

While uniformly extending this new right of action to apply to all state river segments would be easiest, not every state legislature will agree to such a broad delineation. Where this is not possible, states with WRSA mirror acts should direct the appropriate state authority to protect the upper tributaries of Wild and Scenic river segments, or those protected under a state system, through litigation when necessary.[184] Water quality

180. Gray, *supra* note 95, at 593-94.

181. This solution parallels the CWA's Total Maximum Daily Load concept currently being utilized in the revitalization of the Chesapeake Bay and other watersheds. *See* ENVTL. PROT. AGENCY, CHESAPEAKE BAY TMDL EXECUTIVE SUMMARY 1 (2010), *available at* http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/FinalBayTMDL/BayTMDLExecutiveSummaryFINAL122910_final.pdf.

182. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 492 (1987).

183. 33 U.S.C. § 1251(g) (2012).

184. States should consider vesting this right in existing state river authorities, as they already have specific conservation directives.

monitoring by the state authority would be an effective manner of identifying threatening effluent dischargers.

V. CONCLUSION

The WSRA legislative gap has been obvious for over twenty-five years, and Congress has taken no action to correct the problem. While many assume the NPDES permit system complemented the conservationist intent of the WSRA, the case of the swine farm on the Buffalo River's Big Creek tributary provides a clear example of where permit regulation threatens an especially important Wild and Scenic river.

Legislation is the clear solution. Congressional action in the forms of a cooperative federalist conservation and a federal Wild and Scenic right of action would be the most uniform and direct option, but this seems unrealistic given the current political climate and the effects on local property rights. The problem is thus left to the states, which must implement heightened designated use and water quality standards to control effluent discharged by NPDES permit holders. Heightened standards must be coupled with a state-based Wild and Scenic right of action that allows a state authority to bring suit against private landowners whose conduct threatens federal or state Wild and Scenic river segments outside the NPDES permit system. This bifurcated state solution offers a realistic step forward to overcome the legislative gap, and perhaps, through successful implementation, the true objectives of both the WSRA and CWA can be realized to protect such well-loved Wild and Scenic components as the Buffalo River.

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