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Court of Civil Appeals of **Alabama**.

BLACK WARRIOR RIVERKEEPER, INC.

v.

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,

Alabama Environmental Management

Commission, and Metalplate Galvanizing, L.P.

2200609

|

February 18, 2022

Synopsis

Background: Objector, an **environmental** non-profit organization, sought review of the **Department of Environmental** Management's issuance of two permits that authorized applicant to discharge storm-water runoff containing zinc-based pollutants into a state waterway. The Circuit Court, Montgomery County, No. CV-20-900845, affirmed **Environmental** Management Commission's grant of **Department of Environmental** Management and applicant's motion for summary judgment. Objector appealed.

Holdings: The Court of Civil Appeals, *Fridy*, J., held that:

[1] applicant's water-**quality** based effluent limitations was more stringent than technology-based effluent limitations, and


[2] **Department of Environmental** Management did not fail to comply with public notice requirements.

Affirmed.


Procedural Posture(s): Review of Administrative Decision.

West Headnotes (11)

[1] **Environmental Law** 🔑 Permit and certification proceedings

Under the Clean Water Act (CWA), a state may apply for a transfer of National Pollutant Discharge Elimination System (NPDES) permitting authority from federal to state officials; once that authority is transferred, state officials rather than the federal **Environmental** Protection Agency (EPA) maintain the primary responsibility for reviewing and approving NPDES discharge permits, although the EPA continues to exercise oversight. Federal Water Pollution Control Act § 402,  33 U.S.C.A. § 1342.

[2] **Environmental Law** 🔑 Discharge of pollutants

States with an authorized National Pollutant Discharge Elimination System (NPDES) permitting programs under the Clear Water Act (CWA) may issue either general permits or individual permits to address point sources within their boundaries; an individual permit is issued to a specific operation and tailored to its pollution issues; a general permit is written to cover a category of point sources with similar characteristics for a defined area. Federal Water Pollution Control Act § 402,  33 U.S.C.A. § 1342(d).

[3] **Administrative Law and Procedure** 🔑 Correctness or error

Court of Civil Appeals presumes that decisions of administrative agencies are correct because of agencies' expertise in relevant subject matter.

[4] **Administrative Law and Procedure** 🔑 Construction

Courts interpret administrative regulations in accordance with the same principles that are applied to the construction of statutes.

[5] **Administrative Law and Procedure** 🔑 Plain language; plain, ordinary, or common meaning

Statutes 🔑 Natural, obvious, or accepted meaning

Language used in an administrative regulation should be given its natural, plain, ordinary, and commonly understood meaning, just as language in a statute.

[6] **Administrative Law and Procedure** 🔑 Rule or regulation as a whole; relation of parts to whole and one another

Administrative regulation must be interpreted as a whole; an interpretation may not focus only on an isolated clause or paragraph.

[7] **Administrative Law and Procedure** 🔑 Relationship of agency with rule or statute in general

Administrative Law and Procedure 🔑 Erroneous or unreasonable construction; conflict with rule or statute

Interpretation of the agency that promulgated the regulation is controlling unless that interpretation is clearly erroneous.

[8] **Administrative Law and Procedure** 🔑 Relationship of agency with rule or statute in general

Court of Civil Appeals gives deference to agency's interpretation of its own regulations.

[9] **Administrative Law and Procedure** 🔑 Permissible or reasonable construction

Agency's interpretation of its own rule or regulation must stand if it is reasonable, even though it may not appear as reasonable as some other interpretation.

[10] **Environmental Law** 🔑 Particular limitations and guidelines

Applicant's water-**quality** based effluent limitations (WQBEL) were more stringent than required technology-based effluent limitations (TBEL), which restricted quantities, discharge rates, and concentration of pollutants, and thus, applicant's permits complied with water discharge and **quality** regulations under **Alabama** Water Pollution Control Act (AWPCA) and federal Clean Water Act (CWA); applicant's zinc-minimization plans and increased monitoring in its WQBEL went far beyond its TBEL as they required a professional engineer to prepare and certify a report identifying potential sources of zinc in storm-water runoff and propose method for reducing impact of those sources, and applicant's WQBEL was not required to include specific numeric limitations of zinc levels in storm-water runoff as they were not feasibly calculable. Federal Water Pollution Control Act § 402, 33 U.S.C.A. § 1342; **Ala.** Code § 22-22-1 et seq.; **Ala.** Admin. Code r. 335-6-6-.14(3)(a), 335-6-6-.14(3)(e)(1).

[11] **Environmental Law** 🔑 Discharge of pollutants

Department of **Environmental** Management did not fail to comply with requirements under the federal Clean Water Act (CWA) and **Alabama** Water Pollution Control Act's (AWPCA) for public review when it issued applicant's permit to allow storm-water

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discharge in public waterways; substance of what was required to be in applicant's zinc-minimization plans for its water-quality based effluent limitations (WQBEL) was set forth in its National Pollutant Discharge Elimination System (NPDES) permits, which were available for the public to review, and objector failed to show that the Department violated any public notice provision during its process of reviewing applicant's permit applications or issuance of permits. Federal Water Pollution Control Act § 101, 33 U.S.C.A. § 1251(e); Ala. Code § 22-22-1 et seq; Ala. Admin. Code r. 335-6-6-.21.

Appeal from Montgomery Circuit Court (CV-20-900845)

Opinion

FRIDY, Judge.

*1 In this appeal, we review a challenge by Black Warrior Riverkeeper, Inc. (“Riverkeeper”), to the issuance by the Alabama Department of Environmental Management (“ADEM”) of two individual permits to Metalplate Galvanizing, L.P. (“Metalplate”), pursuant to the National Pollutant Discharge Elimination System (“NPDES”). For the reasons set forth herein, we conclude that the issuance of the permits complied with applicable law, and we affirm the judgment of the Montgomery Circuit Court (“the circuit court”) sustaining ADEM's issuance of the permits.

I. Background

A. Relevant Legal Framework

Congress enacted the federal Clean Water Act (“the CWA”), 33 U.S.C. § 1251 et seq., in 1972, intending “to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.” 33 U.S.C. § 1251(a). To further that objective, the CWA prohibits the “discharge of a pollutant” from a “point source” to “navigable waters” unless, in most cases, the entity discharging the pollutant obtains a permit

issued under the NPDES.¹ See 33 U.S.C. §§ 1311(a) and 1342. The CWA is enforced by state and federal authorities working together.

[1] Under the CWA, a state may apply for a transfer of NPDES permitting authority from federal to state officials.

See 33 U.S.C. § 1342. Once that authority is transferred, state officials rather than the federal Environmental Protection Agency (“the EPA”) maintain the primary responsibility for reviewing and approving NPDES discharge permits, although the EPA continues to exercise oversight.

See National Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 650, 127 S.Ct. 2518, 168 L.Ed.2d 467 (2007). Nonetheless, the state must advise the EPA of each permit it proposes to issue, and the EPA may object to any permit. 33 U.S.C. § 1342(d)(1) and (2).

[2] States with authorized NPDES permitting programs may issue either general permits or individual permits to address point sources within their boundaries. An individual permit is issued to a specific operation and tailored to its pollution issues. A general permit is written to cover a category of point sources with similar characteristics for a defined area.

Save the Valley, Inc. v. United States EPA, 223 F. Supp. 2d 997, 1007 (S.D. Ind. 2002).

*2 Alabama has obtained NPDES permitting authority from the federal government. See Ex parte Fowl River Protective Ass'n, 572 So. 2d 446, 450 (Ala. 1990). Alabama law, specifically the Alabama Water Pollution Control Act (“the AWPCA”), § 22-22-1 et seq., Ala. Code 1975, confers on ADEM, a state agency, the primary responsibility for administering environmental legislation, including the AWPCA. See § 22-22A-2(1), Ala. Code 1975; Alabama Dep't of Env't Mgmt. v. Friends of Hurricane Creek, 71 So. 3d 673, 674 (Ala. Civ. App. 2011). The AWPCA charges the Alabama Environmental Management Commission (“the commission”), which oversees ADEM, see § 22-22A-6, Ala. Code 1975, with issuing NPDES permits for the discharge of pollutants into the waters of the State. See § 22-22-9(g), Ala. Code 1975.

Alabama regulations relating to NPDES permitting require that each NPDES permit include, among other things, technology-based effluent limitations (“TBELs”) that restrict the quantities, discharge rates, and concentration of pollutants discharged by the permittee. See **Ala. Admin. Code (ADEM) r. 335-6-6-.14(3)(a)**; see also **Ala. Admin. Code (ADEM), r. 335-6-6-.02(u)** (defining “effluent limitations”). In addition, a permit must include water-**quality**-based effluent limitations (“WQBELs”) that are in addition to or more stringent than the required TBELs when ADEM determines, among other things, that such limitations are necessary to achieve certain water **quality** standards. See **Ala. Admin. Code (ADEM), r. 335-6-6-.14(3)(e)(1)**; **Alabama Dep’t of Env’t Mgmt. v. Alabama Rivers All., Inc.**, 14 So. 3d 853, 859 (**Ala. Civ. App.** 2007).


B. Factual Background

Metalplate operates two hot-dip steel-galvanizing plants — Plant 1 and Plant 2 — in Birmingham. Metalplate’s processes involve the use of zinc, and zinc compounds are produced as byproducts of those processes. Dissolved zinc is regulated as a toxic pollutant. Metalplate has a history of “elevated” or “high” quantities of zinc in its storm-water discharges at both plants.² The storm-water discharge from Plant 1 goes to an unnamed tributary that flows into Village Creek, which is in the **Black** Warrior River Basin. The storm-water discharge from Plant 2 goes to an unnamed tributary that flows into Avondale Creek, which, in turn, is a tributary of Village Creek. The flow of both unnamed tributaries is largely dependent on storm-water flow and storm events. At times, the unnamed tributaries are dry beds.

In 2008, a consent order was entered pursuant to which ADEM required Metalplate to apply for individual NPDES permits to replace the general NPDES storm-water permits under which it had been operating. On December 15, 2010, ADEM provided public notice of the drafts of the individual permits for Plant 1 and Plant 2 to allow any interested person an opportunity to comment on them, as required by **Ala. Admin. Code (ADEM), r. 335-6-6-.21**. **Riverkeeper** commented on the drafts, and ADEM subsequently revised them.

*3 On August 29, 2018, ADEM issued NPDES Permit No. AL0080403 for Plant 1 and NPDES Permit No. AL0080411 for Plant 2.³ Both permits authorize storm-water runoff associated with metal-finishing storage and operations areas, equipment parking and maintenance areas, and petroleum storage and handling areas. The language in both permits regarding discharge limitations and monitoring requirements is identical. Each permit requires Metalplate to monitor the waterways into which its storm water is discharged. Although the permits require Metalplate to monitor its storm-water outflows for most effluents on a quarterly basis, the permits require it to monitor those outflows twice per month for dissolved zinc, oil and grease, and suspended solids. Neither permit includes a numeric limitation on zinc in Metalplate’s storm-water discharges; ADEM concluded that such a numeric limitation was not feasible

“because storm-water events are very unpredictable resulting in varying discharge rates, varying pollutant loadings, and different flows in the receiving waterbodies; the receiving stream flow is variable and largely driven by storm-water; and the complex relationship between the nature of storm-water and receiving waterbodies.”

In addition to the monitoring requirements, the permits require Metalplate to adopt TBELs in the form of a best-management-practices (“BMP”) plan to prevent or minimize the potential for the release of pollutants into the waters of the State. BMPs are defined as schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce pollution. BMPs also include treatment requirements, operating procedures, and practices to control plant-site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw-material storage.  **40 C.F.R. § 122.2**. Federal regulations authorize ADEM to use BMPs to control or abate the discharge of pollutants when numeric effluent limitations are infeasible, or the BMPs are reasonably necessary to achieve effluent limitations and standards, or to carry out the purposes and intent of the CWA. **40 C.F.R. § 122.44(k)(3) and (4)**.

The permits require Metalplate’s BMP plans to include, among other things, provisions for Metalplate to examine each facility component or system for its potential for releasing pollutants and to establish specific preventative or remedial measures to be implemented; to establish a program

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to identify and repair leaking equipment items and damaged containment structures; to prevent the spillage or loss of fluids from vehicle- and equipment-maintenance activities; to develop a solvent-management plan; to prevent or minimize storm-water contact with stored materials; and to provide for routine inspections of structures functioning to prevent storm-water pollution. The BMP plans are required to be made available to the director of ADEM upon request, and the director can require Metalplate to correct any deficiency he or she finds in the plans.

Additionally, before issuing the permits, ADEM conducted a “reasonable potential analysis” and determined that storm-water discharge at both plants had a reasonable potential to cause or contribute to an amount of zinc to enter the waterways beyond water-**quality** standards. As a result of that determination, ADEM included in the individual permits certain WQBELs to achieve water-**quality** standards. Specifically, the permits require Metalplate to develop zinc-minimization plans (“ZMPs”) within ninety days from the effective date of the permits. To develop the ZMPs, the permits require a professional engineer to prepare and certify a report identifying the potential sources of zinc in the storm-water runoff from the plants and to propose a method of reducing the impact of those sources to the unnamed tributaries, including a time line for implementing that method. The engineering report must contain a map of the facility that includes “the property boundaries, a general description of the industrial or other activities occurring within each area of the property, identification of the retention pond, identification of all outfalls, the direction of storm-water flows within and around the property boundaries, and the location of any proposed structural controls.” The report is also required to “include an evaluation of the use of both structural and non-structural controls to minimize the levels of zinc in the discharge” as well as “an estimate of the anticipated zinc reduction as a result of the implementation of the controls identified in the engineering report.”

*4 After submission of the engineering report to ADEM, the permits provide that ADEM will review the report, and that, if ADEM determines that the report is not sufficient, it will require Metalplate to modify the report and submit the revised report within thirty days. The permits require Metalplate to implement all the changes the engineering report proposes within 180 days of ADEM's acceptance of the report.

Finally, the permits require Metalplate to submit to ADEM, within 180 days of the effective dates of the permits, an updated BMP plan that includes any changes proposed by the engineering report along with a monitoring component (which could include the monitoring requirements included in the permits) to assess the effectiveness of the BMPs in achieving zinc reductions in the storm-water discharges. As noted, the permits require Metalplate to test its storm-water discharges twice per month for the level of dissolved zinc. The ZMPs that the permits require Metalplate to develop are considered “enhanced” BMPs.

On September 27, 2018, **Riverkeeper** filed a request for a hearing with the commission to contest ADEM's issuance of the two permits to Metalplate. Metalplate intervened in that proceeding. The parties conducted extensive discovery. Eventually, they agreed that **Riverkeeper's** challenge could be resolved through summary proceedings, and they filed cross-motions for a summary judgment as well as an extensive joint statement of material facts that are not in dispute.

Although **Riverkeeper** offered several arguments in support of its challenge to the issuance of the permits, only two are relevant to this appeal. First, **Riverkeeper** argued that the TBELs and the WQBELs were virtually indistinguishable and that the WQBELs were neither additional to nor more stringent than the TBELs, as required by [Ala. Admin. Code \(ADEM\), r. 335-6-6-.14\(3\)\(e\)\(1\)](#). Second, it argued that, because the permits failed to include the terms of the specific, enhanced BMPs that would be adopted when the ZMPs were implemented, ADEM's issuance of the permits violated the CWA's requirements for public review and comment.

The commission's hearing officer considered the submissions of the parties, as well as the oral argument presented on their motions, and issued a thirteen-page report and recommendation to the commission on March 13, 2020. In his report, the hearing officer rejected **Riverkeeper's** arguments, and he recommended denying **Riverkeeper's** motion for a summary judgment, granting ADEM's and Metalplate's motions for a summary judgment, and approving the permits as issued.

On June 12, 2020, the commission entered its decision adopting the hearing officer's recommendations, denying **Riverkeeper's** summary-judgment motion, granting

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ADEM's and Metalplate's summary-judgment motions, and approving the permits as ADEM had issued them. On July 1, 2020, **Riverkeeper** filed a timely notice of appeal to the circuit court. See § 22-22A-7(c)(6), Ala. Code 1975 (providing for appeal of orders of the commission to the Montgomery Circuit Court). On April 7, 2021, the circuit court entered a judgment finding that substantial evidence supported the commission's decision to approve the permits and that the decision was not arbitrary or affected by error of law. **Riverkeeper** filed a timely notice of appeal to this court on May 13, 2021.

II. Standard of Review

[3] The standard by which this court reviews an appeal involving a determination of the commission is the same standard the circuit court applied and is contained in § 41-22-20(k), Ala. Code 1975. *Gipson v. Alabama Dep't of Env't Mgmt.*, 297 So. 3d 448, 457 (Ala. Civ. App. 2019). That section provides:

*5 “Except where judicial review is by trial de novo, the agency order shall be taken as prima facie just and reasonable and the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, except where otherwise authorized by statute. The court may affirm the agency action or remand the case to the agency for taking additional testimony and evidence or for further proceedings. The court may reverse or modify the decision or grant other appropriate relief from the agency action, equitable or legal, including declaratory relief, if the court finds that the agency action is due to be set aside or modified under standards set forth in appeal or review statutes applicable to that agency or if substantial rights of the petitioner have been prejudiced because the agency action is any one or more of the following:

- “(1) In violation of constitutional or statutory provisions;
- “(2) In excess of the statutory authority of the agency;
- “(3) In violation of any pertinent agency rule;
- “(4) Made upon unlawful procedure;
- “(5) Affected by other error of law;

“(6) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

“(7) Unreasonable, arbitrary, or capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.”

This court presumes that decisions of administrative agencies are correct because of the agencies' expertise in the relevant subject matter. *Gipson*, 297 So. 3d at 458.

[4] [5] [6] [7] The courts interpret administrative regulations in accordance with the same principles that are applied to the construction of statutes. *Ball Healthcare-Jefferson, Inc. v. Alabama Medicaid Agency*, 10 So. 3d 1027, 1030 (Ala. Civ. App. 2008). “The language used in an administrative regulation should be given its natural, plain, ordinary, and commonly understood meaning, just as language in a statute.” *State Pers. Bd. v. Wallace*, 682 So. 2d 1357, 1359 (Ala. Civ. App. 1996). The regulation must be interpreted as a whole; an interpretation may not “focus only on an isolated clause or paragraph.” *Peacock v. Houston Cnty. Bd. of Educ.*, 653 So. 2d 308, 309 (Ala. Civ. App. 1994); see also *Alabama Medicaid Agency v. Beverly Enters.*, 521 So. 2d 1329 (Ala. Civ. App. 1987). Further, the interpretation of the agency that promulgated the regulation is controlling unless that interpretation is clearly erroneous. *Id.*

[8] [9] Finally, this court gives deference to an agency's interpretation of its own regulations. *Ex parte Board of Sch. Comm'rs of Mobile Cnty.*, 824 So. 2d 759 (Ala. 2001). “An agency's interpretation of its own rule or regulation must stand if it is reasonable, even though it may not appear as reasonable as some other interpretation.” *State Health Planning & Dev. Agency v. Baptist Health Sys., Inc.*, 766 So. 2d 176, 180-81 (Ala. Civ. App. 1999).

III. Analysis

A.

[10] **Riverkeeper** first argues that ADEM should not have issued the individual permits to Metalplate because, it says, the WQBELs required of those permits (the ZMPs) were no more stringent than the TBELs included in the permits (the BMP plans). This, it argues, violates **Ala. Admin. Code (ADEM) r. 335-6-6-.14(3)(e)(1)**, which requires that the WQBELs constitute additional or more stringent requirements necessary to achieve the water-**quality** standards established in the CWA and the AWPCA. **Riverkeeper** asserts that,

“[a]lthough the verbiage is slightly different, the TBEL and the WQBEL [included in the permits] are indistinguishable: zinc minimization and BMPs, with monitoring to evaluate the efficacy of the BMPs. The WQBEL is identical to the TBEL and adds no additional or more stringent permit requirements to ensure the protections of water **quality** standards, in violation of the law.”

Riverkeeper contends that the WQBELs in the individual permits add nothing to the TBELs. It argues that WQBELs must impose specific, enforceable requirements that protect water-**quality** standards, but, it says, the WQBELs included in the permits require Metalplate only to submit its own plan to limit zinc, subject to ADEM approval. There are no enforceable performance objectives included in the WQBELs, **Riverkeeper** says, and there is no requirement for a specific, measurable reduction in zinc.

*6 ADEM does not dispute that, to ensure water-**quality** standards, it was required to include additional or more stringent requirements in the individual permits than the TBELs. It contends that its “non-numeric” WQBELs as written in the individual permits, which include the ZMPs and significantly enhanced monitoring requirements for zinc, meet that requirement. We agree with ADEM and reject **Riverkeeper's** characterization of the WQBELs as being essentially the same as the TBELs, as well as its assertion that the WQBELs do not add more stringent requirements or performance objectives to those already contained in the TBELs.

As previously noted, the TBELs in the permits require Metalplate, among other things, to generally examine each of its facility's components and systems for the potential release of pollutants and to develop measures to prevent those releases, to establish a program to deal with leaking and damaged equipment and structures, to prevent fluid loss from maintenance activities, to manage solvents, to limit storm-water contact with stored materials, and to provide for routine inspections of storm-water pollution-prevention structures.

The WQBELs -- the ZMPs and the increased monitoring for zinc -- go far beyond the TBELs. For example, they require that a professional engineer prepare and certify a report identifying the potential sources of zinc in Metalplate's storm-water runoff and proposing a method for reducing the impact of those sources to the unnamed tributaries. They also require the engineer to prepare a time line for implementing that method. The permits require that the engineer's report include an evaluation of both structural and nonstructural controls intended to minimize levels of zinc in storm-water runoff, as well as an estimate of the anticipated reduction in zinc when those controls are implemented. ADEM must review the report and either approve it or require that Metalplate make changes to it. Once the report is accepted, Metalplate is required to implement all changes proposed in the engineering report within 180 days. Within that 180 days, Metalplate is also required to submit a BMP plan that includes the changes established in the engineer's report. Metalplate must also significantly increase its monitoring of zinc in its storm water so that the effectiveness of the ZMPs, i.e., the reduction in the amount of zinc in the discharges, can be determined. As noted, the permits require monitoring for zinc to be conducted twice a month, rather than twice a year as had been required by the general permit under which Metalplate had previously operated its two plants. In short, the WQBELs included in the individual permits require significantly more than the TBELs.

The primary case on which **Riverkeeper** relies, [Natural Resources Defense Council v. United States EPA](#), 808 F.3d 556 (2d Cir. 2015) (“**NRDC**”), does not support **Riverkeeper's** argument. [NRDC](#) involved the EPA's issuance of a general NPDES permit regulating the discharge of ballast water from ships that results in the release of nonnative species into waterways. [Id.](#) at 561-62. The

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petitioners in that case challenged, among other things, the QBEL included in the general permit. That QBEL provided simply: “ ‘Your discharge must be controlled as necessary to meet applicable water **quality** standards in the receiving water body or another water body impacted by your discharges.’ ” [Id.](#) at 578. The appeals court determined that this one-sentence QBEL, “although found by EPA to be required to supplement the TBELs, in fact add[ed] nothing.”

[Id.](#) Here, by contrast, the QBELs are significantly longer than a single sentence, focus on a specific pollutant, and require a number of actions on the part of Metalplate beyond what is required by the TBELs in the permits, including engineering reports, administrative review and approval of the reports, the implementation of controls on zinc pollution called for by the reports, and intense monitoring. The QBELs at issue here are so different from the one-sentence QBEL at issue in [NRDC](#) that **Riverkeeper's** reliance on [NRDC](#) is fundamentally misplaced.

*7 To the extent that **Riverkeeper** argues that the QBELs must include specific numeric limitations to be effective, we reject that contention. In its brief on appeal, **Riverkeeper** does not challenge the premise that it was not feasible to establish numeric effluent limitations. It also does not refer this court to any authority indicating that, in issuing the individual permits, ADEM was required to include specific, measurable numeric limitations under the circumstances. However, it asserts that ADEM's argument that the narrative, nonnumerical QBELs written in the individual permits meets regulatory requirements was rejected in [NRDC](#). To the contrary, the [NRDC](#) court explicitly recognized that “QBELs may be narrative where the calculation of numeric limits is ‘infeasible.’ ” [Id.](#) at 565.

ADEM has consistently asserted throughout this matter that the calculation of a numeric effluent limitation is not feasible because storm-water events are unpredictable as to frequency, length of time, and amount of precipitation, resulting in varying discharge rates, varying pollutant loadings, and different flows into the unnamed tributaries; because the receiving stream flow is variable and largely driven by storm water; and because of the complex relationship between the nature of storm water and the unnamed tributaries. In reviewing the permits, the commission agreed that calculating

a numeric effluent limitation for zinc in the storm-water runoff from Metalplate's plants was not feasible for the reasons ADEM cited and, as a result, that the permits properly established nonnumeric limitations, including the ZMPs and a significant increase in the monitoring of zinc in storm water from twice each year to twice each month to measure the effectiveness of the additional control measures required of the ZMPs. We find that ADEM's approach of including narrative QBELs rather than numeric effluent limitations in the permits is consistent with applicable law. See 40 C.F.R. § 122.44(k)(3) (permitting use of BMPs as effluent limitations when numeric limitations are not feasible).

In sum, **Riverkeeper** has failed to persuade this court that the QBELs in the permits do not add to, or are not more stringent than, the TBELs in the permits or that ADEM incorrectly interpreted applicable regulations or otherwise erred in allowing the permits to include narrative, nonnumerical QBELs and increased monitoring rather than calculating a numerical limitation as a means to regulate the amount of zinc in storm-water runoff from the plants. Thus, as to this first issue, we conclude that the circuit court's judgment is due to be affirmed.

B.

[11] **Riverkeeper** also contends that, in writing the permits, ADEM failed to comply with the CWA's and the AWPCA's requirements of public participation in the development, revision, and enforcement of any effluent-limitation plan established by ADEM pursuant to the CWA, [33 U.S.C. § 1251\(e\)](#). Specifically, **Riverkeeper** argues that, “by failing to flesh out the effluent limitations in the permits and deferring development of key permit conditions until after the close of the normal permit development process, ADEM has denied the public its full right to public participation in the development of permit standards and effluent limitations.”

The United States Court of Appeals for the Second Circuit has explained that, in enacting the CWA, “Congress clearly intended to guarantee the public a meaningful role” in its implementation. [Waterkeeper Alliance, Inc. v. United States EPA](#), 399 F.3d 486, 503 (2d Cir. 2005). The CWA provides that “[p]ublic participation in the development, revision, and enforcement of any regulation, standard,

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effluent limitation, plan, or program” established under the CWA “shall be provided for, encouraged, and assisted by the Administrator [of the EPA] and the States.” [33 U.S.C. § 1251\(e\)](#). The CWA further provides that there be an “opportunity for public hearing” before any NPDES permit issues, [see 33 U.S.C. §§ 1342\(a\)\(1\) and 1342\(b\)\(3\)](#); that a “copy of each permit application and each permit issued under ... section [1342] shall be available to the public,” [see 33 U.S.C. § 1342\(j\)](#); and that “any citizen” may bring a civil suit for violations of the CWA, [see 33 U.S.C. § 1365\(a\)](#). Similarly, ADEM regulations require public notice of draft NPDES permits and allow any interested person to comment on a proposed NPDES permit. [Ala. Admin. Code \(ADEM\), r. 335-6-6-.21](#).

*8 **Riverkeeper** does not dispute that ADEM provided the public with an opportunity to review and comment on the drafts of the proposed permits. It also acknowledges that it commented on the drafts and that ADEM responded to those comments before the permits were issued. Nonetheless, **Riverkeeper** contends that, by allowing the ZMPs to be completed after the permits were issued, the public was deprived of its right to assist in the development, revision, and enforcement of the limitations placed on the discharge of zinc from the plants.

In support of its position, **Riverkeeper** relies primarily on the Second Circuit Court of Appeals’ [Waterkeeper](#) decision, *supra*, which is nonbinding on this court and which involved the rules for NPDES permits relating to the emission of water pollutants from concentrated animal feeding operations (“CAFOs”). In [Waterkeeper](#), **environmental** groups challenged the administrative regulation providing for a “permitting scheme” that required CAFOs to develop and implement a “nutrient management plan” (“NMP”), i.e., a plan to manage and monitor animal waste. The rule provided that the NMPs were to include a “waste ‘application rate’ that ‘minimize[d] phosphorus and nitrogen transport from the field to surface waters.’” [40 C.F.R. § 412.4\(c\)\(2\)](#). [Id.](#) at 496. Neither the rule nor permitting scheme themselves included a numerical effluent limitation for the land application of manure but, instead, established nonnumerical effluent limitations in the form of BMPs.

Land application, the court noted, is “the predominant means by which CAFOs dispose of animal waste” and is a “process by which manure, litter, and other process wastewaters are spread onto fields controlled by CAFOs.” [Waterkeeper](#), 399 F.3d at 494. Animal waste, the court noted, contains “a number of potentially harmful pollutants,” including, among other things, nitrogen and phosphorus, pathogens, antibiotics, pesticides, hormones, trace elements such as arsenic, and odorous/volatile compounds such as carbon dioxide, methane, hydrogen sulfide, and ammonia. [Id.](#)

The [Waterkeeper](#) court determined that the regulation at issue allowed CAFOs to develop their own land-application rates, which constituted the effluent limitations, and that those rates were not subject to oversight by the permitting authority. Additionally, the regulation did not require the terms of the NMPs containing the land-application rates to be included in the NPDES permits. [Waterkeeper](#), 399 F.3d at 502-03. Under the permitting scheme, the court explained, no actual effluent limitations -- whether numerical limitations or nonnumerical, narrative limitations -- were set forth in the permits. Instead, the effluent limitations were established in the NMPs after the issuance of the permits. Therefore, the [Waterkeeper](#) court held, the public was deprived of its right to assist in the development, revision, and enforcement of an effluent limitation in violation of the CWA. [Waterkeeper](#), 399 F.3d at 502-03.

[Waterkeeper](#) is distinguishable from this case. As ADEM points out, a nutrient management plan is not the same thing as a best management practice, and the acronyms NMP and BMP are not interchangeable, because their purposes and natures “are too different to be equated.” [Waterkeeper](#) involved a challenge to the permitting regulation governing CAFOs and not a challenge to a specific NPDES permit. Under the permitting scheme the CAFOs themselves were left to develop the land-application rates for animal waste in the NMPs. Those rates, which by necessity had to be expressed as numerical figures, established the effluent limitations, which, under the CWA, must be available for public review and comment. Because the NMPs was not included in the NPDES permits, the public was deprived of an opportunity to review

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them and, therefore, was precluded from having a voice in the development or enforcement of the effluent limitations.

*9 Here, unlike in [Waterkeeper, Riverkeeper](#) does not challenge the regulation allowing ADEM to issue NPDES permits that call for the development of WQBELs, which, in this case, comprised the ZMPs. The ZMPs in the permits require Metalplate to demonstrate to ADEM how it intends to reduce or minimize zinc in storm-water runoff so as to achieve the water-quality standards established in the CWA and the AWPCA. And, unlike in [Waterkeeper](#), in which a specific land-application rate was required to be determined, but only after the issuance of an NPDES permit, Metalplate is not called on here to provide a certain numerical limitation on the amount of zinc that can be contained in storm-water runoff because, as discussed, the determination of such a numerical limitation is not feasible. The substance of what is required to be in the ZMPs is set forth in the NPDES permits, which are available for the public to review. Furthermore, unlike the NMPs in [Waterkeeper](#), which were left entirely to the discretion of the CAFOs and were not subject to any administrative review or approval, the engineering report mandated of Metalplate by the permits are subject to ADEM's review and revision and must be approved by ADEM.

With regard to the issuance of NPDES permits, [Ala. Admin. Code \(ADEM\), r. 335-6-6-.21\(1\)](#), requires public notice of the following actions:

“(a) An NPDES permit application has been received and a draft NPDES permit or draft modification to an NPDES permit has been prepared and a tentative determination made to issue or reissue the permit or modification;

“(b) An NPDES permit application has been received and a tentative determination to deny a permit application has been made;

“(c) A tentative determination has been made to revoke and reissue an NPDES;

“(d) A tentative determination has been made to terminate an NPDES permit [with one exception not applicable here]; or

“(e) A public hearing has been scheduled.”

The regulation further requires that, “[d]uring the public comment period, any interested person may submit written comments on the permit application and draft permit and may request a public hearing, if no hearing has already been scheduled.” [Ala. Admin. Code \(ADEM\), r. 335-6-6-.21\(5\)](#).

[Riverkeeper](#) has not shown that ADEM violated any of these provisions during the process of reviewing Metalplate's permit applications or in its issuance of the permits. As discussed, the narrative WQBELs in the permits themselves include effluent limitations and the means of monitoring the WQBELs are also included in the permits and, therefore, are subject to public scrutiny. The ZMPs that the permits require provide the mechanism by which Metalplate engineers propose to meet those limitations. Further specificity was simply not required by statute or regulation. See [Divers' Env't Conservation Org. v. State Water Res. Control Bd.](#), 145 Cal. App. 4th 246, 262-63, 51 Cal. Rptr. 3d 497, 508-09 (2006) (affirming issuance of NPDES permit that called for development by permittee of storm-water-pollution prevention plan, including unspecified BMPs after issuance of permit). Thus, we conclude that [Riverkeeper's](#) second contention is without merit.

IV. Conclusion

For the reasons set forth above, [Riverkeeper](#) has failed to demonstrate that the circuit court erred in upholding the commission's decision to approve the NPDES permits at issue. Accordingly, the judgment of the circuit court is affirmed.



AFFIRMED.


[Thompson, P.J.](#), and [Moore, Edwards, and Hanson, JJ.](#), concur.


All Citations



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Footnotes

- 1 The CWA defines “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source.”  [33 U.S.C. § 1362\(12\)\(A\)](#). In relevant part, the CWA defines “pollutant” as “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.”  [33 U.S.C. § 1362\(6\)](#).

The CWA defines “point source,” with some exceptions, as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.”  [33 U.S.C. § 1362\(14\)](#).

The CWA defines “navigable waters” as “the waters of the United States, including the territorial seas.”  [33 U.S.C. § 1362\(7\)](#).

- 2 Storm-water discharge is different from process-wastewater discharge. The applicable federal regulations define storm water as “storm water runoff, snow melt runoff, and surface runoff and drainage.”  [40 C.F.R. § 122.26\(b\)\(13\)](#). The applicable federal regulations define “process wastewater” as “any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, byproduct, or waste product.”  [40 C.F.R. § 122.2](#). Process wastewater is not at issue in this case.
- 3 On September 18, 2018, ADEM modified both permits to correct administrative errors, but the changes are not germane to this appeal.